



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>





RAILROAD REPORTS

(Vol. 30 American and English
Railroad Cases, New Series)

A COLLECTION OF ALL

CASES AFFECTING RAILROADS OF EVERY KIND,
DECIDED BY THE COURTS OF
LAST RESORT

IN THE

UNITED STATES.

EDITED BY

THOMAS J. MICHIE.

VOLUME VII.

THE MICHIE COMPANY, PUBLISHERS,
CHARLOTTESVILLE, VA.

1903.

**PUBLICATIONS
of
THE MICHIE COMPANY,
Charlottesville, Va.**

**Virginia Reports, Annotated.
American and English Railroad Cases, N. S.
American and English Corporation Cases, N. S.
Municipal Corporation Cases.
Banking Cases.**

**COPYRIGHT, 1903,
BY
THE MICHIE COMPANY.**

TABLE OF CASES.

Albemarle Timber Co., <i>Cratt v.</i> (N. Car.).....	84
Aldridge's Adm'r, Southern Ry. Co. <i>v.</i> (Va.)	59
Allison, John H., Southern Railway Co. <i>v.</i> (U. S.)	431
Ames, John C., United States Marshal, Charles F. Champion, Appt., <i>v.</i> (U. S.)	188
Anderson <i>v.</i> Central R. Co. of New Jersey (N. J.).....	51
Ann Arbor R. Co. <i>v.</i> Kinz (Ohio).....	404
Atchison, T. & S. F. Ry. Co. <i>v.</i> Kansas City, M. & O. Ry. Co. (Kan.)..	509
Atlanta, K. & N. Ry. Co. <i>v.</i> Strickland (Ga.).....	35
Atlantic Coast Line R. Co., Hamburg-Bremen Fire Ins. Co. <i>v.</i> (N. Car.)	177
Atlantic C. L. R. Co., Harris <i>v.</i> (N. Car.).....	132
Auburn City Ry. Co., Drake <i>v.</i> (N. Y.).....	269
Avery <i>v.</i> Vermont Electric Co. (Vt.).....	876
Bailey <i>v.</i> Boston & P. R. Corp. (Mass.).....	500
Baker <i>v.</i> Selma Street & Suburban Ry. Co. (Ala.).....	506
Baltimore & O. S. W. R. Co., Murphy <i>v.</i> (Ky.).....	295
Barnhill <i>v.</i> Texas & P. Ry. Co. (La.).....	7
Bates Mach. Co., Elgin, J. & E. Ry. Co. <i>v.</i> (Ill.).....	256
Beaver Valley Traction Co., Hoon <i>v.</i> (Pa.)	556
Behrman, Chattahoochee & G. R. Co. <i>v.</i> (Ala.).....	920
Birmingham Southern R. Co. <i>v.</i> Powell (Ala.).....	806
Bolin <i>v.</i> Southern Ry. Co. (S. Car.).....	320
Boston El. Ry. Co., Lee <i>v.</i> (Mass.).....	346
Boston & M. R. R., Murray <i>v.</i> (N. H.).....	623
Boston & M. R. R., Waldron <i>v.</i> (N. H.).....	54
Boston & P. R. Corp., Bailey <i>v.</i> (Mass.).....	500
Boston & P. R. Corp., Johnson <i>v.</i> (Mass.).....	500
Boulden <i>v.</i> Pennsylvania R. Co. (Pa.)	641
Brooklyn Heights R. Co., Pinder <i>v.</i> (N. Y.)	743
Brown <i>v.</i> Southern Ry. (S. Car.)	764
Brunswick & W. R. Co. <i>v.</i> Griffin (Ga.).....	181
Burgess, Lake Street El. R. Co. <i>v.</i> (Ill.).....	136
Burnett & Goodman <i>v.</i> Central of Georgia Ry. Co. (Ga.).....	945
Buston <i>v.</i> Pennsylvania R. Co. (C. C. A.).....	234
Cadiz R. Co. <i>v.</i> Roach (Ky.).....	502
Cappier, Union Pac. Ry. Co. <i>v.</i> (Kan.).....	771
Carrier <i>v.</i> Missouri Pac. Ry. Co. (Mo.)	585
Carter <i>v.</i> Pennsylvania R. Co. (C. C. A.).....	558
Carver <i>v.</i> Minneapolis & St. L. R. Co. (Iowa).....	70
Caskey, Cincinnati, N. O. & T. Pac. Ry. Co. <i>v.</i> (Ky.).....	583
Cau, Texas & P. Ry. Co. <i>v.</i> (C. C. A.).....	239
Central of Georgia Ry. Co., Burnett & Goodman <i>v.</i> (Ga.).....	945
Central of Georgia Ry. Co. <i>v.</i> Main (Ala.).....	95
Central of Georgia Ry. Co. <i>v.</i> Motes (Ga.).....	161
Central of Georgia Ry. Co., Williams <i>v.</i> (Ga.).....	839
Central R. Co. of New Jersey, Anderson <i>v.</i> (N. J.).....	51
Champion, Charles F., Appt., <i>v.</i> John C. Ames, United States Mar- shal (U. S.).....	188
Charleston & W. C. Ry. Co., Cooper <i>v.</i> (S. Car.).....	112
Charleston & W. C. Ry. Co., Jones <i>v.</i> (S. Car.).....	702
Chattahoochee & G. R. Co. <i>v.</i> Behrman (Ala.)	920
Chattanooga Electric Ry. Co. <i>v.</i> Cooper (Tenn.).....	709
Chesapeake & N. Ry. Co. <i>v.</i> Ogles (Ky.)	740
Chesapeake & O. Ry. Co., Commonwealth <i>v.</i> (Ky.).....	182
Chesapeake & O. Ry. Co., Commonwealth <i>v.</i> (Ky.).....	183
Chesapeake & O. Ry. Co., Commonwealth <i>v.</i> (Ky.).....	184
Chesapeake & O. Ry. Co., Davis' Adm'r <i>v.</i> (Ky.).....	347
Chesapeake & O. Ry. Co., Dilas' Adm'r <i>v.</i> (Ky.).....	712
Chestnut, S. D., & Bro., Louisville & N. R. Co. <i>v.</i> (Ky.).....	252
Chicago & A. R. Co. <i>v.</i> Flaberty (Ill.).....	159
Chicago & E. I. R. Co. <i>v.</i> Clapp (Ill.).....	489

Chicago & N. W. Ry. Co., <i>Goddard v.</i> (Ill.).....	781
Chicago & N. W. Ry. Co., <i>Jefferson v.</i> (Wis.).....	621
Chicago & N. W. Ry. Co., <i>Rueping v.</i> (Wis.).....	15
Chicago, B. & Q. R. Co. <i>v.</i> <i>Lilley</i> (Neb.)	798
Chicago Great Western Ry. Co., <i>Selensky v.</i> (Iowa).....	756
Chicago, I. & L. Ry. Co., <i>Hollingsworth v.</i> (Ind.).....	264
Chicago, I. & L. Ry. Co., <i>Wright v.</i> (Ind.).....	314
Chicago, M. & St. P. Ry. Co., <i>Hamilton v.</i> (Iowa).....	823
Chicago, M. & St. P. Ry. Co., <i>Monahan v.</i> (Minn.).....	761
Chicago, R. I. & P. R. Co., <i>Kitzberger v.</i> (Neb.).....	275
Chicago, R. I. & P. Ry. Co. <i>v.</i> <i>Sporer</i> (Neb.).....	646
Choctaw & M. R. Co. <i>v.</i> <i>Vosburg</i> (Ark.).....	1
Chorman <i>v.</i> <i>Queen Anne's R. Co.</i> (Del.).....	923
Cincinnati, N. O. & T. Pac. Ry. Co. <i>v.</i> <i>Caskey</i> (Ky.).....	583
City & Suburban Ry. Co., <i>Wolf v.</i> (Ore.).....	777
City of Hartford <i>v.</i> <i>Hartford St. Ry. Co.</i> (Conn.).....	546
City of Lincoln <i>v.</i> <i>Lincoln St. Ry. Co.</i> (Neb.).....	892
City of New Haven, Fair Haven & W. R. Co. <i>v.</i> (Conn.).....	526
City of Pittsburg <i>v.</i> <i>Pittsburg, C. & W. R. Co.</i> (Pa.).....	224
City of Seattle, <i>Eskildsen v.</i> (Wash.).....	549
Clapp, Chicago & E. I. R. Co. <i>v.</i> (Ill.).....	489
Cleveland, C., C. & St. L. Ry. Co. <i>v.</i> <i>Hamilton</i> (Ill.).....	40
Coleman <i>v.</i> <i>Lowell, etc., St. Ry. Co.</i> (Mass.).....	680
Commonwealth, Owensboro, Falls of Rough & G. R. R. Co. <i>v.</i> (Ky.).....	947
Commonwealth <i>v.</i> <i>Chesapeake & O. Ry. Co.</i> (Ky.).....	182
Commonwealth <i>v.</i> <i>Chesapeake & O. Ry. Co.</i> (Ky.).....	183
Commonwealth <i>v.</i> <i>Chesapeake & O. Ry. Co.</i> (Ky.).....	184
Concord & M. R. R., <i>Douglass v.</i> (N. H.).....	442
Cooper, Chattanooga Electric Ry. Co. <i>v.</i> (Tenn.).....	709
Cooper <i>v.</i> <i>Charleston & W. C. Ry. Co.</i> (S. Car.).....	112
Corbett <i>v.</i> <i>Oregon Short Line R. Co.</i> (Utah)....	736
Cordray, Savannah, T. & I. of H. Ry. <i>v.</i> (Ga.).....	286
Cordray <i>v.</i> <i>Savannah, T. & I. of H. Ry.</i> (Ga.).....	286
Covert <i>v.</i> <i>Pittsburg & W. Ry. Co.</i> (Pa.).....	516
Cox <i>v.</i> <i>Wilmington City Ry. Co.</i> (Del.).....	818
Cratt <i>v.</i> <i>Albemarle Timber Co.</i> (N. Car.).....	84
Crowder, Southern Ry. Co. <i>v.</i> (Ala.).....	150
Daniel <i>v.</i> <i>Ft. Worth & R. G. Ry. Co.</i> (Tex.).....	331
Danville Ry. & Electric Co. <i>v.</i> <i>Hodnett</i> (Va.).....	170
Darden, Yazoo & M. V. R. Co. <i>v.</i> (Miss.).....	488
Daum <i>v.</i> <i>North Jersey St. Ry. Co.</i> (N. J.).....	814
Davis' Adm'r <i>v.</i> <i>Chesapeake & O. Ry. Co.</i> (Ky.).....	347
Davis, Florida Cent. & P. R. Co. <i>v.</i> (Fla.).....	447
Denny <i>v.</i> <i>North Carolina R. Co.</i> (N. Car.)... ..	146
Detroit, Ft. Wayne & B. I. Ry. <i>v.</i> <i>Chase S. Osborn, Com. of Rail-</i> <i>roads</i> (U. S.).....	456
Devoe <i>v.</i> <i>New York Cent. & H. R. R. Co.</i> (N. Y.).....	949
Dilas' Adm'r <i>v.</i> <i>Chesapeake & O. Ry. Co.</i> (Ky.).....	712
Donovan <i>v.</i> <i>Pennsylvania Co.</i> (C. C. A.).....	229
Douglass <i>v.</i> <i>Concord & M. R. R.</i> (N. H.).....	442
Drake <i>v.</i> <i>Auburn City Ry. Co.</i> (N. Y.)	269
Elder, Savannah, F. & W. Ry. Co. <i>v.</i> (Ga.).....	223
Elgin, J. & E. Ry. Co. <i>v.</i> <i>Bates Mach. Co.</i> (Ill.).....	256
Enright <i>v.</i> <i>Pittsburg Junction R. Co.</i> (Pa.).....	717
Erickson <i>v.</i> <i>Kansas City, O. & S. Ry. Co.</i> (Mo.)	307
Erie R. Co., <i>Shatto v.</i> (C. C. A.).....	120
Erie Ry. Co., <i>Geil v.</i> (N. J.).....	774
Erie Ry. Co., <i>Tucker v.</i> (N. J.).....	774
Eskildsen <i>v.</i> <i>City of Seattle</i> (Wash.).....	549
Fair Haven & W. R. Co. <i>v.</i> <i>City of New Haven</i> (Conn.).....	526
Farmers' Loan & Trust Co. <i>v.</i> <i>Northern Pac. R. Co.</i> (American Trading Co., Intervener) (C. C. A.).....	852
Flaherty, Chicago & A. R. Co. <i>v.</i> (Ill.).....	159
Florida Cent. & P. R. Co. <i>v.</i> <i>Davis</i> (Fla.).....	447
Florida Cent. & P. R. Co. <i>v.</i> <i>Foxworth</i> (Fla.)	604

TABLE OF CASES

V

Ft. Worth & R. G. Ry. Co., <i>Daniel v.</i> (Tex.)	331
Fowler, Indiana, D. & W. R. Co. <i>v.</i> (Ill.)	715
Foxworth, Florida Cent. & P. R. Co. <i>v.</i> (Fla.)	604
Francis, John, Anthony Hoff, and John Edgar, alias Peter Edgar, Petitioners, <i>v.</i> United States (U. S.)	215
Gardner <i>v.</i> Southern Ry. Co. (S. Car.)	958
Garrison, Missouri, K. & T. Ry. Co. <i>v.</i> (Kan.)	746
Geil <i>v.</i> Erie Ry. Co. (N. J.)	774
Georgia R. & Banking Co., <i>Robinson v.</i> (Ga.)	43
Gilliam's Adm'x, Louisville & N. R. Co. <i>v.</i> (Ky.)	272
Givens <i>v.</i> Louisville & N. R. Co. (Ky.)	11
Goddard <i>v.</i> Chicago & N. W. Ry. Co. (Ill.)	781
Godfrey, St. Louis Nat. Stock Yards <i>v.</i> (Ill.)	28
Goe <i>v.</i> Northern Pac. Ry. Co. (Wash.)	310
Graham & Ward, Macon, D. & S. R. Co. <i>v.</i> (Ga.)	860
Green <i>v.</i> Los Angeles Terminal Ry. Co. (Cal.)	117
Griffin, Brunswick & W. R. Co. <i>v.</i> (Ga.)	181
Gulí & Chicago R. Co., Johnson, Nesbitt & Co. <i>v.</i> (Miss.)	640
Guyer <i>v.</i> Missouri Pac. Ry. Co. (Mo.)	673
Hackney <i>v.</i> Illinois Cent. R. Co. (Miss.)	42
Hageman, Southern Electric Ry. Co. <i>v.</i> (C. C. A.)	681
Hamburg-Bremen Fire Ins. Co. <i>v.</i> Atlantic Coast Line R. Co. (N. Car.)	177
Hamilton, Cleveland, C., C. & St. L. Ry. Co. <i>v.</i> (Ill.)	40
Hamilton <i>v.</i> Chicago, M. & St. P. Ry. Co. (Iowa)	823
Hanley, Felix M., Members of the Railroad Commission of Arkansas, Appts., <i>v.</i> Kansas City Southern Railway Company (U. S.)	246
Harris <i>v.</i> Atlantic C. L. R. Co. (N. Car.)	132
Hartford St. Ry. Co., City of Hartford <i>v.</i> (Conn.)	546
Hays <i>v.</i> Wilkinsburg & E. P. St. Ry. Co. (Pa.)	563
Hockenhammer <i>v.</i> Lexington & Eastern Ry. Co. (Ky.)	601
Hockett, Indianapolis St. Ry. Co. <i>v.</i> (Ind.)	787
Hodnett, Danville Ry. & Electric Co. <i>v.</i> (Va.)	170
Hollingsworth <i>v.</i> Chicago, I. & L. Ry. Co. (Ind.)	264
Hoon <i>v.</i> Beaver Valley Traction Co. (Pa.)	556
Hopkins, Illinois Cent. R. Co. <i>v.</i> (Ill.)	3
Houston & S. Ry. Co. <i>v.</i> Kansas City, S. & G. Ry. Co. (La.)	120
Howerton, Louisville & N. R. Co. <i>v.</i> (Ky.)	554
Illinois Cent. R. Co., Hackney <i>v.</i> (Miss.)	42
Illinois Cent. R. Co. <i>v.</i> Hopkins (Ill.)	3
Illinois Cent. R. Co., McMichael <i>v.</i> (La.)	140
Illinois Cent. R. Co. <i>v.</i> Scheible (Ky.)	100
Indiana, D. & W. R. Co. <i>v.</i> Fowler (Ill.)	715
Indianapolis St. Ry. Co. <i>v.</i> Hockett (Ind.)	787
Indianapolis St. Ry. Co. <i>v.</i> Wilson (Ind.)	841
Interstate Commerce Commission <i>v.</i> Nashville, C. & St. L. Ry. Co. (C. C. A.)	874
Jackson, Mexican Nat. R. Co. <i>v.</i> (C. C. A.)	259
Jefferson <i>v.</i> Chicago & N. W. Ry. Co. (Wis.)	621
Johnson <i>v.</i> Boston & P. R. Corp. (Mass.)	500
Johnson, Nesbitt & Co. <i>v.</i> Gulf & Chicago R. Co. (Miss.)	640
Jones <i>v.</i> Charleston & W. C. Ry. Co. (S. Car.)	702
Kansas City, M. & O. Ry. Co., Atchison, T. & S. F. Ry. Co. <i>v.</i> (Kan.)	509
Kansas City, O. & S. Ry. Co., Erickson <i>v.</i> (Mo.)	300
Kansas City, S. & G. Ry. Co., Houston & S. Ry. Co. <i>v.</i> (La.)	120
Kansas City Southern Railway Company, Felix M. Hanley, Members of the Railroad Commission of Arkansas, Appts., <i>v.</i> (U. S.)	246
Karns, St. Louis & S. F. R. Co. <i>v.</i> (Kan.)	753
Kelly <i>v.</i> Pittsburg & B. Traction Co. (Pa.)	811
Kidd, Louisa V., Ex'x <i>v.</i> State of Alabama (U. S.)	518
Kinz, Ann Arbor R. Co. <i>v.</i> (Ohio)	404
Kitzberger <i>v.</i> Chicago, R. I. & P. R. Co. (Neb.)	275
Klair <i>v.</i> Wilmington Steamboat Co. (Del.)	821
Klockenbrink <i>v.</i> St. Louis & M. R. R. Co. (Mo.)	63
Koenig <i>v.</i> Union Depot Ry. Co. (Mo.)	655
Lake Street L. R. Co. <i>v.</i> Burgess (Ill.)	136

Le Croix <i>v.</i> Western & A. R. Co. (Ga.).....	448
Lee <i>v.</i> Boston El. Ry. Co. (Mass.).....	346
Lexington & Eastern Ry. Co., Hockenhammer <i>v.</i> (Ky.).....	601
Lilley, Chicago, B. & O. R. Co. <i>v.</i> (Neb.).....	798
Lincoln St. Ry. Co., City of Lincoln <i>v.</i> (Neb.).....	892
Lindquist, Treasurer of Webster County, Minneapolis & St. L. R. Co. <i>v.</i> (Iowa).....	521
Los Angeles Terminal Ry. Co., Green <i>v.</i> (Cal.).....	117
Louisiana & N. W. R. Co., McCormick <i>v.</i> (La.).....	861
Louisville & N. R. Co. <i>v.</i> Gilliam's Adm'r (Ky.).....	272
Louisville & N. R. Co., Givens <i>v.</i> (Ky.).....	11
Louisville & N. R. Co. <i>v.</i> Howerton (Ky.).....	554
Louisville & N. R. Co. <i>v.</i> S. D. Chestnut & Bro. (Ky.).....	252
Louisville & N. R. Co., West Coast Naval Stores Co. <i>v.</i> (C. C. A.)..	479
Lowell, etc., St. Ry. Co., Coleman <i>v.</i> (Mass.).....	680
Lucas <i>v.</i> St. Louis & S. Ry. Co. (Mo.).....	834
McCormick <i>v.</i> Louisiana & N. W. R. Co. (La.).....	861
McDonald <i>v.</i> Michigan Cent. R. Co. (Mich.).....	288
MacDonald <i>v.</i> New York, N. H. & H. R. Co. (R. I.) ..	792
McLucas <i>v.</i> St. Joseph & G. I. R. Co. (Neb.).....	342
McMichael <i>v.</i> Illinois Cent. R. Co. (La.).....	140
Macon, D. & S. R. Co. <i>v.</i> Graham & Ward (Ga.).....	860
Mathis <i>v.</i> Southern Ry. Co. (S. Car.).....	825
Main, Central of Georgia Ry. Co. <i>v.</i> (Ala.).....	95
Marsh <i>v.</i> Western New York & P. Ry. Co (Pa.).....	124
Mexican Nat. R. Co. <i>v.</i> Jackson (C. C. A.).....	259
Michigan Cent. R. Co., McDonald <i>v.</i> (Mich.).....	288
Minneapolis & St. L. R. Co., Carver <i>v.</i> (Iowa).....	70
Minneapolis & St. L. R. Co. <i>v.</i> Lindquist, Treasurer of Webster County (Iowa).....	521
Minneapolis, St. P. & S. S. M. Ry. Co., Parrault <i>v.</i> (Wis.).....	467
Missouri, K. & T. Ry. Co. <i>v.</i> Garrison (Kan.)... ..	746
Missouri Pacific Ry. Co., Appt., <i>v.</i> United States (U. S.).....	865
Missouri Pac. Ry. Co., Carrier <i>v.</i> (Mo.).....	585
Missouri Pac. Ry. Co., Guyer <i>v.</i> (Mo.).....	673
Missouri Pac. Ry. Co., Riley <i>v.</i> (Neb.)	594
Monahan <i>v.</i> Chicago, M. & St. P. Ry. Co. (Minn.).....	761
Morgan's L. & T. R. & S. S. Co., Ortolano <i>v.</i> (La.).....	103
Morrison <i>v.</i> Thistle Coal Co. (Iowa).... ..	462
Moser <i>v.</i> Union Traction Co. (Pa.).....	632
Motes, Central of Georgia Ry. Co. <i>v.</i> (Ga.).....	161
Murphy <i>v.</i> Baltimore & O. S. W. R. Co. (Ky.)	295
Murray <i>v.</i> Boston & M. R. R. (N. H.).....	623
Muskegon, G. R. & I. R. Co., Wilson <i>v.</i> (Mich.).....	325
Nashville, C. & St. L. Ry. Co., Interstate Commerce Commission <i>v.</i> (C. C. A.).....	874
Nelson, Peter <i>v.</i> Northern Pac. Ry. Co. (U. S.).....	367
New Orleans & C. R. Co., Turnbull <i>v.</i> (C. C. A.).....	698
New Orleans Warehouse Co., State <i>v.</i> (La.)	334
New York Cent. & H. R. R. Co., Devoe <i>v.</i> (N. Y.).....	949
New York, N. H. & H. R. Co., MacDonald <i>v.</i> (R. I.).....	792
New York, N. H. & H. R. Co., Spink <i>v.</i> (R. I.).....	53
New York, O. & W. Ry. Co., Stephens <i>v.</i> (N. Y.)	449
Norfolk & W. Ry. Co. <i>v.</i> Perrow (Va.).....	611
North Carolina R. Co., Denny <i>v.</i> (N. Car.).....	146
Northern Central Ry. Co. <i>v.</i> State of Maryland (U. S.)	536
Northern Pacific Ry. Co., Appt., <i>v.</i> John A. Soderberg (U. S.).....	911
Northern Pac. R. Co. (American Trading Co., Intervener), Farmers' Loan & Trust Co. <i>v.</i> (C. C. A.).....	852
Northern Pac. Ry. Co., Goe <i>v.</i> (Wash.)... ..	310
Northern Pac. Ry. Co., Peter Nelson and Henry Nelson, Plffs. in Err., <i>v.</i> (U. S.).....	367
Northern Pac. Ry. Co. <i>v.</i> Spike (C. C. A.).....	749
North Jersey St. Ry. Co., Daum <i>v.</i> (N. J.).....	814
North Jersey St. Ry. Co., Vogel <i>v.</i> (N. J.).....	654

TABLE OF CASES

VII

O'Brien, John, Lumber Co. <i>v.</i> Royal Trust Co. (C. C. A.).....	560
Ogles, Chesapeake & N. Ry. Co. <i>v.</i> (Ky.).....	740
Ordelheide, Wabash R. Co. <i>v.</i> (Mo.).....	96
Oregon & California Railroad, Appt., <i>v.</i> United States (U. S.).....	943
Oregon & California Ry. Co., Appt., <i>v.</i> United States (U. S)	882
Oregon Short Line R. Co., Corbett <i>v.</i> (Utah).....	736
Ortolano <i>v.</i> Morgan's L. & T. R. & S. S. Co. (La.).....	103
Osborn, Chase S., Com. of Railroads, Detroit, Ft. Wayne & B. 1. Ry. <i>v.</i> (U. S.).....	456
Owensboro, Falls of Rough & G. R. R. Co. <i>v.</i> Commonwealth (Ky.)	947
Pennsylvania Co., Donovan <i>v.</i> (C. C. A.).....	229
Pennsylvania Co. for Ins. on Lives & Granting Annuities, Penn- sylvania R. Co. <i>v.</i> (Pa.).....	607
Pennsylvania R. Co., Boulden <i>v.</i> (Pa.).....	641
Pennsylvania R. Co., Buston <i>v.</i> (C. C. A.).....	234
Pennsylvania R. Co., Carter <i>v.</i> (C. C. A.)... ..	558
Pennsylvania R. Co. <i>v.</i> Pennsylvania Co. for Ins. on Lives and Granting Annuities (Pa.).....	607
Pennsylvania R. Co. <i>v.</i> Rogers (W. Va.).....	413
Perrault <i>v.</i> Minneapolis, St. P. & S. S. M. Ry. Co. (Wis.).....	467
Perrow, Norfolk & W. Ry. Co. <i>v.</i> (Va.)	611
Peters <i>v.</i> Southern Ry. Co. (Ala.).....	90
Pinder <i>v.</i> Brooklyn Heights R. Co. (N. Y.).....	743
Pittsburg & B. Traction Co., Kelly <i>v.</i> (Pa.).....	811
Pittsburg, C., C. & St. L. Ry. Co. <i>v.</i> Town of Crothersville (Ind.)..	474
Pittsburg, C., C. & St. L. Ry. Co. <i>v.</i> Wilson (Ind.).....	671
Pittsburg, C. & W. R. Co., City of Pittsburg <i>v.</i> (Pa.).....	224
Pittsburg Junction R. Co., Enright <i>v.</i> (Pa.).....	717
Pittsburg & W. Ry. Co., Covert <i>v.</i> (Pa.).....	516
Porter <i>v.</i> Raleigh & G. R. Co. (N. Car.).....	249
Potts <i>v.</i> Shreveport Belt Ry. Co. (La.).....	566
Powell, Birmingham Southern R. Co. <i>v.</i> (Ala.).....	806
Queen Anne's R. Co., Chorman <i>v.</i> (Del.).....	923
Racks' Adm'r, Richmond Passenger & Power Co. <i>v.</i> (Va.).....	615
Railroad Commission of Texas <i>v.</i> Weld & Neville (Tex.).....	572
Raleigh & G. R. Co., Porter <i>v.</i> (N. Car.)... ..	249
Richmond Passenger & Power Co. <i>v.</i> Racks' Adm'r (Va.).....	615
Richmond Traction Co. <i>v.</i> Wilkinson (Va.).....	723
Riley <i>v.</i> Missouri Pac. Ry. Co. (Neb.).....	594
Roach, Cadiz R. Co. <i>v.</i> (Ky.).....	502
Robertson, St. Louis, I. M. & S. Ry. Co. <i>v.</i> (Ark.).....	78
Robinson <i>v.</i> Georgia R. & Banking Co. (Ga.).....	43
Rogers, Pennsylvania R. Co. <i>v.</i> (W. Va.).....	413
Royal Trust Co., John O'Brien Lumber Co. <i>v.</i> (C. C. A.).....	560
Royal Trust Co. <i>v.</i> Washburn, B. & I. Ry. Co. (C. C. A.)... ..	560
Rueping <i>v.</i> Chicago & N. W. Ry. Co. (Wis.).....	15
St. Joseph & G. I. R. Co., McLucas <i>v.</i> (Neb.).....	342
St. Louis, I. M. & S. Ry. Co. <i>v.</i> Robertson (Ark.).....	78
St. Louis & M. R. R. Co., Klockenbrink <i>v.</i> (Mo.)..	63
St. Louis & S. F. R. Co. <i>v.</i> Karns (Kan.).....	753
St. Louis & S. Ry. Co., Lucas <i>v.</i> (Mo.)	834
St. Louis Nat. Stock Yards <i>v.</i> Godfrey (Ill.).....	28
Savannah, F. & W. Ry. Co. <i>v.</i> Elder (Ga.).....	223
Savannah, F. & W. R. Co., Smoak <i>v.</i> (S. Car.).....	240
Savannah, T. & I. of H. Ry. <i>v.</i> Cordray (Ga.).....	286
Savannah, T. & I. of H. Ry., Cordray <i>v.</i> (Ga.).....	286
Savannah, T. & I. of H. Ry. <i>v.</i> Williams (Ga.).....	279
Scheible, Illinois Cent. R. Co. <i>v.</i> (Ky.).....	100
Seaboard Air Line Ry. <i>v.</i> Shigg (Ga.).....	37
Selensky <i>v.</i> Chicago Great Western Ry. Co. (Iowa).....	756
Selma St. & Suburban Ry. Co., Baker <i>v.</i> (Ala.).....	506
Shatto <i>v.</i> Erie R. Co. (C. C. A.).....	127
Shigg, Seaboard Air Line Ry. <i>v.</i> (Ga.).....	37
Shreveport Belt Ry. Co., Potts <i>v.</i> (La.).....	566

Smoak <i>v.</i> Savannah, F. & W. R. Co. (S. Car.).....	240
Soderberg, John A., Northern Pacific Ry. Co., Appt., <i>v.</i> (U. S.)....	911
Southern Electric Ry. Co. <i>v.</i> Hageman (C. C. A.).....	681
Southern Railway Company <i>v.</i> John H. Allison (U. S.).....	431
Southern Ry. Co. <i>v.</i> Aldridge's Adm'r (Va.).....	59
Southern Ry. Co., Bolin <i>v.</i> (S. Car.).....	320
Southern Ry. Co. <i>v.</i> Crowder (Ala.).....	150
Southern Ry. Co., Gardner <i>v.</i> (S. Car.).....	958
Southern Ry. Co., Mathis <i>v.</i> (S. Car.).....	825
Southern Ry. Co., Peters <i>v.</i> (Ala.).....	90
Southern Ry. Co., Wright <i>v.</i> (N. Car.).....	677
Southern Ry., Brown <i>v.</i> (S. Car.).....	764
Southern Ry. in Kentucky, Williams' Adm'r <i>v.</i> (Ky.).....	732
Spike, Northern Pac. Ry. Co. <i>v.</i> (C. C. A.).....	749
Spink <i>v.</i> New York, N. H. & H. R. Co. (R. I.).....	53
Sporer, Chicago, R. I. & P. Ry. Co. <i>v.</i> (Neb.).....	646
State <i>ex rel.</i> Trimble <i>v.</i> Superior Court of King County (Wash.)...	929
State of Alabama, Kidd, Louisa V., Exetx., <i>v.</i> (U. S.).....	518
State of Maryland, Northern Cent. Ry. Co. <i>v.</i> (U. S.).....	536
State <i>v.</i> New Orleans Warehouse Co. (La.).....	334
Stephens <i>v.</i> New York, O. & W. Ry. Co. (N. Y.).....	449
Strickland, Atlanta, K. & N. Ry. Co. <i>v.</i> (Ga.).....	35
Superior Court of King County, State <i>ex rel.</i> Trimble <i>v.</i> (Wash.)...	929
Texas & P. Ry. Co., Barnhill <i>v.</i> (La.).....	7
Texas & P. Ry. Co. <i>v.</i> Cau (C. C. A.).....	239
Texas & P. Ry. Co. <i>v.</i> Samuel E. Watson (U. S.).....	634
Thistle Coal Co., Morrison <i>v.</i> (Iowa).....	462
Town of Crothersville, Pittsburg, C., C. & St. L. Ry. Co. <i>v.</i> (Ind.)..	474
Tucker <i>v.</i> Erie Ry. Co. (N. J.).....	774
Turnbull <i>v.</i> New Orleans & C. R. Co. (C. C. A.).....	698
Union Depot Ry. Co., Koenig <i>v.</i> (Mo.).....	655
Union Pac. Ry. Co. <i>v.</i> Cappier (Kan.).....	771
Union Traction Co., Moser <i>v.</i> (Pa.).....	632
United States, John Francis, Anthony Hoff, and John Edgar, alias Peter Edgar, Petitioners, <i>v.</i> (U. S.).....	215
United States, Missouri Pacific Ry. Co., Appt., <i>v.</i> (U. S.).....	865
United States, Oregon & California Railroad, Appt., <i>v.</i> (U. S.)....	943
United States, Oregon & California Ry. Co., Appt., <i>v.</i> (U. S.).....	882
Vermont Electric Co., Avery <i>v.</i> (Vt.).....	876
Vogel <i>v.</i> North Jersey St. Ry. Co. (N. J.).....	654
Vosburg, Choctaw & M. R. Co. <i>v.</i> (Ark.).....	1
Wabash R. Co. <i>v.</i> Ordelheide (Mo.).....	96
Waldron <i>v.</i> Boston & M. R. R. (N. H.).....	54
Washburn, B. & I. R. Ry. Co., Royal Trust Co. <i>v.</i> (C. C. A.).....	560
Watson, Samuel E., Texas & Pacific Ry. Co. <i>v.</i> (U. S.).....	634
Watson, Yazoo & M. V. R. Co. <i>v.</i> (Miss.)..	880
Weld & Neville, Railroad Commission of Texas <i>v.</i> (Tex.).....	572
West Coast Naval Stores Co. <i>v.</i> Louisville & N. R. Co. (C. C. A.)..	479
Western & A. R. Co., Le Croix <i>v.</i> (Ga.).....	448
Western New York & P. Ry. Co., Marsh <i>v.</i> (Pa.).....	124
Wilkinsburg & E. P. St. Ry. Co., Hays <i>v.</i> (Pa.).....	563
Wilkinson, Richmond Traction Co. <i>v.</i> (Va.).....	723
Williams' Adm'r <i>v.</i> Southern Ry. in Kentucky (Ky.).....	732
Williams <i>v.</i> Central of Georgia Ry. Co. (Ga.).....	839
Williams, Savannah, T. & I. of H. Ry. <i>v.</i> (Ga.).....	279
Wilmington City Ry. Co., Cox <i>v.</i> (Del.).....	818
Wilmington Steamboat Co., Klair <i>v.</i> (Del.).....	821
Wilson, Indianapolis St. Ry. Co. <i>v.</i> (Ind.).....	841
Wilson <i>v.</i> Muskegon, G. R. & I. R. Co. (Mich.).....	325
Wilson, Pittsburgh, C., C. & St. L. Ry. Co. <i>v.</i> (Ind.).....	671
Wolf <i>v.</i> City & Suburban Ry. Co. (Ore.).....	777
Wright <i>v.</i> Chicago, I. & L. Ry. Co. (Ind.).....	314
Wright <i>v.</i> Southern Ry. Co. (N. Car.).....	677
Yazoo & M. V. R. Co. <i>v.</i> Darden (Miss.).....	488
Yazoo & M. V. R. Co. <i>v.</i> Watson (Miss.).....	880

RAILROAD REPORTS

CHOCTAW & M. R. CO. *v.* VOSBURG *et al.*

(*Supreme Court of Arkansas, Feb. 23, 1903.*)

[72 S. W. Rep. 574.]

Injuries to Stock—Care Required in Constructing Cattle Guards.

In an action for damages to crops alleged to have been sustained by the insufficiency of a stock guard constructed by defendant railroad company, an instruction that if the guard was improperly constructed, or was insufficient, and by reason thereof stock came over the guard and destroyed plaintiff's crops, he was entitled to recover, was erroneous; the railroad company being liable only for the construction of a stock guard as well adapted for the purpose of turning stock as it was practicable to make it, in connection with the safe operation of its road.

Same—Extent of Liability—Penalty—Damages.

Sand. & H. Dig. §§ 6238, 6239, provide that, where a railroad fails to provide sufficient guards for turning stock, it shall be liable to the person or persons aggrieved for a penalty no less than \$25, nor more than \$200 for each and every offense: *held*, that the penalty so prescribed was intended as full compensation to the party injured, and such party was, therefore, not entitled to recover as damages the value of crops destroyed.

Appeal from circuit court, Yell county, Danville district; William L. Moose, Judge.

Action by G. S. Vosburg and others against the Choctaw & Memphis Railroad Company to recover damages to crops by stock, alleged to have been caused by insufficient stock gaps. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

J. W. McLoud and E. B. Pierce, for appellant.

John M. Parker, for appellees.

BATTLE, J. On the 12th day of January, 1900, the appellees filed in the Yell circuit court, Danville district, their complaint, which is in words and figures as follows:

"The plaintiffs, G. S. Vosburg and T. W. Briggs, complain of the Choctaw & Memphis Railroad Company, for that the said Choctaw & Memphis Railroad Company, in placing and maintaining a stock gap at the entrance of their line of railroad into the inclosed field, situated on the northeast quarter of section twenty-five, township five north, range twenty-three west, in said district, and other adjoining lands, then in possession of and cultivated in the year 1899 by plaintiffs, so negligently constructed the said stock gap that it failed to keep stock out of said inclosed field, and that horses, cattle, and hogs entered said inclosure over said stock gap, and ate up, knocked out, and tramped under foot all of the cotton then growing on twenty-five acres of land inclosed in said inclosed field, thereby totally destroying said cotton, which cotton belonged to and was the property of these

Choctaw & M. R. Co. v. Vosburg

plaintiffs; that the cotton so destroyed was of the value of one hundred and fifty dollars, and therefore plaintiffs allege that by the careless and imperfect manner of constructing and maintaining said stock gap said stock was permitted to enter and destroy said crop, to plaintiffs' damage in the sum of one hundred and fifty dollars."

On August 29, 1900, the defendant filed its answer, which was a general denial of the allegations of the plaintiffs' complaint, and in addition thereto alleged that on the ——— day of December, 1898, L. L. Briggs, who was at that time the owner of said lands, for a valuable consideration, executed to the defendant a deed releasing all damages to his said property by reason of the construction of defendant's railroad.

There was no issue as to notice. A stock gap was constructed by the defendant. The question was, was it sufficient and properly constructed? Witnesses testified that it did not keep stock out of the plaintiffs' field; that stock went over it and destroyed plaintiffs' crop.

A. H. Kilpatrick testified that he had had 10 or 11 years' experience in investigating the subject of stock guards on railroads; that he was familiar with the kind of stock guards that were generally in use in this part of the country; that he knew the particular kind of stock guards on plaintiffs' farm; that he had examined it; "that it was put in properly; that it is one of the most improved that are in general use; that it is recognized as one of the best there is; that ordinarily this stock guard turns stock; that it turns stock in Oklahoma and Kansas." He stated here in Arkansas "stock had been found that will cross bridges as high as 38 feet long, and they cross all sorts of guards; that there had been cases where horses had crossed bridges 20 feet long, and they had cases where hogs had crossed bridges 38 feet long, three spans, and some other cases where they had crossed all kinds of cattle guards that they have on the road."

Among the instructions given to the jury that tried the issues in the case, over the objections of the defendant, was the following:

Instruction 3: "Now, if you find from the testimony that the guard was improperly constructed, or that the guard itself was insufficient for the purpose for which it was intended, and that by reason of that fact stock came over the guard and destroyed the crop of the plaintiff, he would be entitled to recover damages for the value of the crop that was destroyed."

The plaintiff recovered judgment, and defendant appealed.

The instruction numbered 3, given by the court to the jury, was erroneous. According to it a railroad company, when it constructs a stock guard, becomes an insurer of its sufficiency to prevent cattle or stock passing over it and entering an inclosure; but this is not true. As said in *Choctaw & Memphis Railroad Company v. Goset*, 70 Ark. 431, 68 S. W. 879, "the law does not impose an impossible or impracticable duty

Illinois Cent. R. Co. v. Hopkins

upon the company, and when its stock guard is as perfect and as well adapted for the purpose of turning stock as it is practical to make it, in connection with the safe and prudent operation of the road, that is all the law requires, and the company has discharged its duty under the statute." *Andover v. Gould*, 6 Mass. 41, 4 Am. Dec. 80; *Hinsdale v. Larned*, 16 Mass. 65; *Camden v. Allen*, 26 N. J. Law, 398; *Shepard v. Commissioners*, 8 Ohio St. 354; *State ex rel. Gerke v. Board of Com'rs of Hamilton Co.*, 26 Ohio St. 369; *Lang v. Scott*, 1 Blackf. 405, 12 Am. Dec. 257; *Victory v. Fitzpatrick*, 8 Ind. 281; *Sutherland on Statutory Construction*, §§ 325, 399; *Sedgwick*.

This instruction is defective in another respect. It says that, in the event the stock guard in question was insufficient, the plaintiffs were entitled to recover damages for the value of the crop that was destroyed. This is also not true. The statutes created the duty of the railroad company to construct stock guards. Before their enactment there was no such duty. *St. L., I. M. & S. Ry. v. Walbrink*, 47 Ark. 330, 1 S. W. 545. They prescribe what the liability of the railroad company shall be in the event it fails to perform this duty, and that is, it shall be liable to the person or persons aggrieved thereby for a penalty of not less than \$25 nor more than \$200, for each and every offense. *Sand. & H. Dig.* §§ 6238, 6239. The inference is that the penalty, being recoverable by the party aggrieved, was intended as a full compensation to him for the injury received; and therefore he is limited to the remedy given by the statute. *Stevens v. Jeacocke*, 11 Q. B. 731; *Almy v. Harris*, 5 Johns. 175; *Hancock v. Bank*, 32 Ohio St. 194; *Rex v. Robinson*, 2 Burrows, 800, 803; *Andover v. Gould*, 6 Mass. 41; *Hinsdale v. Larned*, 16 Mass. 65; *Camden v. Ellen*, 26 N. J. Law, 398; *Shepard v. Commissioners*, 8 Ohio St. 354; *State ex rel. Gerke v. Board of Com'rs of Hamilton Co.*, 26 Ohio St. 369; *Lang v. Scott*, 1 Blackf. 405, 12 Am. Dec. 257; *Victory v. Fitzpatrick*, 8 Ind. 281; *Sutherland on Statutory Construction*, §§ 325, 399; *Sedgwick on the Construction of Statutory and Constitutional Laws* (2d Ed.) p. 343 et seq.; *Endlich on the Interpretation of Statutes*, § 470.

Reversed and remanded for a new trial.

ILLINOIS CENT. R. CO. v. HOPKINS.

(*Supreme Court of Illinois, Dec. 16, 1907.*)

[65 N. E. Rep. 656.]

Licensees—Persons Carrying Meals to Mail Clerks.*

Evidence that plaintiff had for eight years carried meals to mail clerks on defendant's railroad cars under an agreement with the

*Liability for injuries to persons who are neither passengers nor railway employees resulting from unsafe station and depot premises, see note appended to *Cincinnati, H. & D. R. Co. v. Aller* (Ohio), 21 Am. & Eng. R. Cas., N. S., 304.

Illinois Cent. R. Co. v. Hopkins

clerks, and with the knowledge and consent of defendant, authorized the jury to find that plaintiff, in carrying the meals, was on defendant's premises on its implied invitation in a matter in which it was interested, and plaintiff was not a mere licensee to whom defendant owed no duty other than not to injure her wantonly.

Same—Injury from Falling over Skid on Platform—Sufficiency of Evidence.

In an action for injuries to plaintiff while on defendant's railway platform, by falling over a skid belonging to the defendant, and used in loading freight, and which when not used was usually kept in a shed, and, so far as the evidence showed, was not used by any one else, it was not error to refuse an instruction to find for defendant because there was no evidence that defendant placed or left the skid on the platform, or that it had lain there a sufficient length of time to raise the presumption of notice; it being a reasonable inference for the jury, from all the evidence, that defendant's employees left the skid there after using it.

Instructions.

Where, in an action for injuries received on defendant's railway platform, some of the instructions were defective in omitting the matter of notice to defendant of the defect, but this was fully covered by others, and the instructions as a whole were correct, the error was not harmful.

Appeal from appellate court, Fourth district.

Action by M. J. Hopkins against the Illinois Central Railroad Company for personal injuries. From a judgment of the appellate court (100 Ill. App. 594) affirming a judgment for plaintiff, defendant appeals. Affirmed.

W. W. Barr (J. M. Dickinson, of counsel), for appellant.
M. M. Thompson and R. J. McElvain, for appellee.

CARTER, J. The appellee, who was plaintiff in the Jackson circuit court, recovered a judgment for \$1,000 against the appellant for an injury which she sustained by stumbling and falling over a "skid," which, as she alleged, the defendant had negligently suffered to lie and remain across its depot platform at Makanda, one of its stations in Jackson county. The skid was a kind of ladder about eight feet long, made of two pieces of scantling two by four inches, held about 18 inches apart by iron bands, and was used by the company in loading and unloading barrels and other freight on and from its freight cars at the platform in question. About 7 o'clock in the evening of January 11, 1900, plaintiff, who kept a boarding house in Makanda, went to the depot to deliver to the mail clerks on the defendant's mail and passenger train, then approaching from the south, their evening meals, which she had prepared for them, as she had been accustomed to do for the preceding eight years. When the train stopped it was dark, and the platform was not lighted. The mail car was near the north end of the platform, and the plaintiff, with a basket in each hand, went along the platform toward the mail car, and when near the same struck her foot against the skid, which was lying across the platform, but which she could not see, and fell and was seriously injured. The appellate court affirmed the judgment, and the defendant has appealed.

Illinois Cent. R. Co. v. Hopkins

The principal errors alleged and relied on for a reversal of the judgment are two: First, that the plaintiff was a mere licensee to go upon the defendant's platform, and that the defendant owed her no duty except not to injure her wantonly, and, therefore, is not liable in this action; second, that the only charge of negligence in the declaration is that the defendant suffered the skid to lie across the depot platform, and that there was no proof that the servants of the defendant placed or left it there, or knew it was there, or that it had lain there for a sufficient length of time to raise the presumption of notice. The defendant offered no evidence, but asked the court to instruct the jury to find defendant not guilty. This the court refused. The appellant contends that the instruction should have been given because of lack of proof in the respects above mentioned.

1. If the plaintiff was a mere licensee, and went upon the defendant's platform for purposes of her own, and not for any purpose connected with the business of the company, or which the company permitted to be carried on there, she could not be permitted to recover, for in such case the company owed her no duty to exercise ordinary care to keep its platform free from obstructions, so that she might not be injured by them. *Gibson v. Leonard*, 143 Ill. 182, 32 N. E. 182, 17 L. R. A. 588, 36 Am. St. Rep. 376; 3 Elliott, R. R. § 1250; *Sweeny v. Railroad Co.*, 10 Allen, 368, 87 Am. Dec. 644; *Woolwine's Adm'r v. Railway Co.*, 36 W. Va. 335, 15 S. E. 81, 16 L. R. A. 271, 32 Am. St. Rep. 859; *Tobin v. Railroad Co.*, 59 Me. 188, 8 Am. Rep. 415; *Railroad Co. v. Schwindling*, 101 Pa. 261, 47 Am. Rep. 706; *Railway Co. v. Fairbairn*, 48 Ark. 491, 4 S. W. 50. If, however, the plaintiff was upon the platform of the defendant, not as a mere licensee but by its invitation, express or implied, to furnish meals to persons being carried on its trains, it was, as to the plaintiff, in duty bound to use at least ordinary care to keep its platform free from such obstructions and defects as would be liable to cause injury to persons who, like her, should pass over such platforms while using due care for their own safety. 3 Elliott, R. R. § 1249, and cases there cited. These mail clerks were riding in the mail car of the defendant's train, and were carried by the company under contract with the government,—whether as passengers, or not, it is not in this case material to consider. The evidence tended to prove that the plaintiff, by agreement between them and herself, had furnished them meals in this manner, at the cars, for eight years preceding, with the knowledge and consent of the defendant, and we are of the opinion that it would be a reasonable inference to draw that the business she transacted there, while for her own profit, was beneficial to the company in connection with its business in carrying the mails and the clerks having charge of them. In considering whether or not the plaintiff was upon the defendant's premises as a mere

Illinois Cent. R. Co. v. Hopkins

licensee or upon an implied invitation to transact her business there, no precise test, as said by the author of the work last cited, in section 1249, "can be stated in general terms"; but he there quotes with approval from *Plummer v. Dill*, 156 Mass. 426, 31 N. E. 128, 32 Am. St. Rep. 463, the following: "To come under an implied invitation, as distinguished from a mere license, the visitor must come for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on there. There must be some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the subject of the visit may not be for the benefit of the occupant." Without considering whether such a rule would furnish a sufficient test in all cases, we think it is applicable to the case at bar, and that there was, as between the plaintiff and defendant, a mutuality of interest in the subject to which her business related. We are of the opinion the jury were authorized to find that the plaintiff, at the time she was injured, was upon the platform of the defendant upon its implied invitation, in a matter in which it was interested. It follows, therefore, that the first above mentioned error is not well assigned.

2. Still, if there was no evidence tending to prove the charge of negligence, as counsel in the second place contend, it was not error to refuse the instruction to find for the defendant. The skid in question belonged to and was used by the company in loading and unloading freight on and from freight cars at this same platform, but when not in use it was usually kept in a shed of the company near by. From all of the evidence we cannot say it was an unreasonable inference for the jury to draw, that, after using the skid, the employees of the defendant had on this occasion left it on the platform where they last used it. It was in the possession of the company, on its premises, and used by no one else, so far as the evidence disclosed. An employee of the defendant passed over or very near this skid, with a lighted lantern in his hand, shortly before the accident, but he testified that he did not see it, although it was there at that time. In the instructions given to the jury at the instance of the defendant their attention was called to the proof relating to this allegation of the declaration, and they were told that the burden was on the plaintiff to prove that the defendant placed the skid on the platform, or knew it was there, or that it had been there such a length of time that it must be presumed that the defendant had knowledge it was there, and that without such proof their verdict should be for the defendant. While such instructions could not aid the evidence, or take the place of evidence, they fully informed the jury of their duty in the premises, and, as before said, we cannot say that this necessary fact was found without any evidence of it. It follows that no error was committed in refusing to direct a verdict for the defendant.

Barnhill v. Texas & P. Ry. Co

While some of the instructions given at the instance of the plaintiff may be open to criticism in omitting the matter of notice to the defendant that the skid was lying on the platform, still this omission was fully supplied by other instructions, and, the instructions as a series being correct, no harmful error was committed.

The judgment of the appellate court will be affirmed. Judgment affirmed.

BARNHILL v. TEXAS & P. RY. CO.

(Supreme Court of Louisiana, Nov. 17, 1902.)

[33 So. Rep. 63.]

Accident at Crossing—Care Required of Highway Traveler.*

One who reaches a railway crossing on a public highway is under the duty to stop, look and listen, and if a train be approaching it is his further duty to so act as to minimize the danger and insure his safety, if possible, under the circumstances and conditions then confronting him.

Same—Same.

The party who has the last clear opportunity of avoiding an accident, must, notwithstanding the negligence of his opponent, avail himself of that opportunity.

Same—Same.

The greater the difficulty of seeing and hearing the train as he approaches a crossing, the greater caution the law imposes upon the traveler.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Natchitoches; Charles V. Porter, Judge.

Action by Delilah A. Barnhill against the Texas & Pacific Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Jack & Fleming, for appellant.

Madison C. Mosely (Howe, Spencer & Cocke, of counsel), for appellee.

BLANCHARD, J. Plaintiff's husband was struck and killed by defendant's train, and, in consequence, this suit is brought to recover \$6,000 damages. The petition charges negligence and fault of defendant's agents and employees in this, to wit:—that the train was being driven, or permitted to run, at a reckless rate of speed, and there was failure on part of those in charge of it to give the usual and necessary signals and warnings of its approach at the time of the accident which caused the death of her husband. It is represented that the view of the approaching train from the crossing where the deceased was struck up to the depot, a distance of 300 yards or more, was obstructed by box cars resting on a switch track which paralleled the main track, and also, by lumber stacked

*See generally, foot-note appended to *Peck v. Oregon Short Line R. Co.* (Utah), 4 R. R. R. 358, 27 Am. & Eng. R. Cas., N. S., 358

Barnhill v. Texas & P. Ry. Co

on a lumber yard, and by a shingle shed and cotton seed house, which were located on the company's right of way, and that on account of these obstructions defendant was legally charged with the exercise of extraordinary caution in running its train by said point. The defense is a denial of negligence and the plea that the deceased came to his death through his own imprudence and recklessness. Trial by jury was waived and the case submitted to the judge, from whose decision in favor of defendant the plaintiff prosecutes this appeal. We have reached the same conclusion the trial judge did. He has, in a lucid and able opinion, correctly, we think, appreciated the facts in the case and properly applied the law.

Marthaville, in the parish of Natchitoches, is located on the two sides of defendant company's track. It is an incorporated village of about 250 people. The railway track there runs east and west. The depot is on the north side of the tracks, for there are two of them,—a switch track and the main line. The latter is south of the other. The lumber platform, shingle shed and cotton seed house, spoken of in the petition, are also on the north side of the tracks. At the distance of 849 feet from the eastern end of the depot is a public railway crossing. It is much used, but not the principal crossing in the town. At this crossing plaintiff's husband was struck and killed by an east-bound through-freight train. The casualty occurred between 1 and 2 o'clock in the day. The deceased was a blacksmith and woodworkman, a sober and industrious man, who supported himself and wife (present plaintiff) by his daily labor. There were no children of the marriage. At the time of his death Barnhill was 67 years old. He was a one-legged man—one of his legs having been amputated below the knee in the year 1886. In walking he used a wooden or "peg leg," which was attached to the stump of the amputated limb. Notwithstanding his age and crippled condition he was active and strong, and in the full possession of his faculties of seeing and hearing. His residence was a short distance north of the railroad track, while his workshop was on the south side of the track. He had been in the habit of crossing at the place where he was killed several times a day for years. At the point in question the track, looking westward, is straight for a distance of about 2,000 feet. The switch track referred to above joins the main track a short distance—say 100 feet—below or to the eastward of the crossing. This switch track extends from the crossing westward (passing the depot) a distance of 1,998 feet. At the crossing, the distance between the tracks—from the inside rail of the switch to the nearest rail of the main track—is some inches over 8 feet. The crossing is on a level with the surrounding country. Barnhill had been home to dinner. Finishing that meal, he was on his way back to his shop, when in crossing the main track he was struck by the locomotive and killed. He had gotten nearly

Barnhill v. Texas & P. Ry. Co

over the track when the impact came. His body was knocked or thrown over to the south side of the track. The train which struck him did not stop at the depot in the village. It had stopped at the water tank two or three miles above. Then, on approaching Marthaville, it appears to have slowed down somewhat, with the view of stopping should there be a signal out indicating orders to stop. Otherwise it would not stop, for it was a "through freight." Not perceiving any signal indicating orders to stop, the engineer whistled the brakes up and the speed of the train was accelerated. There was there a "downgrade" for some distance. The decline was eastward. Because of this there was no necessity to use steam to propel the train and it was shut off. The engineer sounded his whistle at the usual distance from the depot to announce the approach of the train, and the preponderance of testimony establishes that as he passed through the village he sounded with the whistle the signals usual at railway crossings. The evidence also establishes, we think, that the bell was ringing all the way down the track within the limits of the village. As to the speed of the train the witnesses for the plaintiff estimate it at from 25 to 45 miles an hour, while those for the defendant at from 12 or 15 miles an hour, except one, Mr. Prothro, who testified that since the accident in question he timed a train which he thinks was running at about the same rate of speed as the one which killed Barnhill, and it was making about 23 miles an hour.

We agree with the district judge that the speed of the train in question was considerably in excess of 12 or 15 miles an hour; that it was nearer 25 miles an hour; and that it was negligence and fault on part of defendant's employees to run a freight train a quarter of a mile long through an incorporated village on a down grade at any such rate of speed. To do so was in reckless disregard of the safety of those who were compelled to cross the track. Certainly, no greater rate of speed than 15 miles an hour should have been permitted, and this, too, without regard to whether there was or was not a town ordinance regulating the rate of speed. *Sundmaker v. Railway Co.*, 106 La. 111, 30 South. 285. Considering the dangerous rapidity with which this train was permitted to rush through the town, we would hold this defendant liable in damages for the death of Barnhill were it not for his own inexcusable negligence. When he reached the railway track on the crossing it was his duty to stop, look and listen, and then so act as to minimize the danger and insure his safety, if possible, under the circumstances and conditions then confronting him. He should have acted with discretion, prudence, caution. Both hearing and seeing the train rapidly approaching, and within 40 to 50 yards of the crossing, he should have stopped and let it pass. Instead of doing so, he attempted to cross ahead of it, thus assuming all the risks of the situation. He failed to get over in time, was run down

Barnhill v. Texas & P. Ry. Co

and killed. All the more he should have waited the passage of the train considering his crippled condition. Had he passed even midway between the switch track and the main track, on the latter of which the train was running, he would have been safe. He did not do so and his recklessness in attempting to cross just ahead of the rapidly approaching train must be held to have been the proximate cause of the fatality which overtook him. When he was seen by the engineer and when it became apparent to the latter he would attempt to cross the track, it was impossible for the engineer to stop or check the train so as to avoid the impact. The engineer as soon as he saw him whistled the danger signal, but it was either not heeded or it was then too late for the doomed man to heed it. The last chance to avoid the accident was thus with Barnhill. He should have availed himself of it. The principle here invoked has been tersely put in the following language:—"The party who has the last clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it." See Barrow, Neg. 53.

It is contended by plaintiff that, on approaching the tracks, Barnhill did not see the train; that his view was obstructed by certain box cars located on the side track and by the structures on the railway reservation heretofore mentioned. The nearest to him of the structures on the right of way was the shingle shed and that was 228 feet away. The distance from this shed to the center of the main line of the railway was 23.2 feet. There is conflict of testimony as to the number of box cars on the switch track. The conclusion to which we have come in respect to it is the same as that of the district judge, and that is, there were but two, and the one of these nearer to the crossing was 249 feet from it. So that when Barnhill reached the outer rail of the side track he undoubtedly had a view up the main track sufficiently distant to have enabled him to observe the approaching train and avoid it. When he reached the center of the side track his view extended still further up the line, and when he reached the inside rail of the side track he had a view of 2,000 feet or more up the track. At that point he was still 8 feet from the nearest rail of the main track, and the approaching train, with its bell ringing and a great noise otherwise, was within 50 yards of him and thundering down upon him. To have attempted, under these circumstances, to cross the track ahead of the train was utter recklessness.

But even if there had been other box cars upon the side track and one of these was within 10 to 20 feet of the crossing, as is the contention of plaintiff, it would avail nothing. The greater the difficulty of Barnhill's seeing the train as he approached the crossing, the greater caution the law imposed upon him. *Vincent v. Steamship Co.*, 48 La. Ann. 935, 20 South. 207, 55 Am. St. Rep. 287. The rule is well stated in 7 Am. & Eng. Enc. Law (2d Ed.) p. 435:—"The traveler,

Givens v. Louisville & N. R. Co

however, is rigidly required to do all that care and prudence would dictate to avoid injury, and the greater the danger the greater the care that must be exercised to avoid it, and where, because of physical infirmities, darkness, snow, fog, the inclemency of the weather, buildings or other obstructions and hindrances, it is more than usually difficult to see or hear, greater precaution must be taken to avoid injury than would otherwise be necessary." If the box car upon the switch was in close proximity to the crossing, it was Barnhill's duty to have peered around its side cautiously before venturing onto the main track. Had he done this there was nothing to have prevented his observing the approaching train. To have stepped suddenly from behind a box car on the main track was the height of imprudence. Beach, Contrib. Neg. pp. 192, 193. A plaintiff who has contributed, proximately, to an injury cannot recover even if he succeeds in proving fault on the part of another. Schwartz v. Railroad Co., 30 La. Ann. 15; Murray v. Railroad Co., 31 La. Ann. 490; Weeks v. Railroad Co., 32 La. Ann. 615; Fleytas v. Railroad Co., 18 La. 339, 36 Am. Dec. 658; Carlisle v. Holton, 3 La. Ann. 48, 48 Am. Dec. 440; Murphy v. Diamond, Id. 441; Hubgh v. Railroad Co., 6 La. Ann. 496, 54 Am. Dec. 565; Hill v. Railroad Co., 11 La. Ann. 292; Knight v. Railroad Co., 23 La. Ann. 462; Laicher v. Railroad Co., 28 La. Ann. 320; Johnson v. Railroad Co., 27 La. Ann. 53; Damont v. Railroad Co., 9 La. Ann. 441, 61 Am. Dec. 214; Montfort v. Schmidt, 36 La. Ann. 750; Schofield v. Railway Co., 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; Vincent v. Steamship Co., 48 La. Ann. 933, 20 South. 207, 55 Am. St. Rep. 287; Provost v. Railroad Co., 52 La. Ann. 1894, 28 South. 305; Childs v. Railroad Co., 33 La. Ann. 154. "The correct principle," says Mr. Rorer in his work on Railroads (volume 11, pp. 1031-1033), "is, that a party cannot expose himself with impunity to injury from the possible negligence of another, and, if injury ensue, recover against the other for such injury." The familiar rule of law that one, who is suddenly placed in a dangerous situation through the negligence of another, is not responsible for an error in judgment in selecting the wrong mode of escape, has no application here. Nor do we think the Sundmaker Case, 106 La. 111, 30 South. 285, relied on with so much confidence by plaintiff's counsel, is in point.

Judgment affirmed.

BREAUX, J., concurs in the decree.

GIVENS v. LOUISVILLE & N. R. Co.

(*Court of Appeals of Kentucky, Feb. 27, 1903.*)

[72 S. W. Rep. 320.]

Personal Injuries—Contributory Negligence.

Evidence examined in an action against a railroad for personal injuries, and held to justify a finding that the injuries resulted from

Givens v. Louisville & N. R. Co

plaintiff's contributory negligence, either in jumping on or off a train while in motion, or in sitting on a cross-tie while the train was approaching.

Presumption That Boy Seen Sitting on Cross-Tie Will Avoid Danger.*

If the engineer or fireman on a railroad train sees a boy sitting on a tie, he has the right to assume that he will get out of the way in time to avoid injury; and if the boy stumbles and falls in so doing, when it is too late to stop the train, injuries resulting to him cannot be charged to the railroad company.

Children—Contributory Negligence.†

Evidence in an action against a railroad for injuries to a boy seven years of age, showing that he is intelligent, that he has lived in proximity to the railroad, and was at the time of his injury acquainted with the movements of trains, and apprehensive of danger from them, is sufficient to show him capable of contributory negligence.

Instructions.

An instruction, in an action against a railroad for personal injuries, that if plaintiff was seated at the end of a cross-tie while the train was approaching him, and those in charge of the train saw or should have seen him in time to have stopped the train before reaching him, but failed to do so, they should find for plaintiff, but if he was hurt while attempting to jump on or off the train while in motion they should find for defendant, though inaptly expressed, is not improper or prejudicial to plaintiff.

Same.

Refusal to give instructions which might properly have been given was not prejudicial when those given properly presented the only issues necessary to be determined by the jury.

Evidence—Contributory Negligence—Implied Admission.

In an action against a railroad for personal injuries, a declaration of plaintiff's brother, made immediately after plaintiff reached home after receiving his injuries, "Ah, ha! This is what you get from jumping on and off the train," to which plaintiff made no reply, was properly admitted in evidence as an implied admission.

Appeal from circuit court, Bell county.

"Not to be officially reported."

Action by Edward Givens, by his father, as next friend, against the Louisville & Nashville Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

N. B. Hays, for appellant.

C. W. Metcalf, J. W. Alcorn, and E. W. Hines, for appellee.

SETTLE, J. This action was instituted in the name of the appellant, Edward Givens, by his father, as next friend, to recover damages for the loss of his foot, which was run over by the wheels of one of appellant's cars, and so mashed as to render its amputation necessary. The petition sets forth with unnecessary particularity the acts of negligence complained of in the following language, viz.: "Plaintiff says, at the time of receiving the injuries he was on the main line of defendant's road, and the train was going south on said track, when plaintiff left said main line and

*See foot-note appended to *Humphreys' Adm'x v. Valley R. Co.* (Va.), 5 R. R. R. 649, 28 Am. & Eng. R. Cas., N. S., 649.

†See foot-note appended to *Ill. Cent. R. Co. v. Jernigan* (Ill.), 5 R. R. R. 535, 28 Am. & Eng. R. Cas., N. S., 535.

Givens v. Louisville & N. R. Co

got on a siding or track running to the mines; that the defendant switched said train and engine just north of plaintiff on the line which plaintiff had moved to, and in plain view of plaintiff, and, without giving any warning by sounding the whistle or otherwise, negligently and carelessly struck plaintiff, bruising his leg as above stated." The answer not only traverses the averments of the petition, but, in addition, pleads contributory negligence, averring that appellant's injury was caused by his improper attempt to jump on the train while in motion. The reply simply denies the affirmative allegations of the answer. The trial resulted in a verdict for appellee, and, a new trial having been refused appellant, he has brought the case to this court by appeal.

We deem it unnecessary to go into a detailed statement of the evidence, but think it sufficient to say that the evidence introduced by appellant conduces to show that as appellee's train which runs from Middlesboro to Mingo was leaving the former place, appellant, who was then a boy seven years of age, ran from the main track 40 feet to the belt line track, where he seated himself on the left-hand side of a cross-tie of the track, and when so seated that his back was toward the train; that he knew, before crossing over and taking his seat, that the train was in motion, but he heard no signal from either its bell or whistle as it approached. He did, however, give his attention to the train when it got near him, and when it came within 10 feet of him he jumped up to get out of its way, but in doing so struck his "sore" toe against a cinder about a foot from the end of the cross-ties and outside of the track, which caused him to stumble and fall, in doing which his foot and leg fell across the rail, and the foot was crushed by the wheels of the passing train. Upon the other hand, appellee's evidence was to the effect that appellant was not on the cross-tie or track in front of the engine, but that he and two other boys ran up to the side of the train while in motion, and jumped, or attempted to do so, upon the side of a car, but fell, and his foot was thereby caught and crushed. Two witnesses—Logsden and Wood—testified that appellant told them he was walking or running along by the side of the train when hurt. Logsden carried him home immediately after he was injured, and upon reaching there appellant's brother said to him, "Ah, ha! This is what you get for jumping on and off the train. You know Pa and Ma have been telling you not to do that;" and that appellant made no reply to this statement of his brother. Shumate, fireman on the engine at the time of the accident, says he was looking out on the track in front of the engine, and saw no boy on the track, but saw some boys running towards the train. Appellant was asked on the trial, "Why did you sit down on the end of the tie on the track that leads to Mingo?" to which he answered: "I was tired. I thought the train was going on the main track, and sat down, and paid no attention to it." The evidence

Givens v. Louisville & N. R. Co

shows that the train was moving at the rate of four or five miles an hour, and that the noise of the cars and the engine could be heard at a distance of four or five hundred yards. So it seems to be reasonably apparent from the evidence that the boy's injury resulted from his own negligence; and, even if we were disinclined to believe the disinterested witnesses who say they saw him jumping on or swinging to the train, the boy's own statement shows that he saw the train when in 10 feet of him, and that he at once got off the tie and on his feet, and would have escaped injury but for stumping his "sore" toe on a cinder, which caused him to fall in such a way as to throw his foot over the rail, where it was caught by the wheel. Besides, if the engineer or fireman on the train saw him sitting on the tie, they had the right to assume that he would get out of the way of the approaching train in time to avoid injury; and the boy, in leaving the place where he was seated, did the very thing that the engineer had the right to expect of him, and, having gotten up and started away from the place of danger, the engineer had no reason to know, and could not have anticipated, that he would strike his toe against a cinder, and by reason thereof fall with his foot on the track; nor would it have been possible to stop the train, after the fall, in time to have prevented the injuries. We are aware of the rule so repeatedly announced by this and other courts of last resort that no presumption of negligence is to be indulged as against a child of tender years; but this boy seems to be intelligent, and, besides, it is shown by the evidence that he lives in close proximity to the railroad, and was at the time of receiving the injury familiar with the movements of the train on appellee's road. We think it does no violence to his youth to say that he was possessed of sufficient discretion to know the danger in which he voluntarily placed himself by taking a seat on the cross-tie near a moving train; and, indeed, he manifested his appreciation of the danger by trying to get out of the way of the train as it approached him, which he would have succeeded in doing but for striking his toe against the cinder. So, upon all of the evidence, we are unable to say that the verdict of the jury was unauthorized.

The alleged errors in reference to the giving and refusing of instructions might, and perhaps should, be refused consideration, because the instructions are not properly incorporated in the bill of exceptions; but we have, nevertheless, considered them, and find that, though inaptly expressed, they were not improper or prejudicial to the appellant. They told the jury, in substance, that if they believed from the evidence that if the appellant, Edward Givens, was seated on the end of the cross-tie while appellee's engine was approaching, and that those in charge of the train saw, or by the exercise of reasonable care ought to have seen, him, in time to have stopped the train before the engine reached him, but failed to do so, they should find for appellant. But upon the other

Rueping v. Chicago, etc., Ry. Co

hand, if they believed from the evidence that he was hurt from having his foot caught under a wheel of the train while he was attempting to jump on or off the train while in motion, they should find for appellee. While one, or perhaps more, of the instructions asked for by appellant and refused by the court might with propriety have been given, we do not think the refusal of the court to give them was prejudicial to appellant, as those given presented the only issues of fact necessary to be determined by the jury.

Counsel for appellant complain of the action of the lower court in admitting as evidence the declarations of appellant's brother, made to him when he reached home just after receiving his injuries. The brother said, "Ah, ha! This is what you get from jumping on and off the train. You know that Pa and Ma have been telling you not to do that"—to which appellant made no reply. We would ordinarily attach very little importance to the silence of appellant under such circumstances, as he was doubtless suffering greatly from the wounded condition of his foot; but the statements of the brother were of a character to call for some explanation or protest, and the failure of the appellant to reply would seem to indicate that he was unable to deny the charge made by the brother. In order to affect a party with the statements of others, made in his presence or hearing, concerning any act or declaration of his, and the truth of which he impliedly admits by a failure to deny it, the statement must have been made under such circumstances as would reasonably or naturally call for some reply from any person similarly situated. 1st Greenleaf on Evidence, section 197. In view of the rule stated, and the testimony of several of the witnesses that they saw him swinging on the train when injured, we are of the opinion that the lower court did not err in admitting the evidence in question.

Finding no error in the record prejudicial to the appellant, the judgment of the lower court is affirmed.

RUEPING v. CHICAGO & N. W. RY. CO.

(*Supreme Court of Wisconsin, Feb. 24, 1903.*)

[93 N. W. Rep. 843.]

Wrongful Act of Servant—Punitive Damages.*

A principal is not liable for punitive damages unless he directed the wrongful act to be done, or subsequently affirmed it, whether the negligence of the servant be ordinary or gross.

Same—Actionable and Gross Negligence—Evidence.

Where actionable negligence is admitted, and there can be no punitive damages, because the principal did not direct or affirm the wrongful act of the servant, and there is no mental suffering, induced by

*See *Proctor v. Southern Ry. Co. (S. Car.)*, 22 Am. & Eng. R. Cas., N. S., 426, and note, 440.

Rueping v. Chicago, etc., Ry. Co

insult, to be compensated for, evidence of the circumstances of the injury and of gross negligence is inadmissible.

Same—Same—Same—Prejudicial Error.

The erroneous admission of evidence of gross negligence, where actionable negligence is admitted, and punitive damages could not have been allowed if gross negligence had been shown, is not harmless, though the jury found that there was no gross negligence; counsel having throughout the trial made contentions (with which the rulings were in harmony) that defendant was guilty of criminal negligence, and that mere compensation to plaintiff for his loss would be inadequate, in view of the enormity of defendant's fault, and having appealed to the jury to fix compensatory damages with regard to defendant's ability to respond.

Excessive Verdict.†

A verdict of \$12,000 for a compound fracture of a leg, below the knee, of a man 45 years old, engaged in office work, is excessive; there having been no great pain, or evidence of probable future suffering; the recovery having been rapid; he being able to attend to his business substantially as before; and his only difficulty being that there is a looseness in the knee joint, permitting the leg to bow out about an inch as he throws his weight on it.

Appeal from circuit court, Fond du Lac county.

Action by Henry Rueping against the Chicago & Northwestern Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

Action to recover for personal injuries. The claim of the plaintiff was that, June 24, 1900, he was a passenger on defendant's excursion train on the way from the city of Fond du Lac to the city of Green Bay in the state of Wisconsin; that through gross negligence of defendant's servants who controlled the movement of said train it collided with one of defendant's freight trains, by reason whereof plaintiff was severely injured; that his injuries consisted of a severe shock to system, both bones of his right leg being transversely fractured from the knee down, the nerves and muscles of his body, particularly those of his right leg, being injured, and his being put to great pain and permanently physically impaired, to his damage in the sum of \$15,000.

The answer admitted that plaintiff was injured at the time alleged by ordinary negligence of the defendant, but denied that it or its servants were guilty of any greater degree of fault than mere failure to exercise ordinary care. It put in issue the extent of the physical injury and the amount of the damages alleged.

There was no allegation in the complaint that defendant was a fault except in that its servants failed to exercise proper care. There was no allegation that it authorized their conduct or ratified it. The allegations as to gross negligence went no further than to charge that the servants of defendant, while in pursuit of their ordinary business of managing the

†As to what is the proper amount of recovery for loss of, or injury to, arm or leg, see foot-note appended to *Newport News, etc., Ry. & Elec. Co. v. Bradford*, 4 R. R. R. 106, 27 Am. & Eng. R. Cas., N. S., 106.

Rueping v. Chicago, etc., Ry. Co

excursion train and the freight train, were grossly negligent. In the opening address of plaintiff's counsel to the jury he treated the subject of gross negligence as the all-important one to be dealt with by them, and in a manner well calculated to inflame their minds with prejudice against the defendant on account of guilt in operating its trains on the occasion in question with reckless disregard of human life. He stated clearly that the difference between the claim of plaintiff and that of defendant, as regards the mere question of liability, was respecting the degree of its fault,—whether it was merely guilty of ordinary negligence or was guilty of gross negligence. Defendant's counsel, in his opening address to the jury, took issue with plaintiff's counsel as to there being any question of gross negligence in the case. He insisted that there was on trial merely a case of accident from ordinary negligence, where the fault was freely admitted, and the only question for decision was the amount that should be awarded plaintiff as compensatory damages. He suggested that there was no disposition on his side to escape payment of any part of such sum as in the judgment of the jury, guided by the evidence and the law applicable thereto, should be deemed necessary to fully compensate plaintiff for his loss; that defendant desired that plaintiff should receive his full legal measure of damages.

Upon the trial plaintiff's counsel was permitted, against objection, to introduce evidence at great length upon the subject of defendant's negligence, and particularly to establish the claim that its servants were guilty of gross negligence. Defendant's counsel insisted from the beginning to the end of the trial that, since defendant freely admitted its liability for ordinary negligence,—the only degree of fault actionably charged in the complaint,—evidence other than to aid the jury in coming to a correct conclusion respecting the amount of money necessary to compensate plaintiff for the injuries received was improper. Plaintiff's counsel, though pressed by defendant's counsel to make his position plain before the court, in order that the court might rule intelligently upon the objections to evidence, did not distinctly claim that a recovery could be had under the complaint for gross fault. During the discussion of the various objections language was indulged in at great length by plaintiff's counsel to the effect that defendant was guilty of criminal negligence and that plaintiff was entitled to damages by way of punishment.

The court, by the rulings made at all points during the trial in respect to the subject of gross negligence and permitting the conduct of plaintiff's counsel indicated, allowed him to succeed in placing before the jury evidence to sustain his claim that the defendant's servants, in the handling of the passenger train and in directing its movements, were guilty of gross negligence. When the case was ready to submit to the jury there was no fact in issue on the pleadings in controversy

Rueping v. Chicago, etc., Ry. Co

on the evidence in a way to charge defendant with legal liability. The only disputed questions were whether plaintiff was permanently impaired, and the amount of money that should be paid to compensate him for his loss.

The case was submitted to the jury for a special verdict. The first two questions covered the controverted matters mentioned. They were followed by six other questions covering various elements of actionable negligence, ordinary and gross. Instructions were given in respect to each of such questions. The jury found for the defendant as to the claim of liability for gross negligence, answered the questions respecting ordinary negligence in favor of plaintiff and assessed his damages at \$12,000. Judgment was entered on the verdict in plaintiff's favor. All matters referred to in the opinion that follows were preserved for review by proper exceptions.

Edward M. Hyzer, for appellant.

E. S. Bragg, for respondent.

MARSHALL, J. (after stating the facts). This case from first to last was tried upon a wrong theory. Counsel for appellant was clearly right in his position that upon the pleadings the only questions for decision by the jury were these: (1) Are the plaintiff's injuries permanent? (2) What sum of money will compensate him for his loss? Those questions, with proper explanations to enable the jury to understand their scope and the legal principles governing the same, would have covered all the matters required to be solved to settle the controversy between the parties. It may be that the learned counsel for plaintiff really supposed that his client was entitled upon correct legal principles to show all the circumstances of the accident. It may be that he did not consciously lead the learned circuit judge astray by his attitude, suggesting expressly or by implication that under the pleadings respondent was entitled not only to show gross negligence on the part of defendant's servants, as bearing on the question of compensatory damages, but for the purpose of charging appellant with punitive damages, notwithstanding there was no claim in the complaint or in the evidence that defendant authorized the acts complained of or ratified them. However, it would be a reflection upon the distinguished counsel for respondent, which we hardly feel justified in suggesting, to treat this case as if he was misinformed in respect to the fact that the settled judicial policy of this state is to the contrary, and has been for some over 40 years. While if the duty devolved upon us now to demonstrate the correctness of such policy, tested by principle and authority, it would not seem to be a specially difficult task, we shall not enter into any discussion thereof, since the matter has been settled by a long line of adjudications of this court. In *Milwaukee & M. R. Co. v. Finney*, 10 Wis. 388, decided in 1860, it was held that though a person is liable for com-

Rueping v. Chicago, etc., Ry. Co

pensatory damages for injuries wrongfully inflicted by his servants upon another while in the performance of their duties as such servants, the principal cannot be visited with damages by way of punishment without proof that he directed the wrongful act to be done or subsequently affirmed it; that without such authorization or ratification the degree of negligence, as to whether ordinary or gross, has no proper place in the controversy as to the measure of the plaintiff's right to redress and should not be submitted to the jury. The same principle, so far as applicable, ruled *Bass v. C. & N. W. R. Co.*, 36 Wis. 450, 17 Am. Rep. 495; same case, 42 Wis. 654, 24 Am. Rep. 437; *Craker v. C. & N. W. R. Co.*, 36 Wis. 657, 17 Am. Rep. 504; *Eviston v. Cramer*, 57 Wis. 570, 15 N. W. 760; *Patry v. C., St. P., M. & O. R. Co.*, 77 Wis. 218, 46 N. W. 56; *Mace v. Reed*, 89 Wis. 440, 62 N. W. 186; *Robinson v. Superior R. T. R. Co.*, 94 Wis. 345, 68 N. W. 961, 34 L. R. A. 205, 59 Am. St. Rep. 897; *Bryan v. Adler*, 97 Wis. 124, 72 N. W. 368, 41 L. R. A. 658, 65 Am. St. Rep. 99; *Gaertner v. Bues*, 109 Wis. 165, 85 N. W. 388. In all the later decisions of the court such principle was deemed so firmly established that a mere reference to the previous adjudications was all that was deemed necessary in applying the same. In *Robinson v. Superior R. T. R. Co.* this language was used:

"This court has repeatedly held, in effect, that exemplary damages can only be recovered against the principal for the wrongful and malicious act of the agent, when such act is either authorized or ratified by the principal."

In *Gaertner v. Bues*, this language was used:

"There is no finding that such acts were authorized or ratified by the defendant. Without this, there can be no recovery as and for punitive damages. Such damages are given only by way of punishing the malice or oppression, and are usually graduated by the intent of the party committing the wrong. When the action is against the principal for the act of an agent, the question of their assessment cannot properly be submitted to the jury, unless there is evidence connecting the principal with such intent on the part of the agent."

Counsel occupied considerable space in his brief in arguing that a principal is responsible for the negligence of his agent in the pursuit of his duties resulting in an injury to another, and therefore that, necessarily, on principle and authority, all the circumstances attending the act may properly be shown in an action to recover for the wrong, whether the proper measure of damages be such as will merely compensate such other for his actual loss or the jury be permitted in their discretion to allow an additional sum by way of punitive damages. True, a principal is responsible for gross negligence under the circumstances stated. That is supported by all the cases cited. But not responsible for more than compensatory damages without the element of authorization or ratification by him. The measure of damages is the same without such

Rueping v. Chicago, etc., Ry. Co

element, whether the degree of fault be ordinary or gross negligence. So in such case the circumstances of the injury are entirely immaterial where actionable negligence is admitted, unless they are of such special nature as to present, as one of the elements to be compensated for, sense of wrong or insult arising from an act apparently dictated by a spirit of willful injustice or a deliberate intent to vex or degrade. It is held that mental suffering of that character is a proper subject for compensatory damages (*Grace v. Dempsey*, 75 Wis. 313, 323, 43 N. W. 1127; *Duffies v. Duffies*, 76 Wis. 374, 386, 45 N. W. 522, 8 L. R. A. 420, 20 Am. St. Rep. 79); that all mental suffering, coupled with physical injury—that form which springs merely from insult or willful wrongdoing as well as that caused by physical pain—is in a proper case a legitimate subject to be considered in awarding compensatory damages. The cases holding generally that the circumstances attending the infliction of an injury in an action to recover compensation therefor are material regardless of whether liability is admitted, are not universally restrained by the language of the opinions within their legitimate limits. It seems that it needs only to be suggested that evidence of gross negligence, where there can be no punitive damages as matter of law, or damages for mental suffering caused otherwise than by physical injury, is irrelevant; that it is liable to be prejudicial where, in the very nature of things, it is plain that there was no mental suffering induced by insult to be compensated for. Counsel calls our attention to the opinion of Mr. Justice Davis in *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 489, 23 L. Ed. 374, where this language is found:

“As the question of intention is always material in an action of tort, and as the circumstances which characterize the transaction are, therefore, proper to be weighed by the jury in fixing the compensation of the injured party, it may well be considered whether the doctrine of exemplary damages cannot be reconciled with the idea, that compensation alone is the true measure of redress.”

An examination of the entire opinion will show that the materiality of intention which the court was talking about was in respect to whether the defendant was liable for punitive or only compensatory damages. As an abstract proposition it seems too elementary to warrant any very extended discussion, that as regards any element of compensable injury except mental suffering caused by insult or something of that sort, the intent of the wrongdoer neither enhances nor mitigates the loss. There was no attempt here to recover for any such element. The circumstances of the case show that no such element entered into it. Therefore, there was clearly no justification for presenting the subject of gross negligence to the jury for consideration.

We cannot, in justice to the learned circuit judge who presided at the trial and the distinguished counsel for respondent,

Rueping v. Chicago, etc., Ry. Co

omit to notice *Lawson v. C., St. P., M. & O. R. Co.*, 64 Wis. 447, 24 N. W. 618, 54 Am. Rep. 634, to which counsel refers us. The opinion there, taken as it reads, justifies the conduct of the trial. However, it seems that no such effect should be given to the case. There was no claim in the complaint there of liability for gross negligence. The essential allegation to support such a claim was wanting. There was no proof offered or received, so far as we can discover in the report of the case or the printed matter used upon the argument, suggesting gross negligence. There was no element of injury of a compensable character that would not have existed regardless of whether the fault of the defendant was ordinary or gross negligence. Yet, the trial court, misconceiving what constitutes gross negligence—not understanding that it requires actual intent to injure, or that disregard of human life or of consequences evincing a willingness to produce harmful results, sometimes called intent in law and equivalent to intent in fact (*Ryan v. La Crosse City R. Co.*, 108 Wis. 122, 83 N. W. 770; *Milwaukee & St. P. R. Co. v. Arms*, *supra*)—directed the jury to convict the defendant of such fault because, as was said, the evidence established it, and the measure of damages was no greater than would have resulted from ordinary negligence, the degree of fault admitted in the answer. The error was not harmful, because there was nothing in the case upon which the court predicated his decision tending by reason of the ruling to enhance the recovery, and the jury were distinctly restrained, in assessing the damages, to such compensation as would fairly remunerate the beneficiary of the cause of action of her pecuniary loss. This language was used in deciding the case:

“The respondent was allowed to show the circumstances of the collision, against the objection of the appellant, in order to show that the servants of the company were guilty of gross negligence. According to the brief of the learned counsel of the appellant, ‘it made no difference in the case so long as defendant was negligent. If plaintiff showed herself otherwise entitled to recover, she could only be defeated by showing negligence on her husband’s part.’ This being so, proof of gross negligence was immaterial and could do no harm. But we think proof of the accident and its circumstances was proper, and that it justified the finding of gross negligence. The negligence of the company was charged in the complaint and admitted in the answer, but its degree was an open question for the jury.”

Since, as the court said, in effect, whether the wrong of the defendant was characterized by the essentials of gross negligence was immaterial to the case, and ordinary negligence was charged and admitted, rendering defendant liable for full compensatory damages to the beneficiary of the cause of action, and there was no other element of compensable loss involved than such as was of a distinctly pecuniary character,

Rueping v. Chicago, etc., Ry. Co

we must confess that the court was wrong in saying that the degree of the defendant's fault was a proper subject for proof and for consideration by the jury. It seems that the furthest the court should have gone was to have said that, the liability of the defendant for the pecuniary loss suffered by the widow of the deceased being admitted and the jury having been limited in the assessment of damages to such elements, evidence respecting the circumstances of the injury was unnecessary, and, as regards mere degree of negligence, was error, but harmless error.

We will say in passing that we do not lose sight of the language called to our attention in *Bass v. C. & N. W. R. Co.*, 36 Wis., at page 462, and 17 Arn. Rep. 495, to the effect that the mere inadvertent placing of a railway train in charge of negligent or careless agents, or that any negligence by the agents of a railway company in charge of one of its trains, "may well deserve the epithet of gross." In view of the long line of decisions in this state regarding the essentials of gross negligence, it would hardly seem that such language, quoted, as it was, from another jurisdiction, and used merely *arguendo*, should be referred to as authority.

Counsel for respondent insists that if it was error to admit evidence of gross negligence of defendant's servants and to try the case on the theory that defendant might be guilty of that degree of fault, it was not prejudicial error, because the finding on that was in its favor, citing *Stone v. C., St. P., M. & O. R. Co.*, 88 Wis. 98, 59 N. W. 457. That would be true if there were no indications in the record that defendant was prejudicially affected notwithstanding. A universal rule cannot be predicated on *Stone v. R. Co.* and similar cases. The question of whether error of the sort in question is harmful or not must necessarily be determined very largely by the facts of each particular case.

The persistence with which counsel for respondent, from his opening address to the jury till the case was finally submitted to them, contended that appellant was guilty of criminal negligence and that mere compensation to plaintiff for his loss would be inadequate to the enormity of its fault, and the extent to which rulings were made in harmony therewith, could hardly have resulted otherwise than to unfit the jury to fairly consider and decide the vital issues in the cause. Such conduct of the trial went to an extraordinary length. A few excerpts from the record will amply show that. Speaking of the responsible officers of the defendant, who were entirely innocent of any criminal fault or moral turpitude, or personal fault at all, this language was used by the learned counsel:

"If Puck were to publish a cartoon of these distinguished gentlemen in procession on that Sunday as they came from church—I have no doubt they were all at church—Wall street was not running that day—he would picture this long line of mourners and grievous characters with tears dropping down

Rueping v. Chicago, etc., Ry. Co

from their eyes, and put under it what they sometimes do to give point to the caricatures, 'We wonder what this will cost.' Then it will be left for any body else to determine what they meant when they said, 'We wonder what this will cost,' and whether it was the tears that were shed for what it might cost, or whether the tears were shed because they had got caught once when it was apparent that they would be held responsible."

The great wealth of the defendant and the amount of money damages requisite to be visited upon it in order that it might feel the smart of the legal lash and be conscious of the enormity of its offense, was treated in part thus:

"These impositions by way of fine for example's sake, punishment's sake, to operate as a warning to protect the body politic that travel to and fro, in this case over railroads—the same rule that applies outside of railroads applies here—correspond the punishment that you impose with the ability to pay the money that you impose and then you have an easy, graded movement—as easy as you ever can have—in fixing either compensatory or exemplary damages. * * * Now as a public example, in the way of punishment, how much more, how many more thousand in addition shall you give, so that when the blister is administered, it will draw. That is what we want for example's sake and for punishment's sake."

Note the appeal to the jury to fix compensatory damages, having regard to the ability of the defendant to respond. What justification can there be suggested for conduct so calculated as that to inflame and pervert the minds of an ordinary jury assembled to perform so simple a duty as that of determining the money damages necessary to compensate for loss suffered; or for the use in addressing the jury of language like this respecting the circumstances of the accident:

"As I said to you, some were launched into the other world; others had legs broken or ribs broken; every ailment, very nearly, that could be inflicted upon them came upon them. They spent their summer in pain and misery; and became thence, some of them, as I think I shall show you, * * * crippled for life."

Or this language in respect to the engineer who handled the train:

"Ran in upon that engine, crashed there in its force and rebounded, one car telescoping into another, sending, as we have shown, five or six unshrived souls to their Maker, and left a large number, whatever that number may be, crippled for life."

Pages might be covered in presenting a full history of the trial with expressions of the same sort, tending to unfit any ordinary jury for doing justice in the case.

It is with much regret that we are, in the discharge of our duties, required, as above, to give even a few glimpses of the unhandsome features of the trial of this case. It is to be re-

Rueping v. Chicago, etc., Ry. Co

gretted that counsel so distinguished should have so indulged his personal mastery of a situation as to lead so conscientious a judge as the one who presided upon this trial so far astray. It is to be regretted that counsel will do that under any circumstances. Counsel should never forget that they are of the instruments provided by law for the administration of justice,—officers, as it were, in the eye of the law, charged with a high degree of responsibility respecting the protection of the rights of their clients within the legitimate boundaries of the controversy they are called upon to present for adjudication, and charged as well with a high degree of responsibility not to purposely or negligently go outside such boundaries. Within that sphere they may, with all their learning, ability and industry, present their client's claim; but they will step outside thereof at the peril of sacrificing the very interests they are in duty bound to safeguard.

From what has been said we must conclude that there was not a fair trial of this case. If it appears probable that the verdict was enhanced thereby, the judgment must be reversed. The jury found for the defendant on the question of gross negligence. That is a point in favor of the judgment. However, as counsel for defendant suggest, there is a strong indication in the amount of the verdict that, while the jury acquitted defendant of gross negligence, they were ruled by the idea pressed upon them throughout the trial that damages should be assessed sufficiently high to roundly punish the defendant when they came to assess the plaintiff's compensatory damages. The indications are that the idea of damages as mere compensation for loss sustained was too involved in their minds with the idea of punishing appellant to enable them to intelligently or dispassionately pass upon the vital questions in the case.

The evidence as regards the nature of the plaintiff's injury and the result was to the following effect: The large bone of the right leg below the knee was broken transversely downward. There was a displacement, giving the injury the character of what is called a compound fracture. It was not especially painful. Plaintiff recovered, so far as probably he ever will recover, in a few months. He was 45 years of age when injured. His business was mainly office work. He was sufficiently restored to enable him to attend to such business substantially as formerly. The restored limb is not quite as strong as before. It is not wholly in its normal condition and never will be. The ligaments at the knee joint are so impaired that the joint is more than normally mobile. That permits a slipping outward as the weight of the body is thrown upon the imperfect limb. He is required, in using his limb, to use care and favor the impaired member. He has not full control of the limb because, as indicated, the ligaments of the knee are

Rueping v. Chicago, etc., Ry. Co

to some extent permanently relaxed. He testified that his only difficulty in using his limb was that there was a looseness in the knee joint permitting the leg to bow out about an inch as he threw his weight upon it, and that it troubled him some in moving about.

An examination of the numerous cases that have come to this court furnishes clear indication that \$12,000 for the loss above indicated is far beyond what is legitimate. Plaintiff was not prevented from going about his customary affairs more than six months. There was no special circumstance characterizing the injury from that of an ordinary compound fracture of one of the legs below the knee. There was no extensive laceration of the tissues of the limb. There was no extraordinary amount of pain suffered. There was a pretty rapid recovery, and a complete healing of the wounds. The permanent impairment of earning power is not large. There is no evidence of reasonable certainty of future pain and suffering from the injury. The amount awarded is equivalent to an annuity sufficient to enable plaintiff, with an ordinary family, to live in ordinary circumstances during his natural life. The mere statement of that is sufficient to demonstrate that the verdict is unreasonable in a high degree. A reference to verdicts in other cases will be of some service in determining how far the one in question is out of harmony with what is reasonable: but there is, after all, no test to be applied but that of human judgment. An examination of a large number of cases fails to bring to our attention one where anywhere near as large a verdict as the one before us has been sustained for a similar loss. Instances may be found in our books where there was the loss of a leg, with suffering probably as great as that of plaintiff, and where there was as great or greater diminution of earning power, and the amount of compensation allowed was from \$1,600 to \$5,500. In *Karasich v. Hasbrouck*, 28 Wis. 569, there was a verdict for \$5,500. The plaintiff, a man 28 years old, had two ribs broken. One leg was so badly bruised and wounded that pieces of the bones subsequently worked out through the wound. He was confined to his bed for some days, was under a surgeon's care for months, and was rendered permanently disabled from following his usual occupation, and made reasonably certain to suffer considerable pain for the rest of his life. In *Duffy v. C. & N. W. R. Co.*, 34 Wis. 188, a strong, healthy man 64 years of age was very severely and permanently injured, the injury leaving him to some extent a cripple for life. The amount of damages awarded was \$1,600. In *McMahon v. Eau Claire W. W. Co.*, 95 Wis. 640, 70 N. W. 829, \$5,000 was allowed for a severe permanent injury to a young man, a member of the city fire department. In *Cummings v. National F. Co.*, 60 Wis. 603, 18 N. W. 742, 20 N. W. 665, a middle-aged man was rendered helpless for life. The amount awarded to him was \$8,000. In *Propsom v. Leatham*, 80 Wis. 608, 50 N. W. 586, a laborer

Rueping v. Chicago, etc., Ry. Co

in good health, with a good prospect of long life, was seriously and permanently injured, one of his legs being broken, and after he was cured so far as practicable, the leg being left in a partially deformed condition, was awarded \$1,800. In *McCoy v. Milwaukee Street R. Co.*, 88 Wis. 56, 59 N. W. 453, the sum of \$4,000 was awarded for the loss, by a boy 17 years old, of his left arm. In *Baltzer v. Chicago, M. & N. R. Co.*, 89 Wis. 257, 60 N. W. 716, a recovery of \$10,000 was allowed for loss of the left arm of a boy 19 years of age. In *King v. City of Oshkosh* (Wis.) 44 N. W. 745, \$600 was allowed to compensate a man for an injury causing considerable expense, loss of time, and a somewhat permanent impairment of earning power. In *Nadau v. White R. L. Co.*, 76 Wis. 120, 43 N. W. 1135, 20 Am. St. Rep. 29, \$9,650 was allowed for an injury to a strong young man. His leg was crushed and had to be amputated above the knee. These examples, though including cases of injuries quite dissimilar in kind to the one suffered by plaintiff, furnish a pretty good index of the amount usually found necessary in the administration of justice, to compensate for pain and lost time incident to an injury and impaired earning power. We may well look, not so much to the particular nature of the injury in the cases, in comparing them with the one before us as to the magnitude of the elements of pain, loss of time, expense, diminished earning power, and the age of the subject. Those cases strongly support our conclusion that the verdict of the jury here was either the result of passion and prejudice or that the case was not intelligently considered by the jury; that they were swung away from the true basis for the assessment of damages by the errors we have discussed; that they thought as much or more of roundly punishing the appellant as of requiring it to make good to respondent the loss he sustained, upon a common-sense basis.

There being no controversy but that appellant is liable to respond for compensatory damages, this is a proper case for this court, upon reversing the judgment, to name a sum which the plaintiff may accept and terminate the litigation if he sees fit. We will do that, being guided by the rule that, since defendant is left with no option in the matter, in order to avoid invading its substantial rights as to a judicial assessment of the damages it should pay, the sum named must be as low as in any reasonable probability a jury of 12 men rightly instructed as to the law, and with a proper conception of their duty in the matter, would be liable to award. *Baxter v. C. & N. W. R. Co.*, 104 Wis. 307, 80 N. W. 644. It is our best judgment that the defendant ought not to be compelled under that rule to submit to the payment of more than \$2,500. That seems small, compared with the verdict of the jury, but, unlike most cases where this court has been called upon to exercise its power to give parties an opportunity to end their

Rueping v. Chicago, etc., Ry. Co

litigation without a new trial, the verdict furnishes here no sort of assistance. A jury might reasonably assess plaintiff's damages as low as \$2,500. They might, of course, assess the same somewhat higher. The range of human judgment in respect to such matters is quite large. It is a very difficult matter to set boundaries beyond which it cannot go. It cannot be done at all with any very great degree of certainty. The best that can be done is to apply unbiased judgment and experience to the evidence. We have done that with the result suggested. If plaintiff does not see fit to accept the amount named, the way is open for him to appeal to another jury.

There is nothing further that need be said in this case. It is with much regret that we have been compelled to treat it as we have. We entertain a high regard for the learned, pains-taking and conscientious judge who tried the case, and for the distinguished counsel who conducted the case for respondent. For the former, we can say it is but natural to lean somewhat for support in the course of a hotly contested trial, without time for reflection, upon eminent counsel, whose standing at the bar and whose large experience is an assurance against his consciously, or at all, proceeding to effect outside the legitimate boundaries of the case, especially in moving the judicial mind to the commission of error. But after all lawyers are not judges. Their sphere of action is different. However distinguished they may be, the only really safe way in any case is for the independent judgment of the judicial head of the court to dominate the trials. Counsel are liable to use all power they are masters of, if permitted, for the attainment of valuable results for their clients. The court must necessarily at all times himself control the scales of justice, keeping out those illegitimate makeweights that have no business therein, but which able counsel are liable, if not restrained, to throw into the balance upon their side of the case. The court can do that and still give counsel ample range for all their learning, ability and experience within the limits of the case, while repressing, and if necessary suppressing, excursions outside thereof.

The judgment of the circuit court is reversed. The cause is remanded for a new trial unless the plaintiff elects, by notice in writing served upon the attorney for the defendant within 20 days after the filing of the remittitur in the office of the clerk of the trial court, to take judgment for the sum of \$2,500, with costs in such court subsequent to such filing. If such election be made, judgment may be rendered accordingly upon application therefor to such court.

ST. LOUIS NAT. STOCK YARDS v. GODFREY.*(Supreme Court of Illinois, Oct. 25, 1902.)*

[65 N. E. Rep. 90.]

Collision in Switch Yard—Application of Statute Requiring Trains to Stop When Approaching Intersections.

Act entitled "An act in relation to fencing and operating railroads" (section 12), as amended June 19, 1885 (Hurd's Rev. St. 1899, p. 1330), providing that trains on any railroad, when approaching a crossing with another railroad on the same level, shall be brought to a full stop, and the person in charge of the engine shall positively ascertain that the way is clear before proceeding, does not apply to a switch yard, consisting of an intricate system of tracks all belonging to the same company.

Negligence of Fellow Servant Concurring with That of Another.*

Negligence of plaintiff's fellow servant does not prevent recovery of one also negligent, who was not their master.

Negligence in Running Trains in Switch Yard—Rules.

It is not negligence per se for an engineer to take a train into a switch yard over one track in contravention of a rule of the owner that such track shall be used only for out-bound trains, he not having notice of the rule, and there being evidence that it was not enforced, but was disregarded habitually, with the owner's knowledge and acquiescence.

Same—Usages and Customs.

On the question of negligence in the case of a collision in a switch yard, evidence of the environment and the usual manner of doing the business there is competent.

Same—Waiver of Rules.

An instruction, in an action for collision in defendant's switch yard, that a rule of defendant relative to use of tracks by crews entering the yard is to be disregarded in the case, if it was habitually violated with defendant's knowledge and acquiescence, or was not enforced as to the crew with which plaintiff was working, correctly states the law, and is not misleading.

Negligence—Instructions.

An instruction that defendant is liable if it was guilty of the negligence charged, and plaintiff's injury resulted therefrom while he was in the exercise of ordinary care for his safety, is not erroneous, as limiting the time plaintiff was required to use due care to the moment when he was injured.

Negligence and Contributory Negligence—Instructions.

An instruction that defendant is liable if the jury believe from the evidence that the defendant's engine, which struck plaintiff's engine, was not managed with ordinary care, and plaintiff's injury was the direct result of such negligence while he was in the exercise of ordinary care for his own safety, not only does not limit the time plaintiff was required to use ordinary care to the moment when he was injured, but does not assume that at some time he was in the exercise of ordinary care, the words "if the jury believe from the evidence" applying to the entire sentence.

Contributory Negligence—Instructions.

An instruction that the question whether plaintiff was guilty of negligence which contributed to his injury, and without which the accident would not have occurred, is for the jury, is not misleading.

Appeal from appellate court, Fourth district.

Action by August Godfrey against the St. Louis National Stock Yards. From a judgment of the appellate court (101

*See note at end of case.

St. Louis Nat. Stock Yards *v.* Godfrey

Ill. App. 40) affirming a judgment for plaintiff, defendant appeals. Affirmed.

This was an action on the case, in the city court of East St. Louis, by August Godfrey, appellee, against the St. Louis National Stock Yards, appellant, to recover for a personal injury suffered by him in the switch yards of appellant December 30, 1898.

The declaration contained but one count, and charged, in substance, that the appellee was in the employ of the Baltimore & Ohio Southwestern Railroad Company as a locomotive engineer, and was required, in the discharge of his duties, to operate and run a certain switching engine of said company in hauling freight cars into and out of the yards of the defendant at said city, and defendant was conducting the business of a stock yard company, and had in its use for that purpose divers switching engines, cars, trains, railway tracks, and other appliances necessary in prosecuting said business, whereby it became the duty of defendant to conduct and carry on its said business in a reasonably prudent manner in order to avoid injuring the plaintiff while he was performing said services, but that the defendant, not regarding such duty, so carelessly and improperly managed and controlled one of its engines, with cars attached, the headlight of which engine was not burning, that it was negligently made to collide with the engine which appellee was operating, whereby he was thrown to the ground and permanently injured without any fault or negligence on his part. The plea was not guilty.

Appellee was the engineer on a locomotive of the aforesaid railroad company, and with a switching crew of five men besides himself had run into the switch yards of appellant to do some switching for his road. He was familiar with the tracks and method of doing business in the yards. To enter the switch yards two tracks were available, one called the "Whittaker Track" and one called the "Hog-House Track." The Whittaker track was in use by another switching crew when appellee entered the yards, and so he used the hog-house track. To get to the place of his destination he had to cross several other tracks, the last one being the crossing of the track known as the "Coal Track" or the "Nelson Morris Track," which comes out from behind the large building of the Nelson Morris Company and crosses the hog-house track a little west of the building, almost at right angles. A switch engine of appellant, drawing a train of cars, was approaching this crossing at the same time. The two locomotives met on the crossing, and appellant's engine pushed appellee's engine sideways and partly off the track, causing appellee to fall out between the engine and the tender, whereby he was seriously and permanently injured. When within 50 feet of the crossing appellee had stopped his engine and had given two blasts of the whistle, and, not hearing any signal from any other engine, assumed, under the rules observed in the switch yards

St. Louis Nat. Stock Yards v. Godfrey

in regard to such signals, that the crossing was clear. He had sent his helper, Kehoe, ahead to see if the track was clear, and to throw a switch a little way beyond the crossing. When Kehoe reached the crossing he signaled appellee to go ahead, and then proceeded to throw the switch. The headlight on appellee's engine was burning and the bell was ringing. None of his crew heard any whistle or bell from the approaching engine of appellant's train, and they testified that its headlight was not burning. Appellant's switching crew testified that their headlight was burning and the bell ringing and that the whistle was blown for the crossing, but that they heard no signals from appellee's engine, and that its headlight was not burning. It was about 5:30 o'clock in the afternoon, and was getting dark. The two engines were hidden from each other's sight, as they approached the crossing, by the Nelson Morris building and by box cars which filled two stub tracks. The wind was blowing, and other engines were working in the yards. One of appellant's switching crew was on the front footboard of the engine, and when about 15 feet from the crossing discovered appellee's engine approaching. He immediately signaled appellant's engineer to stop, whereupon the engineer set the brakes and reversed his engine and brought it to a stop, but the slack of the loaded cars attached to the engine, it being on a slight down grade, pushed it against appellee's engine, and thus caused the accident, as before stated.

At the close of appellee's evidence, appellant's counsel moved the court to instruct the jury to find a verdict for appellant, which motion was denied. They also moved to exclude certain portions of the evidence from the jury, and these motions were denied also. These several motions were renewed at the close of all the evidence, and again denied. The jury found the issues for the plaintiff, and assessed his damages at \$5,500, which amount was reduced to \$4,000 by remittitur, and judgment was rendered therefor. The appellate court for the Fourth district affirmed the judgment, and the appellant now brings the case to this court for review.

Messick & Crow, for appellant.

F. C. Smith and M. Millard, for appellee.

CARTER, J. (after stating the facts). The first contention of appellant is that the trial court erred in refusing to direct a verdict in its favor, on the ground alleged that the evidence did not tend to prove that the plaintiff used ordinary care for his own safety, and because there was no evidence that he performed the duty required of him by the statute before attempting to pass the crossing. The statute referred to is section 12 of "An act in relation to fencing and operating railroads," as amended June 19, 1885 (Hurd's Rev. St. 1899, p. 1330), viz.: "All trains running on any railroad in this state, when approaching a crossing with another railroad upon the same level, * * * shall be brought to a full stop be-

St. Louis Nat. Stock Yards v. Godfrey

fore reaching the same, and within eight hundred feet therefrom, and the engineer or other person in charge of the engine attached to the train shall positively ascertain that the way is clear and that the train can safely resume its course before proceeding to pass the * * * crossing." The point made is that the plaintiff, who was in charge of the engine, did not "positively ascertain" that the way was clear, and that such violation of the statute was negligence per se. We are of the opinion that the statute does not apply to switch yards like the one in question, consisting of an intricate system of tracks running in various directions, some crossing each other, all used for switching purposes, and belonging to the same railroad or company.

It is also urged that Kehoe, the plaintiff's helper, was negligent in not seeing the approaching train when he ought to have seen it, and in not signaling appellee to stop, and that his negligence was imputable to appellee. Upon this question the trial court gave an instruction at the instance of the defendant, which told the jury, in substance, that if they found Kehoe guilty of negligence they should find a verdict for the defendant. This instruction was more favorable to the defendant than it was entitled to. *Railroad Co. v. O'Connor*, 119 Ill. 586, 9 N. E. 263; *Railroad Co. v. Harrington*, 192 Ill. 9, 61 N. E. 622. Kehoe was not an employee of the defendant, and if it was through his negligence that appellee was injured that would not absolve the defendant from responsibility if it was also negligent. The case of *Railway Co. v. Snyder*, 117 Ill. 376, 7 N. E. 604, is not a parallel case. The case at bar was not brought against the common master of Kehoe and the plaintiff, while the case last cited was brought against the common master and another.

It is also claimed that there was no evidence that Godfrey used reasonable and proper care in attempting to pass the crossing, and that he is contradicted by his own witnesses. There was evidence tending to prove that appellee was in the exercise of ordinary care for his safety when attempting to pass over the crossing, and it is not within the province of this court to weigh the evidence when it is conflicting.

It is further said that there was no evidence that the defendant carelessly and improperly managed its switch engine so that it was negligently made to collide with plaintiff's engine. It was a controverted fact whether defendant gave any signals or had its headlight burning. It is conceded that it did not send out any man to see whether the crossing was clear before moving its train down. There was evidence that there was a rule or custom to send out a flagman before reaching the crossing, to ascertain whether it was clear or not. There was evidence tending to prove negligence in the respect mentioned, and the fact has been finally and conclusively settled against the appellant.

It was also claimed by appellant that it had an order in

St. Louis Nat. Stock Yards *v.* Godfrey

force that all in-bound trains should take the Whittaker track, and that the hog-house track was only to be used by out-bound trains. The plaintiff never had any notice of such rule, and there was evidence tending to prove that the rule was not enforced, but was disregarded habitually, with the knowledge and acquiescence of the defendant. It cannot, therefore, be said that it was negligence per se for plaintiff to take the hog-house track in going into the yards.

The motions to direct a verdict for the defendant were properly overruled.

Evidence was admitted by the trial court with reference to the location of certain buildings, tracks, and cars, and with reference to the usual manner of conducting the business of appellant and others in appellant's yards. All this was competent evidence in the case. The environment and usual manner of conducting the business involved at the place of the injury is competent as shedding light on the acts and conduct of the parties.

Error is assigned on the giving of the following instructions for appellee:

"(1) The jury are instructed that if they believe from the testimony the rule or notice of the defendant read in evidence, relating to the use of tracks by crews of the plaintiff's company in entering the defendant's yard from the Terminal Railroad Association yard, was habitually violated with the knowledge and acquiescence of the defendant, or was not enforced as to the switching crew with which the plaintiff worked, then the jury should disregard such notice or rule in considering the whole case.

"(2) If the jury believe from the evidence that the defendant is guilty of the acts of negligence charged in the declaration, and that the injury to plaintiff complained of resulted therefrom while he was in the exercise of ordinary care for his own safety, the defendant is liable, and plaintiff is entitled to a verdict."

"(5) The jury are further instructed, as a matter of law, that the question whether the plaintiff was guilty of negligence which contributed to his injury, and without which the accident would not have occurred, is for the jury, and must be determined from all the facts and circumstances shown by the testimony."

"(7) It was the duty of the defendant's switching crew to exercise ordinary care in so doing their work as to avoid injuring the plaintiff while running his engine upon the defendant's track, and if the jury believe, from the evidence, the engine which struck and collided with plaintiff's engine at the crossing was not managed and controlled with ordinary care by the defendant's crew in charge of the same, and the plaintiff's injury was the direct result of the negligence of such crew in managing and controlling said colliding engine while he was in the exercise of ordinary care for his own safety, the defendant is liable, and plaintiff is entitled to a verdict."

St. Louis Nat. Stock Yards v. Godfrey

The first instruction states the rule correctly as laid down in *Railroad Co. v. Flynn*, 154 Ill. 448, 40 N. E. 332. It does not assume to say anything about appellant's duty, as claimed by counsel, and could not in any way have misled the jury.

The second instruction is criticised by counsel also. They say the rule is that, although the plaintiff may have been in the exercise of ordinary care for his own safety at the time of the injury, still he was not entitled to recover unless he was in the exercise of ordinary care to foresee and avoid danger before the accident. They contend the instruction limits the time the plaintiff was required to use due care to the moment when he was injured. This interpretation of the expression, "while he was in the exercise of ordinary care for his own safety," is too narrow. The same contention was passed on adversely to appellant's contention in *Railroad Co. v. Fisher*, 141 Ill. 614, 31 N. E. 406. The words have reference to the whole transaction. *Railway Co. v. Ouska*, 151 Ill. 232, 37 N. E. 897. Besides, the third instruction required the jury to find that the plaintiff exercised ordinary care for his own safety before and at the time of the occurrence of the injury.

The same criticism is made of the seventh instruction. It is further claimed that this instruction assumes that at some time the appellee was in the exercise of ordinary care. This criticism is hypercritical. A similar one was met in *Railroad Co. v. Fisher*, supra, and it was there said that the qualifying words, "if the jury believe, from the evidence," applied to the entire sentence.

The fifth instruction is said to be misleading, because it tells the jury "that the question whether the plaintiff was guilty of negligence which contributed to his injury and without which the accident would not have occurred is for the jury." Counsel say that, "if negligence on the part of the plaintiff affect the chain of causation in any degree, the courts will no longer weigh the negligence of the parties and nicely balance their degrees of negligence. The defendant was entitled to have the jury plainly instructed that if the negligence of plaintiff contributed, in any degree, to the injury, he could not recover." Counsel claim that this instruction lays down the doctrine that "plaintiff may recover notwithstanding his own negligence contributed to the injury, if it did not so far contribute as that without it the injury would not have occurred." If plaintiff was guilty of any negligence not contributing to the injury, such negligence could not be contributory negligence. As said in *Coal Co. v. Bokamp*, 181 Ill. 9, 54 N. E. 567, "it might be that plaintiff failed to do some act or was guilty of some careless or negligent act which contributed to his injury, yet which was not the proximate cause of the injury, and still be entitled to recover." In 7 Am. & Eng. Enc. Law (2d Ed.) 371, the following definition of contributory negligence is given: "Contributory negligence is a want of ordinary care upon

Note

the part of a person injured by the actionable negligence of another, combining and concurring with that negligence, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred." Mr. Beach in his work on Contributory Negligence, speaking of the difficulty of framing precise definitions, suggests this definition: "Contributory negligence, in its legal signification, is such an act or omission on the part of a plaintiff, amounting to a want of ordinary care, as, concurring or co-operating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of." Without undertaking to define contributory negligence, we see no objection to the instruction mentioned, on the grounds urged by appellant.

Finding no error in the record, the judgment must be affirmed. Judgment affirmed.

NOTE.

Railroad's Liability for Injury to Employee of Another Company as Affected by Concurring Negligence of Fellow Servant.

The authorities generally cited as covering this point are those sustaining the rule that a tortfeasor is responsible for the consequences of his wrongful conduct. The decisions in which this question has been directly passed upon are very few, but they all support the rule laid down in the principal case.

In *Gray v. Philadelphia & Reading R. R. Co.* (D. Ct.), 22 Am. & Eng. R. Cas. 351, it is held that where a fireman on a railroad train is injured by a collision at a crossing of two roads, brought about by the concurring negligence of the engineer on his train and of the employees of the other road, his right to recover damages for such injury from the other road will not be defeated by reason of the negligence of the engineer. In this case it is said in the opinion: "The instructions given were certainly as favorable for the defendant as could reasonably be required. Although the plaintiff was a fellow servant of the engineer, he was a subordinate, and had no control over the movements of the locomotive. If he was not guilty of any personal negligence, and did not countenance the negligent conduct of his fellow servant, upon reason, and according to the weight of authority, he ought not to be precluded from a recovery against the defendant. If he could maintain an action against his fellow servant and the defendant jointly, he can, at his election, pursue either severally. Upon the facts found by the jury, he was no more accountable for the misconduct of the engineer than a passenger would be, or than the owner of a cargo would be for the negligent acts of the carrier whom he has employed to transport his property. If he had occupied such a relation to the transaction, he could recover against either or all of the offenders whose acts contributed to his injury.

An employee was injured in a collision between trains of railways at a crossing of their tracks. It was urged in defense that the collision was occasioned by the neglect of a fellow servant of the plaintiff contributing. There was testimony of a common negligence. It was held proper to refuse an instruction asked by the defendant that the neglect of a fellow servant of the plaintiff, jointly with that of the defendant, would be a defense; that an employee does not assume such risks; and can recover for an injury caused by the joint wrong of a fellow servant and a stranger. *Ft. Worth & D. C. R. Co. v. Mackney*, 83 Tex. 410, 18 S. W. 949; 55 Am. & Eng. R. Cas. 316. In this case it is said in the opinion: "The doctrine is founded on the principle that the injured party may have his action against each joint

Atlanta, K. & N. Ry. Co. v. Strickland

tortfeasor. Why should not the same principle apply when a stranger stands in the place of the master? It seems to the writer that the reason is much stronger against the stranger. Fellow servants may sue each other for injuries inflicted upon each other in their common employment, resulting from personal negligence, when an action would not lie against the master. Shear & R. Neg. 112. The servant contracts with the master, and it is for him alone that he assumes the risks of his fellow servants' negligence. Then, leaving the master out of view, we have in the case at bar an injury inflicted by the negligence of a fellow servant actionable against him personally, and by the concurrent and contributory negligence of a stranger. Are they not joint tort-feasors pure and simple? The master himself would be liable in the place of the stranger, and by a much stronger reason would the stranger be. There is no express or implied contract with the stranger to assume any risks on his account. This is the reasoning employed in the case of *Gray v. Railroad Co.*, 22 Am. & Eng. R. Cas. 351. In that case it was distinctly held that a fireman on a railroad, injured by a collision at a crossing of two roads, occasioned by the concurring negligence of the engineer on his train and of the employees of the other road, could recover from the other road. See the case and authorities cited. When the plaintiff is free from fault, the negligence of the fellow servant cannot be imputed to him for the benefit of a stranger, whose wrong contributed to the injury. Where the negligence of the fellow servant is the sole cause of the injury, of course he alone is responsible; but where it concurs with that of a stranger, or the stranger's servants, and the plaintiff is free from personal negligence, the stranger is liable. This is expressly laid down in *Perry v. Lansing*, 17 Hun 34. In that case the plaintiff, a pilot of a tug-boat, was injured by a collision of the tug with another boat belonging to defendant, by the concurrent negligence of the operatives of both boats. It was held that the plaintiff, being free from fault, could recover of defendant. See the case for authorities and dissenting opinion. Cooley, Torts, 684, and notes 4, 5." A. R. Y.

ATLANTA, K. & N. RY. CO. v. STRICKLAND *et al.*

(Supreme Court of Georgia, Oct. 30, 1902.)

[42 S. E. Rep. 864.]

Evidence—Speed of Trains.*

Questions as to the passage of time and the speed of trains usually involve opinions, and therefore testimony to the effect that a period was but a short time, or that, in the opinion of the witness, a train was running at a rate of four or five miles per hour, is competent.

Same.

It is not competent, for the purpose of sustaining a witness and showing that he was present and saw an occurrence, to prove that he afterwards told different persons that he was present and did witness the occurrence.

Rulings.

Except as stated in the headnote last preceding, no error is found in the rulings of the trial court.

(Syllabus by the Court.)

Error from superior court, Pickens county; Geo. F. Gober, Judge.

Action by Roy Strickland and others, by their next friend,

*See foot-note appended to *Union Pac. R. Co. v. Buzicka* (Neb.), 5 R. R. R. 64, 28 Am. & Eng. R. Cas., N. S., 64.

Atlanta, K. & N. Ry. Co. v. Strickland

against the Atlanta, Knoxville & Northern Railway Company. Judgment for plaintiffs, and defendant brings error. Reversed.

Smith, Hammond & Smith, for plaintiff in error.

F. C. Tate, N. A. Morris, and E. P. Green, for defendants in error.

ADAMS, J. The defendants in error, as the minor children of a deceased employee of the plaintiff in error, obtained a verdict based upon a claim of his negligent homicide. A motion for a new trial was made by the defendant company upon the general grounds, and upon the further ground that the court below erred in certain rulings as to the admissibility of evidence, and in refusing to grant a new trial on the ground of newly discovered evidence which it is claimed shows that the principal witness for the plaintiff below was guilty of perjury in testifying that he was present at the time of the homicide, and witnessed it.

The error that we find in the rulings of the court below, and which is covered by several grounds of the motion for a new trial, is the admission of testimony by this witness, and by others in corroboration of him, to the effect that on the day after the occurrence he said that he was present and saw the homicide. This was admitted because the railroad company had claimed and had endeavored to show that the witness was not present, but had manufactured his testimony. We do not think that a witness can be "bolstered up" in this way. The error seems to us to have been material, because we can readily conceive how such testimony would probably have a strong influence upon the minds of the jury in passing upon the credibility of the witness. We know of no authority which sustains this ruling. We think the principle of the decision of this court in the case of Middleton v. State, 52 Ga. 530, is against it. In that case, in order to sustain an accomplice, the state was permitted to show that immediately after his arrest, which was soon after the murder, he gave substantially the same account of the homicide that he had given on the stand. This was held to be illegal testimony. It would, we think, be unfortunate to permit testimony of this character. A designing and unscrupulous witness might, in anticipation of a trial, mention to different credible witnesses that he was present and saw an occurrence; and these witnesses, in the event that the other side took the position that the account was untrue or fabricated, might be sworn in corroboration, and much time be consumed in the investigation of a purely collateral issue. It might be that the witnesses would claim that a number of parties were present, and these parties might disagree among themselves, and a large part of valuable time be consumed in determining what a witness said out of court, and not under oath. If the defendant company had claimed that the witness had stated after the

Seaboard Air Line Ry. v. Shigg

homicide, at a particular time and place, and in the hearing of various parties, that he was not present at the time of the homicide, it would, of course, be perfectly competent to meet that testimony by proof that the witness had, on the contrary, claimed at this time and place that he was present, and that other parties had heard him so assert. No reason of this character, however, appears in the record for the entertainment of this testimony.

In view of the evidence in its entirety, we think the error noticed was sufficiently material to require the grant of a new trial in this case, and the judgment of the court below is accordingly reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

SEABOARD AIR LINE RY. v. SHIGG.

(*Supreme Court of Georgia, March 18, 1903.*)

[43 S. E. Rep. 706.]

Railroads—Trespasser on Track—Action for Injuries.*

A petition for damages by the administratrix of one who was killed in the state of South Carolina while admittedly trespassing on the right of way of a railroad company, which alleges that the killing was negligent, careless, and wanton, but the specific allegations of which distinctly negative any idea of gross or wanton negligence, is fatally defective, and should be dismissed on general demurrer. Under the laws of South Carolina, it is necessary to a recovery, under the circumstances mentioned, that the killing should have been due to wanton negligence.

(Syllabus by the Court.)

Error from City Court of Savannah; T. M. Norwood, Judge.

Action by Patsy Shigg, administratrix of Robin Shigg, against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant brings error. Reversed.

Mackall & Anderson, for plaintiff in error.

Twiggs & Oliver and W. H. Wade, for defendant in error.

CANDLER, J. Patsy Shigg, as administratrix of Robin Shigg, sued the Seaboard Air Line Railway for damages on account of the alleged negligent killing of Robin Shigg by a train of the defendant company. From the petition it appears that on a named day the deceased, with two children, aged, respectively, 10 and 12 years, was walking on a trestle belonging to the defendant, which crossed the Savannah river from the state of Georgia to the state of South Carolina. This trestle was about four miles long. Shigg lived on an island in the Savannah river, on the South Carolina side; and on account of the fact that severe rain storms had so swollen the river as to render it practically impossible for him to reach his home from the Georgia side by means of a boat,

*As to railroad's duty to trespassers on track, see foot-note appended to *Mizzell v. Southern Ry. Co.* (Ala.), 1 R. R. R. 514, 24 Am. & Eng. R. Cas., N. S., 514.

Seaboard Air Line Ry. v. Shigg

which he generally used, it was necessary for him, in order to reach his home, to be on said trestle, proceeding in the direction he was taking. While he and the two children were on the trestle, and within a few hundred yards of the South Carolina end, a passenger train of the defendant, on its way from the city of Columbia, S. C., to the city of Savannah, came in sight of the party on the trestle, on a straight stretch of track leading up to the trestle from the South Carolina side. When the train appeared in sight of Shigg and the children, they made frantic efforts, and used every means in their power, to reach the South Carolina end of the trestle before the train reached it. Shigg was running in advance of the two children, and when it became apparent that the younger and weaker of the children would not be able to reach the shore unaided, he turned and gathered her in his arms, with the result that the older child reached the shore before the train arrived, while Shigg and the younger child were struck by the engine while within 30 feet from the shore, knocked from the trestle, and killed. It was alleged that Shigg and the children were in view of the engineer and fireman of the engine, "the morning being clear and the sun shining brightly," and that the engineer, seeing the efforts they were making to get off the trestle, "supposed that they would succeed, and negligently, carelessly, and wantonly allowed said train to continue at its rapid speed of about forty miles per hour, and, when the said engineer endeavored to check the speed of said train in order that your petitioner's said husband and the said children might escape with their lives, the rapid speed of said train and the near proximity of the helpless victims rendered the effort of said engineer futile, and the said train, after it had struck and killed your petitioner's husband, ran by fully its entire length before it was brought to a full stop." By amendment it was alleged that the homicide occurred on the South Carolina side of the river, and in the original petition the following extract from the statute law of South Carolina is set out as being applicable to the case: "Whenever the death of any person shall be caused by the wrongful act, neglect or default of another, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages thereof, then, and in every such case, the person or corporation who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, although the death shall have been caused under such circumstances as make the killing in law a felony. Every such action shall be for the benefit of the wife, husband, parent and children of the person whose death shall have been so caused; and if there be none such, then for the benefit of the heirs at law or distributees of the person whose death shall have been so caused, as may be dependent upon him for support; and shall be

Seaboard Air Line Ry. v. Shigg

brought by, or in the name of, the executor or administrator of such person; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties, respectively, for whom and for whose benefit such action shall be brought, and the amount so recovered shall be divided among the before-mentioned parties in such shares as they would have been entitled to if the deceased had died intestate and the amount recovered had been personal assets of his or her estate. All such actions must be brought within two years from the death of such person, and the executor or administrator, plaintiff in the action, shall be liable to costs in case there be a verdict for the defendant, or nonsuit, or discontinuance, out of the goods, chattels and lands of such executor or administrator." The foregoing is the substance of the plaintiff's petition. The defendant filed a general demurrer, which was overruled, and it excepted.

The right of the plaintiff in the court below to a recovery in this case is to be determined by the law of South Carolina, and the question presented for our determination is whether, under that law, the declaration made out a case sufficient to authorize a recovery, assuming to be true all the allegations of fact in the petition which were well pleaded. An examination of the order passed by the court overruling the demurrer shows that the judge was satisfied that, under this declaration, the deceased, Robin Shigg, was a trespasser on the right of way of the defendant, and indicates that in the judgment of the court he was guilty of negligence in being upon the trestle; but it also appears that the demurrer was overruled because there were two children with the deceased on the track at the time he was struck, and, to quote the language of the orders, "what the law requires of adults as to ordinary care is not applicable to children." It is clear from this language that the court misconceived the nature of the action. This was not a suit for the homicide of the child that was killed, but for that of Shigg, the husband of the defendant in error, brought by his administratrix for the benefit of his estate; and no question of the degree of care required of the child should have been allowed to enter into a consideration of the case.

Since the deceased is clearly shown by the petition to have been a trespasser upon the trestle at the time he was struck by the defendant's train, in order for his administratrix to recover, under the laws of South Carolina, the declaration must set forth facts which amount to a willful and wanton killing. The rule of comparative negligence does not obtain under the laws of that state, but it seems to be well settled by the adjudications of its highest court that contributory negligence to any extent will defeat a recovery, unless the injury is willfully and wantonly inflicted. Paragraph 6 of the plaintiff's petition, in detailing the circumstances of the killing, alleges that the deceased and his companions had nearly reached the

Cleveland, etc., Ry. Co. v. Hamilton

end of the trestle, and that one of the children had gotten off, and that the deceased, with the other child in his arms, was within 30 feet of a point of safety when struck by the engine. In paragraph 7 it is distinctly alleged that the engineer, seeing the efforts that they were making to get off the trestle before the engine reached them, supposed that they would succeed; and it also affirmatively appears that he endeavored to check the speed of his train, in order that the deceased and the children might escape, the petition adding that "the rapid speed of the train rendered the effort of said engineer futile." The plaintiff's petition must be taken most strongly against her, and, so construing it, we do not see how it could be held that if the engineer supposed that the parties on the trestle would have time to reach the end of it in safety, and, upon seeing that they would not, made every effort to check the speed of his train so as to avoid striking them, there was any element of wantonness in his act. These allegations seem to us to negative any idea of willful and wanton negligence in the killing; and the mere use of the words, "negligently, carelessly, and wantonly," does not cure the defect in the petition.

The fact that, owing to the swollen condition of the river, it was impracticable for the deceased to reach his home by means of a boat does not render him any the less a trespasser upon the right of way of the defendant, nor does it render any the less negligent his venturing upon a trestle four miles long, burdened down with the care of two small children. It is also fairly inferable from the petition that the deceased lived near enough to the railroad track to have been familiar with the schedules of the trains of the defendant, and it would seem that in going upon the trestle he deliberately took the chances of meeting with a train while in that perilous position. It was certainly a lack of ordinary care on his part, and, in the absence of a showing of wanton negligence on the part of the servants of the defendant, his estate would be precluded from a recovery under the laws of South Carolina. See *Smalley v. Southern Ry. Co.* (S. C.) 35 S. E. 489; *Cooper v. R. Co.* (S. C.) 34 S. E. 16; *Jones v. R. Co.* (S. C.) 39 S. E. 761. It follows that the general demurrer to the petition should have been sustained.

Judgment reversed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

CLEVELAND, C., C. & ST. L. RY. CO. v. HAMILTON.

(*Supreme Court of Illinois, Feb. 18, 1903.*)

[66 N. E. Rep. 389.]

Constitutional Law—Act Making Railroad Companies Liable for Attorney's Fees.*

Section 1½ of the act in relation to fencing and operating rail-

*See generally, *Paddock v. Missouri Pac. Ry. Co.* (Mo.), 17 Am. & Eng. R. Cas., N. S., 310, and foot-note.

Cleveland, etc., Ry. Co. v. Hamilton

roads, which requires all railroads to keep their rights of way clear from dead grass, etc., and makes them liable, in case of neglect, for the resulting damages, and "reasonable attorney's fees in any court wherein suit is brought for such damages or to which the same may be appealed," is not, in respect to the provision for attorney's fees, violative of the fourteenth amendment of the federal constitution.

Appeal from circuit court, Champaign county; Francis M. Wright, Judge.

Action by John A. Hamilton against the Cleveland, Cincinnati, Chicago & St. Louis Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Gere & Philbrick (John T. Dye, of counsel), for appellant. Ray & Dobbins and W. B. Riley, for appellee.

CARTWRIGHT, J. The circuit court of Champaign county overruled the demurrer of appellant to the amended declaration of appellee, and, appellant electing to abide by its demurrer, damages were assessed by a jury at \$100, and judgment was entered for said amount and costs.

The declaration alleged that plaintiff was the owner of a certain field of grass and hay; that defendant was possessed of and used and operated a railroad through said field upon a right of way 100 feet in width; that defendant, contrary to its duty, failed to keep its right of way cleared from dry grass and weeds, by means whereof fire emitted and thrown from a locomotive engine and train of defendant ignited said dry grass and weeds, and fire was spread and communicated to the field of plaintiff, consuming said grass and hay; that plaintiff brought suit in the circuit court of Champaign county to recover his damages on account of said fire, and obtained judgment for \$70 and costs, from which defendant appealed to this court; that said appeal was dismissed by this court at the February term, 1902, thereof; and that plaintiff was compelled to, and did, employ attorneys to represent him on said appeal, and incurred expenses thereby to the amount of \$100 for reasonable attorney's fees. The demurrer was general and special; the special cause of demurrer assigned being that the act under which the recovery of said attorney's fees was sought was unconstitutional and void, as in violation of the fourteenth amendment to the constitution of the United States.

Section 1 of the act in relation to fencing and operating railroads requires every railroad corporation to erect and maintain fences, with cattle guards, on both sides of its road, except at certain specified places, and provides that, when such fences or cattle guards are not made or not kept in good repair, the corporation shall be liable for resulting damages, "and reasonable attorney's fees in any court wherein suit is brought for such damages or to which the same may be appealed." Section 1½ of said act is as follows: "It shall be the duty of all railroad corporations to keep their right of way clear from all dead grass, dry weeds, or other dangerous com-

Hackney v. Illinois Cent. R. Co

bustible material, and for neglect shall be liable to the penalties named in section 1." Hurd's Rev. St. 1899, p. 1328. The original judgment was for damages, including attorney's fees in the trial court, and this suit was brought for the attorney's fees in this court, to which the cause was appealed. The constitutionality of the provision for attorney's fees was raised by demurrer, and the cause has been brought directly to this court by appeal, on the ground that the constitutionality of the act is involved.

The provision for attorney's fees was held in *Peoria, Decatur & Evansville Railway Co. v. Duggan*, 109 Ill. 537, 50 Am. Rep. 619, to be valid and constitutional, as in the nature of a penalty for noncompliance with the duty imposed upon railroad corporations. The regulation designed to prevent the starting or spreading of fire has regard to the public welfare, and is within the police power. It does not seem to be denied that the legislature may impose a penalty for failure to comply with the requirement, but it is argued that this provision for attorney's fees is not a penalty for a failure to keep the right of way clear from dead grass, dry weeds, and other dangerous combustible material, but, rather, an attempt to impose a penalty for exercising the right to resort to the courts for the purpose of securing justice by defendant against exorbitant or illegal demands. Corporations have equal rights with natural persons to defend against claims which they believe to be illegal or exorbitant, but this statute does not provide for the recovery of attorney's fees unless it shall be judicially determined that the defendant had neglected its duty, and been guilty of a violation of the statute. If no damages are recovered, there can be no attorney's fees; and, if the corporation deems the demand exorbitant, it is entitled to make a tender of the actual damages. Inasmuch as the statute does not provide for attorney's fees, except upon proof of the violation of the duty, we do not regard the statute subject to the objection made in the argument.

The judgment of the circuit court is affirmed. Judgment affirmed.

HACKNEY et al. v. ILLINOIS CENT. R. CO.

(Supreme Court of Mississippi, March 9, 1903.)

[33 So. Rep. 723.]

Railroads—Injuries at Crossing—Contributory Negligence.*

Where deceased, who was quite deaf, and walking against the wind and rain, in open daylight attempted to cross the track without looking up, he was guilty of such contributory negligence as to bar a recovery, though defendant was negligent in not keeping a lookout at that point.

*Foot-note appended to *Chicago, I. & L. Ry. Co. v. Reed* (Ind.), 3. R. R. R. 627, 26 Am. & Eng. R. Cas., N. S., 627.

Robinson v. Georgia R. & Banking Co

Appeal from circuit court, Copiah county; Robt. Powell, Judge.

Action by Mary D. Hackney and others against the Illinois Central Railroad Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

Green & Green, for appellants.

Mayes & Harris, for appellee.

TERRAL, J. W. H. Hackley, on the 31st of January, 1902, while attempting to cross a spur track of appellee company, was run over by the moving train of the appellee company and killed. The train of appellee was running at 12 or 15 miles per hour, and without proper lookouts. The deceased was walking against the wind and rain, but in open daylight. He was quite deaf; but he never stopped to look for a train, for, if he had done so, he must have seen the train plainly approaching from his left and rear. The company was negligent in not keeping a lookout where deceased was killed, but deceased was guilty of contributory negligence that bars a recovery by the plaintiffs. If persons of full age will take the hazards assumed by the deceased, they have suffered nothing of which they can legally complain.

Affirmed.

ROBINSON v. GEORGIA R. & BANKING CO.

(*Supreme Court of Georgia, Feb. 10, 1903.*)

[43 S. E. Rep. 452.]

Wrongful Death—Illegitimate Child—Action by Mother.

The mother of an illegitimate child has no right of action, under Civ. Code, § 3828, for his homicide.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by M. Q. Robinson against the Georgia Railroad & Banking Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Arnold & Arnold, for plaintiff in error.

Jos. B. & Bryan Cumming and Sanders McDaniel, for defendant in error.

FISH, J. This record presents but a single question for our determination, and that is, has the mother of an illegitimate child a right of action, under Civ. Code, § 3828, for his wrongful or negligent homicide? That section reads as follows: "A widow, or, if no widow, a child or children, may recover for the homicide of the husband or parent, and if suit be brought by the widow or children, and the former or one of the latter dies pending the action, the same shall survive in the first case to the children, and in the latter to the surviving child or children. The husband may recover for the homicide

Robinson v. Georgia R. & Banking Co

of his wife, and if she leaves child or children surviving, said husband and children shall sue jointly, and not separately, with the right to recover the full value of the life of the deceased, as shown by the evidence, and with the right of survivorship as to said suit if either die pending the action. A mother, or, if no mother, a father, may recover for the homicide of a child minor or sui juris, upon whom she or he is dependent, or who contributes to his or her support, unless said child leave a wife, husband or child. Said mother or father shall be entitled to recover the full value of the life of said child." In seeking for the true meaning of this section as to the question under consideration, we must be guided by two firmly established and familiar rules of construction: (1) That statutes in derogation of the common law are to be strictly construed, and (2) that prima facie the word "child" or "children," when used in a statute, will, or deed, means legitimate child or children—in other words, bastards are not within the term "child" or "children." This court on several occasions, in construing this very section, has applied to it the first of these rules. In *Smith v. Hatcher*, 102 Ga. 158, 29 S. E. 162, it was held: "It is essential to the maintenance of an action by a parent for the homicide of his child that the former should, at the time of the homicide, be to a material extent dependent upon the latter for a support, and that the child should then be actually contributing thereto." In the opinion Lumpkin, P. J., said: "The statute giving a right of action to a parent for the homicide of a child, and conferring upon the former the right to recover the full value of the child's life, is, to say the least, a harsh one, and must be strictly construed." Substantially the same language is used by the learned justice in *Georgia Railroad Co. v. Spinks*, 111 Ga. 573, 36 S. E. 855. In *Marshall v. Macon Sash Co.*, 103 Ga. 725, 30 S. E. 571, 41 L. R. A. 211, 68 Am. St. Rep. 140, it was held: "A child has no right of action for the homicide of its stepfather." In that case it was alleged that the plaintiffs were the only heirs of their stepfather, he having left no widow and no other children; that he married the mother of the plaintiffs eight years prior to his death, and from the time of such marriage to the date of his death he maintained and supported the plaintiffs as his children, rearing them in his own home, feeding, clothing, and schooling them, and exercising over them complete parental control, by consent of their mother and themselves; and that such relation continued up to the date of his death, up to which time he not only contributed to their support, but they were entirely dependent upon him for a livelihood. The action was dismissed on general demurrer. Mr. Justice Lewis said: "The right of action provided for in the above Code section [3828] did not exist at common law. The statute is therefore in derogation of the common law; and, applying to it the universal rule of strict construction, we cannot see how there

Robinson v. Georgia R. & Banking Co

is any escape from the conclusion that the Legislature never contemplated giving a child any right of action for the homicide of a stepfather." Instances of the application by this court of the second of these rules of construction are: *Hicks v. Smith*, 94 Ga. 809, 22 S. E. 153; *Floyd v. Floyd*, 97 Ga. 124, 24 S. E. 451; and *Johnstone v. Taliaferro*, 107 Ga. 6, 32 S. E. 931, 45 L. R. A. 95. In the first of these cases it was held: "Where, by the provisions of a will made by the great-grandfather of a bastard on the paternal line, an estate is vested in the father of a bastard for life with remainder over to his children, and, he failing issue, remainder over in fee to other great-grandchildren of the testator, upon the death of the father of such bastard without issue other than such legitimated bastard, while the latter, by force of the statute, may take by descent from his father, he cannot take by purchase under the will of his great-grandfather, which devises the estate to his great-grandchildren generally, there being in the will no language expressly indicating a purpose to include within the scheme of his benevolence any bastard descendants." Mr. Justice Atkinson in that case said: "The word 'children,' as a general rule, means legitimate children, and will not be extended by implication so as to embrace children other than legitimate, unless such construction be necessary to carry into effect the manifest purpose of the testator." In the second case it was held: "The term 'child,' as employed in section 2664 of the Code, does not include a bastard so as to entitle him to the benefits of its provisions, and the conclusive presumption of a gift resulting from continuous possession, under the circumstances therein set forth, arises only in favor of legitimate children." In the opinion Chief Justice Simmons said: "It is well settled that at common law the words 'child' and 'children' mean only legitimate child and children." In the third case it was held: "The words 'child' and 'children,' appearing in a deed conveying to an unmarried female certain property during her life, and at her death to such child or children as she may leave living at the time of her death, will not include an illegitimate child of such female born several years after the making of the deed, unless it plainly appears from the language of the instrument that it was the intention of the grantor that an illegitimate child was to take thereunder. The word 'issue,' used in a subsequent part of the deed under consideration in the present case, is to be given the same meaning as the words 'child' or 'children.'" Mr. Justice Cobb, in delivering the opinion, said: "The words 'children' and 'issue' in deeds, wills, and other conveyances must be held to mean legitimate children or issue, unless the context is such as to require a different meaning, or the circumstances surrounding the execution of the paper are such as to make the words import other than legitimates." Page 20, 107 Ga., and page 937, 32 S. E., 45 L. R. A. 95.

The exact question we have in hand has been decided by

Robinson v. Georgia R. & Banking Co

courts in other jurisdictions, and upon the application of the two rules of construction under discussion. In *Dickinson v. Northeastern Railway Co.*, 2 Hurl. & C. 735, it was held that the word "child," in section 2 of 9 & 10 Vict. c. 93 (Lord Campbell's act, which is the prototype of our statute), means a legitimate child, and that an action could not be maintained on behalf of a bastard child against a railway company for the homicide of its mother. Counsel for the plaintiff in that case contended that the case was within the spirit of the act, for beyond question the child was dependent solely on the mother, and that the act must mean any child who was deriving pecuniary advantage, and is deprived thereof by the death. Pollock, C. B., said: "We have no doubt that in the act of parliament, as in all others, the word 'child' means 'legitimate' child only." In *Gibson v. Midland Railway Co.*, 2 Ontario, 658, it was held, under a statute of Ontario similar to Lord Campbell's act, the mother of an illegitimate child could not recover damages for its death. To the same effect is *Clark v. Carfin Coal Co.* [1891] App. Cas. 412. In *Harkins v. Philadelphia & Reading R. Co.*, 15 Phila. 286, it was held: "The mother of an illegitimate child is not within the words or meaning of the act of April 26, 1855, which enacts that the persons entitled to recover damages for any injury causing death shall be the 'husband, widow, children, or parents of the deceased and no other relative.'" In his opinion, Thayer, P. J., after citing *Dickinson v. Northeastern Ry. Co.*, supra, said: "The line of argument adopted by the plaintiff's counsel in that case was much the same as that pursued by the plaintiff's counsel in the present case, viz., that the Legislature intended the right of action to be coextensive with the moral right to support; that, for many purposes, the law recognizes the relationship of a bastard child to his parent; and that, therefore, the question of legitimacy or illegitimacy is immaterial. But we are not convinced by this reasoning. It is true that some rights have been accorded by statute to illegitimate children and their mothers which did not exist at common law. The act of 26th of April, 1855, § 3 (Purd. Dig. p. 810), enacts that illegitimate children shall take the name of the mother, and that they and the mother respectively shall have capacity to take or inherit from each other personal estate as next of kin and real estate as heirs, but this act conferred only limited powers upon persons of this description. It did not legitimate illegitimate children, and it was so ruled by the Supreme Court of this state," citing cases. In conclusion, the learned justice said: "In addition it may be observed that, by the act of 26th of April, 1855, the right of action is given, not to the mother alone, but to the 'parents' of the deceased. If the effect of the act of 26th of April, 1855, were to legitimate bastards for all purposes, and to give to them and their natural parents the standing in all respects which the law accords to lawful children and lawful parents,

Robinson v. Georgia R. & Banking Co

then the natural father would, equally with the natural mother, be within the enabling words of the act. We do not think this to have been the purpose of the law, but are of the opinion that the Legislature, in enacting the act of 26th of April, 1855, and when using the words, 'husband, widow, children, parents of the deceased, and no other relative,' had in view the family relation as constituted and recognized by law, and that it was not intended to extend the benefits of the act to persons not falling within the legal definition of the enumerated relationship." In *Alabama & Vicksburg Railway Co. v. Williams*, 78 Miss. 209, 28 South. 853, 51 L. R. A. 836, 84 Am. St. Rep. 624, it was held: "A mother cannot maintain an action for damages caused by the wrongful killing of her bastard son," citing *Illinois, etc., R. R. Co. v. Johnson*, 77 Miss. 727, 28 South. 753, 51 L. R. A. 837, where it was held that an illegitimate half-sister cannot maintain an action under a statute of Mississippi entitling a sister or brother to sue for the homicide of a sister or brother.

In further support of the proposition that the right of action for a negligent or wrongful homicide is purely a statutory one and in derogation of common law, and that, therefore, the statute giving the right must be strictly construed and the case brought clearly within its provisions to enable the plaintiff to recover, we select from a number of cases the following: *Good v. Towns*, 56 Vt. 410, 48 Am. Rep. 799, wherein it was held: "Under the civil damages act, giving an action to one 'dependent' on the deceased, a plaintiff claiming to be his widow must show a lawful marriage, and one claiming to be his child must show his legitimacy." Rowell, J., said: "It is true, as contended, that the language of the statute is broad—'in any manner dependent'; but, after all, we think it should be construed to mean a legal dependency only, the same as though it read, 'in any manner legally dependent.'" *Dickinson v. Northeastern Railway Co.*, 2 Hurl. & C. 735, was approvingly cited. *Thornburg v. American Strawboard Co.*, 141 Ind. 443, 40 N. E. 1062, 50 Am. St. Rep. 334, wherein it was held that a statute giving a father a right of action for the homicide of his child confers no right upon one who marries the mother of a bastard child, and receives the child into his home as a member of his family, to sue for the death of the child. *McDonald v. Pittsburg Ry. Co.*, 144 Ind. 459, 43 N. E. 447, 32 L. R. A. 309, 55 Am. St. Rep. 185, in which it was held a bastard is not a child within the meaning of the statute of Indiana providing that a father may maintain an action for the death of a child. It appeared in that case that the plaintiff, when the child for whose death the action was brought was six months old, received him from his mother and relieved her of his care and custody, and acknowledge him as his own son, and afterwards discharged every duty as a parent towards him, and received from him all the services, obedience, and respect due from a legitimate son,

Robinson v. Georgia R. & Banking Co

and that his mother abandoned him and was dead, and that the deceased had no guardian or next of kin. The plaintiff's action was dismissed on demurrer. *Citizens' St. Ry. Co. v. Cooper*, 22 Ind. App. 459, 53 N. E. 1092, 72 Am. St. Rep. 319, in which it was held: "The right of a father or mother to recover damages for the wrongful killing of a child is statutory, and such an action cannot be maintained by a woman, where she is not the mother and has not legally adopted the child, although it was given to her in infancy, and she had ever since maintained and treated it as her own." *Western Union Tel. Co. v. McGill*, 6 C. C. A. 521, 57 Fed. 699, 21 L. R. A. 818, where it was held, under a statute of Kansas, giving a right of action for death by wrongful act, and providing that the damages must inure to the exclusive benefit of the widow and children, if any, or next of kin, that a widower could not recover for the wrongful death of his wife, who left children living, because he was not one of the beneficiaries of the statute, although under the Kansas statute of descent and distribution of estates a husband who survives his wife is entitled to a share of her personal estate. In the opinion, Sanborn, J., referring to the statutes giving a right of action for the negligent killing of another, said: "Under these statutes the following rules have been established without dissent among the authorities: The action under them is entirely the creature of the statute. If the right to maintain it and to recover the damages allowed in it in any case is not expressly given by these statutes, the judgment rendered cannot stand. Where such a statute giving a new right of action for damages specifies the person or class of persons for whose exclusive benefit the damages are to be recovered, no damages to any other person or class of persons can be allowed in the action based on the statute." In 1 *Shearman & Redfield on the Law of Negligence*, § 136, it is said: "Whereas in England, Maine, New Hampshire, Massachusetts, Maryland, Pennsylvania, Louisiana, Georgia, Alabama, Missouri, and Kansas, and other states, the statute [giving a right of action for homicide] specifies the 'child' of the deceased, an illegitimate child is not within the description."

There are, however, authorities of a different tenor. In *Muhl's Adm'r v. Michigan Southern R. Co.*, 10 Ohio St. 272, the headnote is: "In an action by the administrator of a woman killed by the carelessness of the servants of a railroad company in running its locomotive, the petition alleging and the proof showing the deceased to have left a son as her sole surviving heir, held (1) that it is error to order a nonsuit on the ground that such child is illegitimate; (2) that the fact of such child's legitimacy or illegitimacy can in no respect affect the right of action in his behalf." It appears that the suit was based upon a statute of Ohio, which provided that the action for a homicide should be brought by the personal representative of the deceased and that the recovery should be

Robinson v. Georgia R. & Banking Co

distributed to the "widow and next of kin, in the proportions provided by law in relation to the distribution of personal estates left by persons dying intestate." Act March 25, 1851. The deceased left a lawful sister and an illegitimate son. The trial court granted a nonsuit because the child alleged in the petition to be next of kin was a bastard. This ruling was reversed by the Supreme Court, upon the ground that the action was properly brought in the name of the personal representative of the deceased, and that the question whether the child or sister should be regarded as the next of kin did not in any way affect the cause of action, for the reason that the right to sue existed in favor of the administrator in either case. It is true the court added: "But it is quite evident that the nearness or remoteness of kin on the part of the son of the deceased mother, neither in fact, nor by any canon of descent under the statute, depended at all upon the circumstance of his being born within or without lawful wedlock." In view of the ruling made, this remark seems merely obiter. In *Security Title Co. v. West Chicago R. Co.*, 91 Ill. App. 332, it was held: "(1) It was the intention of the Legislature, by section 2 of the act of 1872 (Laws 1871-72, p. 353), * * * to remove the common-law disability of illegitimate children. (2) Under the statute requiring compensation for causing death by wrongful act, neglect, or default, an action can be maintained for the benefit of the mother of an illegitimate child, as the next of kin of such child." The Illinois statute seems to be the same as the Ohio statute just referred to, and provides that the recovery "shall be for the exclusive benefit of the widow and next of kin," etc. Hurd's Rev. St. 1893, p. 813, c. 70, § 2. As the mother of an illegitimate child could inherit from it under the law of Illinois, the court held that she was included within the term "next of kin" of such child. In *Marshall v. Wabash R. Co.*, 120 Mo. 275, 25 S. W. 179, it was held: "Under the provisions of section 4425, Rev. St. 1889, giving the father and mother the right to join in an action for damages for the wrongful death of their unmarried minor child, and in case of the death of either parent that such suit may be brought by the survivor, the mother of a deceased illegitimate minor child may in such case sue alone, and the reputed father need not and should not be made a party." In delivering the opinion, Black, P. J., said: "The harsh rules of the common law have been modified by express statute in this state, so that the mother is declared the natural guardian of her illegitimate child. Rev. St. 1889, § 5279. And section 4473 declares: 'Bastards shall be capable of inheriting and transmitting inheritance on the part of their mother, and such mother may inherit from her bastard child or children in like manner as if they had been lawfully begotten of her.'" It may be stated that the plaintiff in this case finally brought his action against the same defendant in the Circuit Court, S. D. Ohio, W. D., and while

Robinson v. Georgia R. & Banking Co

the case was dismissed upon the ground that the statute upon which it was based was penal, and for that reason could be enforced only within the sovereignty of its creation, yet Sage, J., said, as the matter had been fully argued before him, he would express his opinion as to whether the plaintiff had any standing in court. His opinion was that the statute extended only to the cases of natural born legitimate children, and no action could be maintained by a mother for the death of her bastard child. *Marshall v. Wabash R. Co.* (C. C.) 46 Fed. 269.

In this state, the mother of a bastard child is entitled to its possession, unless it is legitimated by the father, and, being the only recognized parent, may exercise all the paternal power. Civ. Code, § 2509. "Bastards have no inheritable blood, except that given to them by express law. They may inherit from their mother, and from each other, children of the same mother, in the same manner as if legitimate. If a mother have both legitimate and illegitimate children, they shall inherit alike the estate of the mother. If a bastard dies leaving no issue or widow, his mother, brothers, and sisters shall inherit his estate equally. In distributions under this law the children of a deceased bastard shall represent the deceased parent." Id. § 2510. While it is evidently true that the status of bastards under our law is greatly superior to what it was under the common law, yet it cannot be said that they have been legitimated, at least for all purposes, and placed upon the same footing in all respects as children born in lawful wedlock; and in view of the decisions of this court above cited, to the effect that the statute giving a right of action for a homicide should be strictly construed, and that the word "child" used in a statute *prima facie* means a legitimate child, we are constrained to hold that the mother of an illegitimate child has no right of action for his wrongful or negligent homicide. The statute provides that "a mother, or, if no mother, a father, may recover for the homicide of a child minor or *sui juris*, upon whom she or he is dependent, or who contributes to his or her support, unless said child leave a wife, husband or child. Said mother or father shall be entitled to recover the full value of the life of said child." There are no words in the statute qualifying the word "child" in any particular, nor is there anything in the context which would authorize a conclusion that the Legislature intended to use the word in any broader sense than is usually given it in statutes, but, on the contrary, the context plainly indicates, to our mind, that the child in legislative contemplation, was the child of a lawful marriage, whose mother, or, if no mother, whose father, might recover for his homicide.

Judgment affirmed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

CANDLER, J. (concurring specially). I concur in the

Anderson v. Central R. Co. of New Jersey

judgment rendered in this case, because of the previous rulings of this court, which seem to be binding upon us. If it were an original question, I would never agree to a judgment which holds that the doubly unfortunate mother of a child whose sole parent she is and upon whom she is dependent,—this dependence probably due to the fact of its miserable birth,—cannot recover for its homicide, although our law-makers have declared that "A mother may recover for the homicide of a child upon whom she is dependent, or who contributes to her support."

ANDERSON v. CENTRAL R. CO. OF NEW JERSEY.

(*Court of Errors and Appeals of New Jersey, Nov. 17, 1902.*)

[53 Atl. Rep. 391.]

Accident to Boy at Crossing—Contributory Negligence.

An intelligent boy, within a few weeks of nine years of age, was struck and killed by a train of the defendant company at a crossing of a public highway and the company's tracks. Deceased was familiar with the crossing and the passing of trains on the railroad tracks. The evidence most favorable to the plaintiff, who was the personal representative of deceased, showed that there was nothing to distract the attention of deceased as he approached the crossing, and that for a distance of at least 50 feet before he reached the track on which he was killed he had an unobstructed view of that track for a long distance, and, if he had made an observation, he would have seen the approaching train. He was shown to have walked in front of the train, and was so struck by it: *held*, that a direction of a verdict for defendant for the contributory neglect of deceased was not erroneous.

Children—Care Required of.*

The degree of care exacted of minors differs from that exacted from adults, and whether minors have exercised the required care is frequently a jury question. But when the infant's act exposes him to peril which he must appreciate, and when his personal safety may be secured by means plain to the most immature judgment, his exposure of himself to peril without any precaution will leave no question for a jury.

(Syllabus by the Court.)

Error to supreme court.

Action by William Anderson, administrator of Frank Anderson, against the Central Railroad Company of New Jersey. Judgment for defendant, and plaintiff brings error. Affirmed.

J. A. Kiernan, for plaintiff in error.

Sherrerd Depue and William A. Barkalow, for defendant in error.

MAGIE, Ch. The judgment brought up by this writ of error was entered in an action brought by the administrator of a deceased person to recover damages in favor of his

*See foot-note appended to *Chicago City Ry. Co. v. Tuohy* (Ill.), 4 R. R. R. 1, 27 Am. & Eng. R. Cas., N. S., 1.

Anderson v. Central R. Co. of New Jersey

next of kin upon a claim that the death of the deceased had been occasioned by the actionable negligence of the defendant company. The bill of exceptions discloses that a verdict in favor of the defendant was directed by the trial judge, and the sole question presented on this argument is whether the trial judge erred in such direction. This question will be solved by determining whether the evidence, viewed in the aspect most favorable to the plaintiff, would have supported any other verdict than that which was directed. *Crue v. Caldwell*, 52 N. J. Law, 215, 19 Atl. 188; *Railway Co. v. Block*, 55 N. J. Law, 605, 27 Atl. 1067, 22 L. R. A. 374; *Myers v. Birch*, 59 N. J. Law, 238, 36 Atl. 95; *American Saw Co. v. First Nat. Bank*, 60 N. J. Law, 417, 38 Atl. 662; *Coyle v. Iron Co.*, 63 N. J. Law, 609, 44 Atl. 665, 47 L. R. A. 147; *Lippincott v. Royal Arcanum*, 64 N. J. Law, 309, 45 Atl. 774. The deceased person was an intelligent boy within a few weeks of nine years old. It was shown that he came to his death by being struck by a railroad train of the defendant company running at great speed, and there was evidence that the collision took place at a point within a highway which crossed the railroad at grade. The boy was familiar with the crossing. The evidence disclosed that a train moving in an opposite direction from the train which collided with the deceased had passed upon the south-bound track, but it clearly established the fact that the train had passed so long before the approach of the train which killed deceased that the doctrine announced in *West v. Transportation Co.*, 32 N. J. Law, 91; *Transportation Co. v. West*, 33 N. J. Law, 430,—is not applicable, and there is no occasion to inquire whether the doctrine of that case has not been limited or modified, or even repudiated. The evidence, with the maps and photographs produced, showed beyond any possible doubt that a person approaching the crossing in the direction deceased was moving had, for a distance of at least 50 feet from the track on which the collision took place, a clear view for a long distance. There was nothing to obstruct the vision, and observation made at any point before deceased reached that track would have disclosed the approaching train. If deceased had been an adult, there can be no possible question but that his failure to discover the train, which was approaching, and within the range of his vision, would have established the fact that he did not make the observation which duty for his safety required. It would make out contributory negligence, and justify the direction of verdict. *Railroad Co. v. Righter*, 42 N. J. Law, 180. The duty of taking care for one's personal safety when in a place known to be dangerous is imposed upon all minors who are sui juris, as well as upon all adults. The degree of care for personal safety exacted from adults may, and doubtless does, differ from that exacted from minors. The latter lack experience, and are of immature judgment. Such deficiencies will be most observable in

Spink v. New York, N. H. & H. R. Co

infants of tender years, and may well be considered in determining whether they have exercised due care for safety. As infants increase in years, and as they approach majority, such deficiencies will be of less weight. Where they tend to characterize the infant's acts as being prudent or imprudent, the question presented is usually a jury question. But when the act of an infant exposes him to a personal peril, which he must recognize and appreciate, and when his personal safety may be secured by means indicated by the most immature judgment, his exposure of himself to the peril without any precaution will leave no question for a jury. The infant in this case was shown to have been in the constant and daily practice of crossing the tracks of the defendant company, and so acquired experience of the running of trains across the public highways at great speed, and in a mode which would peril the safety of any one who stepped upon the track in front of them. No judgment more mature than his was required to show him that safety in the place of known peril was to be obtained by observing whether or not a train was approaching the highway on which he was moving, and to abstain from crossing in front of an approaching train. When, therefore, the evidence clearly establishes that, although there was nothing to distract him from observation, nor any physical obstacle to effective observation, deceased walked upon the track in front of the swiftly moving train, which observation would have disclosed to him, I feel bound to conclude that deceased is thereby shown to have been guilty of negligence contributing to his death, and that no verdict to the contrary could be supported. It was not erroneous, therefore, to direct a verdict.

SPINK v. NEW YORK, N. H. & H. R. Co.

(Supreme Court of Rhode Island, Dec. 29, 1902.)

[54 Atl. Rep. 47.]

Railroads—Fires—Liability.

Act June 25, 1836, amending the charter of the N. Y., P. & B. R. Co., and providing in section 2 that the company should be liable to property owners for the burning of "houses, wood, hay, or any other substance whatever," caused by fire from its engines, is broad enough to cover all kinds of property so burned.

Action of debt by Daniel Spink against the New York, New Haven & Hartford Railroad Company, brought under Act June 25, 1836, amending the charter of the New York, Providence & Boston Railroad Company, of which latter road defendant was lessee. Demurrer to declaration overruled.

Argued before STINESS, C. J., and TILLINGHAST and ROGERS, JJ.

Waldron v. Boston & M. R. R

William B. Greenough and James C. Collins, Jr., for plaintiff.

John. W. Sweeney, for defendant.

PER CURIAM. The terms of the act making the defendant liable for damage caused by fire from its engines, embracing the burning of "houses, wood, hay, or any other substances whatever," are broad enough to cover all kinds of property so burned.

The demurrer to the declaration is overruled.

WALDRON v. BOSTON & M. R. R.

(*Supreme Court of New Hampshire, Belknap, May 6, 1902.*)

[52 Atl. Rep. 443.]

Accident at Crossing—Contributory Negligence—Presumption of Due Care on Part of Deceased.*

Though, in an action for the death of a traveler, in a collision with a railroad train at a crossing, when all that is known is the fact that he was killed, the natural disposition of men to avoid injuries under such circumstances is evidence tending to show that he was not negligent, yet, when the direct evidence shows what he did or omitted to do for his protection, the evidence derived from such natural disposition cannot be used to prove that he was not negligent, but only furnishes a test of the reasonableness of his known conduct.

Same—Same.

Plaintiff's intestate was killed by a train at a crossing. The deceased was familiar with the crossing and surroundings, and had been accustomed to cross it several times a week. The train which killed him was eight minutes late, and running from 25 to 35 miles an hour. The fireman first saw deceased as he was coming toward the crossing when the train was from 175 to 200 feet away. The fireman testified that the bell was rung from there on; that the whistle for the next station was given; that deceased did not look toward the train, or in any way show that he knew of its approach; that there was nothing unusual in his appearance; and that he believed deceased would stop before reaching the track, and first thought that the deceased might go on the track when he was within 8 feet of it; that the fireman then signaled to the engineer, but it was too late. Several witnesses testified that they heard no bell or whistle. A traveler could see up the track for several hundred feet before reaching the crossing: *held*, that deceased was guilty of contributory negligence as matter of law.

Same—Same—Presumption That Person Seen near Track Will Avoid Danger.†

Defendant's engineer, in the absence of knowledge reasonably

*See *Weller v. Chicago, etc., Ry. Co. (Mo.)*, 22 Am. & Eng. R. Cas., N. S., 61, and foot-note; *Dalton v. Chicago, R. I. & P. Ry. Co. (Iowa)*, 21 Am. & Eng. R. Cas., N. S., 460; *Sims v. Western & A. R. Co. (Ga.)*, 17 Am. & Eng. R. Cas., N. S., 756; *Cameron v. Great Northern Ry. Co. (N. Dak.)*, 12 Am. & Eng. R. Cas., N. S., 520.

†See *McArver v. Southern Ry. Co. (N. Car.)*, 23 Am. & Eng. R. Cas., N. S., 772, and foot-note; *Smith v. Ga. R. & Banking Co. (Ga.)*, 21 Am. & Eng. R. Cas., N. S., 20; *Hebert v. Louisiana W. R. R. (La.)*, 20 Am. & Eng. R. Cas., N. S., 87; *Piskorowski v. Detroit, etc., Ry. Co. (Mich.)*, 19 Am. & Eng. R. Cas., N. S., 120; *Jackson v. Kansas City, etc., R. Co. (Mo.)*, 19 Am. & Eng. R. Cas., N. S., 99.

Waldron v. Boston & M. R. R

leading to the conclusion that deceased intended to recklessly go on the track to commit suicide, or that he was not in possession of ordinary intelligence, or was not governed by the ordinary instinct of self-preservation, was not required, on seeing the deceased walking toward the track, to stop the train so as to permit him to pass.

Exceptions from superior court, Belknap county; Peaslee, Judge.

Action by Maria A. Waldron, as administratrix, against the Boston & Maine Railroad. Verdict for defendant, and plaintiff excepts. Case transferred from the superior court. Exceptions overruled.

About 1,900 feet above the crossing the track comes around a curve at a point called the "Mountain." From this point the grade is descending, and the trains are accustomed to coast past the crossing. The track curves to the east, and on that side of it, just above the crossing, there are thick bushes.

A person standing midway between the rails at the crossing can see up the track 700 feet; 4 feet easterly from the east rail one can see 568 feet; 9 feet from the rail, 484 feet; 14 feet from the rail (the easterly edge of the planking), 400 feet; and 28 feet from the middle of the track, 214 feet. There is a sharp rise coming up from an ice house situated easterly of the track. The plaintiff's evidence tended to prove the following facts: The decedent was 49 years old, in good health, and in full possession of his faculties. He was a board sawyer by trade, and about a year before the accident purchased a mill near the scene of the accident. During that year he had occasion to use this crossing frequently, and was familiar with it and its surroundings. He resided west of the track from June 1, 1901, and was accustomed to go across it to get ice from the house on the east side two or three times a week. He went there on the day of the accident shortly after dinner, loaded the ice upon a wheelbarrow, and started to wheel it up the rise toward the crossing. The White Mountain express was eight minutes late. As it came around the mountain, it was running from 25 to 35 miles an hour. The engine was not working steam, and both the engineer and fireman were on the lookout. By reason of his position on the outside of the curve, the engineer could not see the crossing as they approached it. The fireman could see it, and testified that he first observed the deceased just as he was coming upon the easterly edge of the planking, and as soon as his presence was disclosed by the engine rounding the curve at a distance from the crossing estimated at from 175 to 200 feet, and from that time kept an eye on him; that the whistle for Weir's station was given as they passed the mountain, and that the witness rang the bell from there on; that he supposed Waldron would stop before he reached the track, and for that reason did not at once signal the engineer; that Waldron did not look toward the train, or in any way show that he was conscious of its approach; that there was nothing unusual in

Waldron v. Boston & M. R. R

his appearance; that the witness first thought there was a likelihood that Waldron would go upon the track when he was within 8 feet of it, and he then shouted "Whoa!" to the engineer; that the engineer was leaning out of his window, and did not hear the cry, and the witness repeated it, but it was then too late to avoid the accident. Eight witnesses testified that they were in positions where they heard the noise of the train, but heard no bell or whistle. At the close of the plaintiff's evidence a verdict was directed for the defendants, subject to exception.

Shannon & Young and E. A. & C. B. Hibbard, for plaintiff.
Jewett & Plummer and Frank S. Streeter, for defendants.

WALKER, J. The plaintiff cannot recover unless it appears that her intestate was at the time of his injury in the exercise of ordinary care, or was not himself guilty of negligence which alone, or in conjunction with the defendant's negligence, was the proximate cause of his injury (*Nashua Iron & Steel Co. v. Worcester & N. R. Co.*, 62 N. H. 159); and the plaintiff is bound to prove this proposition by competent evidence. The fact alone that the injury occurred is not sufficient evidence of his care or freedom from negligence contributing to his injury. When there is no direct evidence bearing upon the question of the care exercised by the deceased, and all that is known in reference to it is the fact that he was killed while attempting to cross a railroad track in front of an approaching train, the natural or instinctive disposition of men in general to avoid fatal injuries under such circumstances has been held to be evidence tending to show that the deceased did not carelessly and without due regard for his own safety expose himself to the inevitable fatality resulting from a collision with a swiftly moving locomotive. *Huntress v. Railroad*, 66 N. H. 185, 34 Atl. 154, 49 Am. St. Rep. 600. If the great majority of men, when approaching a railroad crossing, take some precautions against being injured by passing trains,—which precautions are deemed reasonable,—and if, in the absence of direct evidence, this general custom of mankind may become evidence that the deceased in a given case used similar reasonable precautions to avoid danger, the fact remains that some men under similar circumstances are careless and negligent to the extent even of hazarding their lives upon the performance of foolhardy feats. It follows, therefore, that when it is known what the deceased did or omitted to do for his protection, evidence derived from the instinct, which most men possess, of securing their own safety in crossing a railroad track, could not be used to prove that he used the same degree or kind of care. Its only office would be to furnish a test by which to determine the reasonableness of his known acts; not to contradict them or minimize their importance. In this case the plaintiff's evidence shows that the deceased apparently paid no attention to the approaching train. After he reached

Waldron v. Boston & M. R. R

the easterly edge of the planking, 14 feet from the rail, when the fireman first saw him, until the engine reached the crossing, he did not look toward the train, or act as though he was conscious of its approach. He was in the full possession of his faculties. He must have known a train was liable to pass the crossing at that time. There is no evidence that he understood the train had passed, although it was eight minutes late. He resorted to no apparent means to ascertain his situation. If he had, his duty both to himself and to the railroad would have been instantly obvious. He failed to perform his duty, and was guilty of negligence which contributed to his death. "He not only did nothing to protect himself, but was in fact acting without attention to his situation. He was thoughtless and careless, when his duty to the railroad as well as to himself required him to be thoughtful and careful." *Gahagan v. Railroad*, 70 N. H. 441, 446, 50 Atl. 146, 55 L. R. A. 426. Upon this point reasonable men could not differ, and but one sustainable verdict could be rendered. Hence it was proper for the court to refuse to submit the question to the jury. *Butterfield v. Corporation*, 10 Allen, 532, 87 Am. Dec. 678; *Bush v. Railroad Co.*, 62 Kan. 709, 64 Pac. 624; *Carter v. Railroad Co.*, 72 Vt. 190, 47 Atl. 797; *Railroad Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542; 3 Elliott, R. R. § 1165.

But it is claimed that, notwithstanding the negligence of the deceased, there is evidence that after he was discovered approaching the track the engineer had time to stop the engine, or to reduce its speed, so that the deceased might have crossed in safety. If the evidence would warrant that conclusion, and if it is assumed that the engineer saw him at the same time the fireman saw him, the question would be whether the engineer, upon seeing the deceased walking toward the track, ought to have endeavored to stop the train to allow him to pass in front of it. The question relates to the legal duty of the engineer in view of the circumstances that were apparent to him. The general rule is that the engineer has the right of way as against a person approaching a crossing. In the absence of his knowledge of facts reasonably leading to the conclusion that the traveler intends to recklessly go onto the track and commit suicide, or that he is not in possession of ordinary intelligence, or is not governed by the ordinary instinct of self-preservation in the face of imminent danger, the engineer is not bound to stop his train, and give the traveler the right of way. He is not chargeable with negligence in not assuming that the traveler will deliberately persist in walking onto the track, for the latter is not in danger until he reaches the track. Common prudence would cause him to stop at that point, if not before; and, without other evidence of his intention to hazard a passage across the track than is furnished by the mere fact that he is walking toward it, the engineer is justified in assuming that he will exercise

Waldron v. Boston & M. R. R

common prudence, and stop before reaching the place of danger; otherwise, as is said in *Gahagan v. Railroad*, supra (at page 451, 70 N. H., and page 151, 50 Atl., 55 L. R. A. 426), "the rule heretofore laid down, and found to be approved by the authorities and the reason of the case, that it is the duty of the highway traveler to stop and allow the train to pass, would be reversed. It would become the duty of the train to stop, and wait for the person on foot to go by. This would be unreasonable, impracticable, and put an end to the modern system of rapid transportation demanded by the public, and to effectuate which railroads are authorized by the state." If the engineer knew, or ought to have inferred, that the deceased was deaf, or blind, or mentally unbalanced, and that in consequence of his infirmity he was liable to go upon the track without regard to the train, it may be true he should have reversed his engine, and slackened its speed. But the deceased was not deaf, or blind, or mentally unbalanced. He must at least have heard the train when he was about to step upon the track, as other witnesses did; and it would be absurd to hold that the engineer was guilty of a violation of his duty to the deceased because he did not infer what was not a fact,—that the latter was unable to appreciate the danger of crossing the track. He was fully capable of using the care which men in general would use under the same circumstances, and, if he had observed that degree of care, the accident would not have happened. But from all the circumstances apparent to the engineer the only inference he could reasonably draw was that Waldron would exercise the care expected of men in his situation, and stop before reaching the track. The defendant cannot be held liable if the acts of its servant, the engineer, were the acts of a reasonably prudent and skillful man under the circumstances. That they were of that character cannot be doubted. They were such acts on the part of the engineer (still assuming he saw the traveler) as a reasonably prudent man in Waldron's situation, acting as Waldron did, would naturally expect; and his representative cannot complain of their occurrence. His acts up to the time he stepped upon the track were entirely consistent with the idea that he would perform his plain duty under the circumstances, and stop, both for his own protection and in recognition of the defendant's right of way. Hence the engineer, if he had seen the deceased in time to have avoided the collision by reversing the engine, was under no obligation to do so, so far as the facts apparent to his observation indicated what his duty was. That the man might walk onto the track without stopping is not sufficient to charge the engineer with knowledge that he would do so, or to make it his duty to stop the engine, and ascertain the fact of the traveler's intention. The management of the engine was not inconsistent with Waldron's performance of his duty as a reasonably prudent man,—a duty with which he was chargeable upon all the facts

Southern Ry. Co. v. Aldridge's Adm'x

apparent to the defendant's servants. 3 Elliott, R. R. § 1175; Railroad Co. v. Miller, 25 Mich. 274, 279; Olson v. Railroad Co. (Minn.) 87 N. W. 843; Boyd v. Railway Co., 105 Mo. 371, 16 S. W. 909. It is therefore immaterial whether the engineer in fact saw the deceased before the accident, or in time to have avoided the collision; for the question is, not what he might have done, but what his duty to Waldron required, in view of the latter's apparent duty and ability to protect himself. The case is not distinguishable in principle from Gahagan v. Railroad, supra. This result renders it unnecessary to consider the question of the defendant's alleged negligence.

Exception overruled. All concur.

SOUTHERN RY. CO. v. ALDRIDGE'S ADM'X.

(*Supreme Court of Appeals of Virginia, Jan. 22, 1903.*)

[43 S. E. Rep. 333.]

Accident at Crossing—Absence of Watchman—Failure to Stop, Look, and Listen—Instruction.

Where, in an action for the killing of a person at a railroad crossing, it appeared that the railroad company had been permitted by the city to temporarily discontinue the operation of gates at the crossing by substituting a watchman, instructions hypothetically stating the facts, but omitting the element of the watchman's absence, and charging that under the facts stated, if plaintiff did not stop, look, and listen before crossing the track, he was guilty of contributory negligence, and could not recover, were properly refused.

Same—Negligence.

Where a railroad train was running over a graded street crossing at a rate of speed prohibited by the city ordinance, with its headlight extinguished, and without giving any warning, by reason of which plaintiff's intestate was killed while crossing the track, the company was guilty of negligence.

Same—Absence of Watchman and Failure to Stop, Look, and Listen.*

Where intestate was familiar with a grade railroad crossing, and at the time he attempted to cross the same no train was due, and the watchman required to be maintained by a city ordinance was not present to warn him, the fact that he did not stop before attempting to cross the track did not render him guilty of contributory negligence as a matter of law, so as to prevent a recovery for his death by a train which ran over the crossing at a high rate of speed, without a headlight, or without giving any signal of its approach.

Error to corporation court of Danville.

Action by the administratrix of one Aldridge, deceased, against the Southern Railway Company. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

Berkeley & Harrison, for plaintiff in error.

Cabell, Cabell & Cutler and Peatross & Harris, for defendant in error.

*See foot-note appended to Peck v. Oregon Short Line R. Co. (Utah), 4 R. R. R. 358, 27 Am. & Eng. R. Cas., N. S., 358.

Southern Ry. Co. v. Aldridge's Adm'r

KEITH, P. The administratrix of C. W. Aldridge brought suit in the corporation court of the city of Danville, alleging that the death of her intestate was due to negligence of the Southern Railway Company, and recovered a judgment for \$8,500, to which the Southern Railway Company obtained a writ of error.

At the trial instructions were asked by the plaintiff and defendant. There was no exception taken to those given at the instance of the plaintiff, but it is assigned as error that instruction No. 5 asked for by plaintiff in error was amended, and that instruction No. 9 asked for by it was refused. It is also assigned as error that the court refused to set aside the verdict upon motion of plaintiff in error, as contrary to the law and the evidence.

Instruction No. 5, as tendered to the court, is as follows: "The court instructs the jury that, although they may believe from the evidence that an ordinance of the city of Danville required the defendant company to have gates at the North Main street crossing where this accident happened on January 24, 1901, with a man in charge of the same, and to lower the said gates whenever a train was about to cross said street; and although they may believe from the evidence that the defendant company did not lower the gates when the train which struck the deceased, C. W. Aldridge, passed over the said street; and although they may believe that the defendant company failed to have a headlight at the front of the engine as it approached said crossing at the time of the accident, or to signal its approach by ringing a bell, sounding a whistle or otherwise; and although they may believe from the evidence that the train of the defendant company at the time of the accident was running at a greater rate of speed than is permitted by the ordinance of the city of Danville, and was thereby violating the ordinance of the said city,—yet the said failures on the part of the defendant company did not relieve the said intestate, C. W. Aldridge, from exercising care and caution to avoid injury from the approaching train. That if, on account of permanent obstructions at and about the crossing, the said Aldridge could not see an approaching train as he approached the crossing, and by reason of noises at and near the said crossing he could not hear the noise and signals of an approaching train, then it was the duty of the said Aldridge to stop before going upon the said crossing, or to use such other means in his power to satisfy himself that no train was near at hand, before going upon the said track and crossing; and if the jury believe from the evidence that the said Aldridge could not see and could not hear the approaching train as he approached the crossing, and, knowing this, he still did not stop, or take any other means, or do anything else to find out whether the train was approaching or not, but drove right along upon the crossing and track, then the said Aldridge was guilty of such contributory negligence as pre-

Southern Ry. Co. v. Aldridge's Adm'r

cludes any recovery in this case, and the jury must, therefore, find for the defendant company."

This court has never decided that, as matter of law, it was the duty of a person approaching the crossing of a railroad to stop, look, and listen for an approaching train. It has been said in numerous cases that the railroad track itself was a signal of danger, and imposed upon one approaching it the duty to look and listen; but it has in no case been held that it was his duty to stop in order to look and listen, or that it was his duty, when in a vehicle, to get out in order to look and listen. On the other hand, it has been said that the degree of care and caution to be exercised depended upon the facts and circumstances of the particular case, and we have had no occasion to say that in no case would a traveler be required to stop in order to look and listen. It is not denied that instruction No. 5, as given by the court, propounds a correct proposition of law. The contention is that, as offered, it not only states the law correctly, but that it was proper, and should have been given, looking to the facts of the case under consideration. If the instruction had stated all the facts, it would then have required us to say whether it was the duty of the defendant in error to stop in order to look and listen, but the instruction omits a view of the evidence which we deem essential to the case. An ordinance of the city had required the railroad company to erect gates at the crossing where the accident happened, which were to be in charge of a man, whose duty it should be to lower them upon the approach of a train; but these gates had been temporarily discontinued with the assent of the city, and in lieu of the gates the railroad company was required to have a watchman constantly present to give timely warning to passengers along the street of an approaching train. The instruction, as offered, refers to the duty imposed upon the railroad company to erect gates, and to have them lowered at the proper time, but omits any reference to the fact that, for reasons which need not be specifically mentioned, the gates had been temporarily discontinued, and a watchman substituted in their stead. As to what occurred with respect to this watchman, what he did and what he omitted to do upon the occasion when Aldridge met his death, is the subject of conflicting evidence, and plaintiff in error was entitled to have its view of what was proved by the evidence upon this point submitted to the jury upon a proper instruction; but it could not have an instruction given directing the jury upon a hypothetical statement of the facts to find a verdict in its favor, when it omitted in its recital of the facts any reference whatever to the presence or absence of the watchman. Aldridge, it was shown, was perfectly familiar with this crossing, with its physical environment, and with all the facts connected with it, and he may very properly have been influenced in the course of conduct which led to his death by the absence of the watchman, whose duty it was to inform him of his peril. Knowing that it was the duty of the

Southern Ry. Co. v. Aldridge's Adm'r

watchman to be present to keep a lookout for trains, and to warn those interested of their approach, he was or may have been lulled into a false sense of security, and been thereby placed in a worse position than if no precaution had been taken for his safety. He may, indeed, have been betrayed by the omission on the part of the watchman to perform the duty which the railway company had imposed upon him in obedience to an ordinance of the city enacted for his protection.

It has been held by this court that an instruction is misleading, and should not be given, which calls special attention to a part only of the evidence and the facts it tends to prove and leaves out of view other evidence in the cause. *Railroad Co. v. Cromer's Adm'r*, 99 Va. 763, 40 S. E. 54; *Boush v. Deposit Co.*, 100 Va. —, 42 S. E. 877.

There was no error, therefore, in rejecting instruction No. 5 as offered to the court, or in giving it as amended by it.

Instruction No. 9, as offered by plaintiff in error, is in the following words: "If the jury believe from the evidence that Aldridge was familiar with that locality, and knew that the crossing was there, and trains liable to pass at any time, and that the bluff and buildings obstructed his view and made hearing difficult; and believe farther that he was driving in a vehicle over a street paved with rock, at night, whereby the sound of the horse's hoofs and the rattle of the vehicle over the rocks lessened his ability to hear, and knew also of the noise from the mills and water flowing over the dam, and, notwithstanding, drove on without stopping to look or listen, down the hill, so fast that he could not avoid being struck,—the court instructs the jury that he contributed to his own hurt, and they must find for the defendant, even though they believe the defendant's train was moving too fast, and the usual and proper signals were not given."

This instruction was properly rejected, for the reasons which we have already stated in considering instruction No. 5.

The only other assignment of error is to the ruling of the court upon the motion to set aside the verdict as contrary to the law and the evidence, and in considering this assignment it is scarcely necessary to say it is before us as upon a demurrer to the evidence. Looked at in the light of that rule, there can be no doubt that the defendant in error was guilty of negligence. The facts which we must consider as established by the evidence are that the train which caused the accident approached a crossing at a speed prohibited by an ordinance of the city, and which, if there had been no ordinance upon the subject, would have warranted the jury in fixing negligence upon the railroad company, when we consider that its track crossed a public street at grade, and that it gave no notice of its approach in any way, that its headlight was extinguished, and that its watchman, who was placed at the crossing to give warning of approaching trains, failed in the performance of his duty. We are aware, of course, that the evidence with respect to many of these facts is strongly con-

Klockenbrink v. St. Louis, etc., R. Co

troverted. It may be conceded that the weight of evidence is with the plaintiff in error as to some of them, but that avails nothing under the rule governing demurrers to evidence. The most serious controversy, for instance, is as to the position of the watchman at the time of the accident. If his account be true,—and it is corroborated in a large degree by disinterested witnesses,—he performed his duty fully and faithfully, and did all in his power to save the unfortunate victim from the consequences of his own temerity; but if the testimony of at least two witnesses on behalf of defendant in error be true, then the watchman was derelict in the performance of his duty, and his negligence is, of course, to be imputed to plaintiff in error.

The evidence being plainly sufficient, considered as we must consider it under the law governing such cases, it only remains for us to inquire whether or not the contributory negligence of Aldridge constituted a bar to his recovery.

Do the facts so plainly disclose the negligence of Aldridge as that reasonable men should not differ in their judgment upon it? He was passing along a much-frequented street. He was approaching a crossing, where, under the ordinance of the city, there should have been a watchman to warn him of his danger. There was no train due at the time, and it was all the more incumbent upon the railroad company to herald the approach of a train not running upon its scheduled time. It is true that, if he had stopped or paused, the accident might not have occurred; but we do not feel warranted in saying that, as matter of law, his failure to stop made a case of contributory negligence so plain as to justify the court in withdrawing it from the consideration of the jury. *Kimball v. Friend's Adm'r*, 95 Va. 125, 27 S. E. 901; *Marshall's Adm'x v. Railroad Co.*, 99 Va. 798, 34 S. E. 455.

We are of opinion that there is no error in the judgment of the corporation court, and it must be affirmed.

KLOCKENBRINK v. ST. LOUIS & M. R. R. Co.

(Supreme Court of Missouri, Division No. 2, Feb. 24, 1903.)

[72 S. W. Rep. 900.]

Demurrer to Evidence—Waiver.

Defendant, by putting in evidence after its demurrer to plaintiff's evidence has been overruled, does not thereby waive its right to have the ruling of the court reviewed on appeal; but the appellate court will consider the whole evidence, whether offered by plaintiff or defendant.

Accident on Street Railway Track—Avoidable Injury—Evidence.*

Evidence in an action against a street railway company for injuries

*As to the care required of those in charge of street cars to avoid collisions with persons, animals, or vehicles, see note appended to *Robinson v. Louisville Ry. Co.* (C. C. A.), 1 R. R. R. 838, 24 Am. & Eng. R. Cas., N. S., 838.

Klockenbrink v. St. Louis, etc., R. Co

considered, and held sufficient to justify a finding that the motorman saw, or by the exercise of ordinary care could have seen, plaintiff's wagon on the track in time to have avoided the accident.

Same—Contributory Negligence in Driving on Track.

Contributory negligence of plaintiff, if it be such, in driving on the tracks of a street railway company at night, does not preclude his recovery, when defendant's servants saw, or by the exercise of reasonable care could have seen, plaintiff in time to avoid injury to him, and failed to do so.

Same—Right to Use Tracks.†

A street railway has not an exclusive right to the use of its tracks laid in a public highway, nor are persons driving on its tracks trespassers.

Instructions.

The fact that plaintiff, in an action against a street railway company for injuries, did not count on the negligence of defendant in running its car at a high rate of speed and failing to ring the gong, did not entitle defendant to an instruction declaring evidence on such points immaterial, where it was admitted without objection, and defendant itself introduced evidence on the subject.

Appeal from St. Louis Circuit Court; P. R. Flitcraft, Judge.

Action by E. F. Klockenbrink, Jr., against the St. Louis & Meramec River Railroad Company. From a judgment for plaintiff, defendant appeals. Removed to Supreme Court from St. Louis Court of Appeals by reason of a division of opinion. Affirmed.

Action for personal injuries. Suit commenced November 19, 1898. Amended petition filed March 15, 1899. The petition, as amended, states that defendant is a railroad corporation organized under the laws of this state, and was on 19th of July, 1898, operating its railroad over and along the streets and highways of Webster Groves, a town in St. Louis county; that on that day plaintiff was driving a large staked wagon, to which was attached two horses, over and along a highway in St. Louis county, to wit, Lockwood avenue, in said town of Webster Groves, going in an easterly direction; that one of defendant's servants in charge of one of its cars, moving along and upon its track in Lockwood avenue in the same direction in which plaintiff was traveling, and at a high and unusual rate of speed, carelessly and negligently ran into and against plaintiff's wagon from the rear; that the said defendant, by its said servant, at the time saw said wagon, which plaintiff was driving, or in the exercise of reasonable care might have seen said wagon and plaintiff, in time to stop the said car before striking or running into said wagon; that the wagon was broken, torn to pieces, and one of the horses killed, and the other permanently disabled, and plaintiff was thrown to the ground, his finger broken, his back sprained, and he was otherwise maimed, bruised, and wounded in his body, and has

†See *Adams v. Wilmington & N. Electric Ry. Co.* (Del.), 4 R. R. R. 307, 27 Am. & Eng. R. Cas., N. S., 307; *New Jersey St. Ry. Co. v. Schwartz* (N. J.), 22 Am. & Eng. R. Cas., N. S., 620, and foot-note.

Klockenbrink v. St. Louis, etc., R. Co

suffered and will continue to suffer much pain in body and mind, and has been permanently injured and disabled, has been compelled to spend large sums of money for medicine and medical treatment, etc., to his damage in the sum of \$2,500 for which he prays judgment. The answer is a general denial, and a plea of contributory negligence on the part of plaintiff in driving upon the defendant's track on a dark night, when there was plenty of room on a well-improved street where he could have driven, and continued to drive on the tracks without looking or listening for an approaching car. The reply denied all new matter. There was a verdict and judgment for plaintiff for \$1,500, from which defendant appeals. Various errors are assigned, which we will consider in their order. The appeal is in this court by reason of a division of opinion in the St. Louis Court of Appeals.

McKeighan, Barclay & Watts and R. A. Holland, Jr., for appellant.

R. P. Williams, for respondent.

GANTT, P. J. (after stating the facts). 1. Did the circuit court err in overruling the demurrer to the evidence? As the defendant did not stand on its demurrer at the close of plaintiff's evidence, this question must be answered in view of the whole evidence—that which was offered by defendant, as well as plaintiff. *McPherson v. Ry. Co.*, 97 Mo. 253, 10 S. W. 846. The defendant, by putting in its evidence after its request for such an instruction had been made and overruled, took the chances of curing any defect in the plaintiff's evidence, but did not wholly waive its right to have the ruling of the court reviewed; but this court will look to the whole evidence, no matter by whom offered. This is the settled practice in this state. *Eswin v. Ry. Co.*, 96 Mo. 294, 9 S. W. 577; *Jennings v. Ry. Co.*, 112 Mo. 268, 20 S. W. 490.

The testimony established that plaintiff, on the 19th of July, 1898, was a teamster; that he drove two horses to a very large stake wagon, and on that day had taken a load of freight from St. Louis to Kirkwood, in St. Louis county, and was returning to the city in the night; that his route required him to come through Webster Groves, and when he reached that town, coming from the west, he entered upon Lockwood avenue, a street or highway on which defendant had its railroad tracks. From the top of the hill on which he came into Lockwood avenue there was a decline for about 1,800 feet, and then another elevation was reached. It was about midnight. Plaintiff drove safely down the first hill, and had gone about 200 feet up to second, when one of defendant's electric cars struck his wagon from the rear, and killed one of his horses, crippled the other, and threw plaintiff out of the wagon, severely injuring him. At the time the wagon was struck by defendant's car, one of the horses and the two left wheels were inside of the rails of defendant's track, and the

Klockenbrink v. St. Louis, etc., R. Co

other horse and the remainder of the wagon were outside, and between the south rail and the curb line, which was about 12 feet distant. Between the south rail and the curb line there were telephone poles at intervals of about 150 feet, so that plaintiff's wagon could not pass between the telephone poles and the south track without coming within the reach of a car, should one pass the wagon opposite the poles. There was also evidence that a buggy in which there were three men was traveling along the avenue that night, and near this wagon. The plaintiff's witnesses all place this buggy some 30 to 60 feet in the rear of the wagon, and following it. The defendant's witnesses testified that the buggy was in front of the wagon, some 35 to 50 feet ahead of the wagon, when the motorman first discovered it.

As usual, there was considerable discrepancy as to the rate of speed at which the car was moving. It was variously estimated from 15 to 18 or 20 to 25 miles an hour. The plaintiff neither observed or heard the approach of the car. The testimony of Rockwell, the electrician for the defendant, was that, if there was a mist or rain on the headlight, the motorman ought to see an object on the track 75 feet ahead of him. If there was no mist or rain on the headlight, he ought to see 150 feet ahead of him. Greenhurst, the motorman, says he could stop the car, moving as it was at the time, within 100 feet, and Rockwell, as an expert, concurred in that statement. Both Greenhurst and McManus, who stood in the front door of the car talking to Greenhurst, say they saw the buggy about 35 to 40 feet ahead of the car when they first noticed it. Ralston, who was riding in the buggy, testified that when the car passed the buggy the motorman had not applied his brake, and his right hand was hanging at his side. He could not see the position of his left hand. Mr. John C. Berthold was a passenger on that car at the time, and says he heard no bell; that the effort to stop the car was not made over two seconds before the collision occurred.

The evidence for the plaintiff tended to show the buggy was not on the track, but was driven along by the side of it; but the defendant's evidence tended to prove the buggy had been on the track, and was driven off just before the collision, and that until that movement the wagon was obscured by the buggy. The evidence also tended to show that, when the car reached a point 40 or 50 feet west of or in the rear of the buggy, not only the buggy was plainly visible, but the rays of the headlight would also reach far enough to disclose the wagon to an ordinarily observant man. After striking the wagon the car ran on from 75 or 150 feet beyond the point of collision. From which it appears there was substantial evidence from which the jury might find that, granting that plaintiff was negligent in driving his wagon on the track of the railroad company when there was danger, owing to the late hour of night and the darkness, that he might not be seen

by a motorman in time to avoid a collision, still the motorman in charge of defendant's car either saw, or by the exercise of ordinary care could have seen, plaintiff's wagon on the track, and by the exercise of ordinary care could have avoided the injury to plaintiff and his wagon and team; and, this being true, there was no error in refusing the peremptory instruction to find for defendant.

It was the province of the jury to weigh all the evidence, and it was their right to believe and find that the wagon of plaintiff was 50 feet ahead of the buggy, which the testimony of plaintiff's witnesses showed was following the wagon from 10 to 30 feet behind, and that the buggy was seen 50 feet ahead of the car, and there was ample evidence from which the jury could have found that it was not a misty night, and that the motorman could have seen, by a proper and careful look, an object as large as this wagon 150 feet ahead of him on his track, and there was evidence in the physical facts that the car not only knocked the heavy stake wagon off the track and wrecked it, but that it ran from 100 to 150 feet east after the collision; and, so finding, the jury were justified in drawing the inference and finding that the motorman failed to exercise ordinary care, and the means at his hand to stop his car, after he became aware, or by the exercise of ordinary care could have known, of the danger in which plaintiff was placed by the approach of the car from the rear.

This is the settled law of this court. Thus in *Scoville v. Railroad*, 81 Mo. 434, it was ruled that, to make defendant liable where both parties are negligent, the negligence of defendant must occur after the defendant knew, or by the exercise of ordinary care might have known, of the danger of the deceased. In *Hilz v. Railroad*, 101 Mo. 36, 13 S. W. 946, it was said by this court: "If the failure to so discover him was the result of the omission of that measure of duty which the law requires, in view of the locality, circumstances, and dangers to be anticipated, and due observance thereof would have enabled the persons in control of dangerous agencies of this sort to have avoided the injury by the use of reasonable care, then and in such case such omission and want of reasonable care is, under the law, held the proximate cause of the injury, and liability for the resulting damage may then exist, notwithstanding the negligence of the person injured." The same doctrine was reasserted in *Fiedler v. Ry. Co.*, 107 Mo. 645, 18 S. W. 847. In that case the plaintiff was admittedly a trespasser, by a positive statute, and yet we held that, notwithstanding her contributory negligence, the company was liable, if its engineer discovered her peril in time to have avoided the injury by the exercise of ordinary care. See, also, *Bunyan v. Ry. Co.*, 127 Mo. 12, 29 S. W. 842. And as said in the *Hilz Case*, *supra*, ordinary care is to be measured "by the circumstances, locality, and dangers to be anticipated."

The jury in this case were authorized to believe that the

Klockenbrink v. St. Louis, etc., R. Co

motorman was rapidly descending an incline on a public street in a populous village without having his hand on his lever. While it may be conceded that the defendant has a superior right to its tracks, it must be remembered its tracks are laid in a public highway, where every citizen has a right to travel, and it often occurs that these tracks are necessarily occupied by other vehicles, and what would be ordinary care in the country on a fenced track, which the public do not frequent, would be gross negligence in a populous city. Its paramount right must be exercised in a reasonable and prudent manner. *Moore v. Ry. Co.*, 126 Mo., loc. cit. 274, 29 S. W. 9. And, while defendant argues that it was negligent for plaintiff at that hour of night to travel with his wheels inside of its rails, it is equally open to plaintiff to argue that it was reckless conduct on the part of the motorman to run his car at the rate of at least 15 miles an hour on a public street at night without having his motor and brakes well in hand, to prevent injury to those who might be lawfully compelled to use the street at that time.

Judge Bond, in his opinion in the St. Louis Court of Appeals (81 Mo. App. 356) in this case, quotes with approval a statement of the rule as laid down by Shearman & Redfield in their work on Negligence (volume 1 [5th Ed.] § 99) as follows: "But, furthermore, the plaintiff should recover, notwithstanding his own negligence exposed him to the risk of injury, if the injury of which he complains was more immediately caused by the omission of the defendant, after having such notice of the plaintiff's danger as would put a prudent man upon his guard, to use ordinary care for the purpose of avoiding such injury. It is not necessary that the defendant should actually know of the danger to which the plaintiff is exposed. It is enough if, having sufficient notice to put a prudent man on the alert, he does not take such precaution as a prudent man would take under similar notice. This rule is almost universally accepted." We have seen it is the settled doctrine of this court. *Dunkman v. Ry. Co.*, 95 Mo. 244, 4 S. W. 670; *Kellny v. Railway*, 101 Mo. 67, 13 S. W. 806, 8 L. R. A. 783; *Hanlon v. Ry.*, 104 Mo. 389, 16 S. W. 233; *Czezewska v. Ry.*, 121 Mo. 201, 25 S. W. 911; *Morgan v. Ry. Co.*, 60 S. W. 195, 159 Mo. 262. And the same doctrine is announced by the Supreme Court of the United States. *Inland & Seaboard Co. v. Tolson*, 139 U. S. 557, 11 Sup. Ct. 653, 35 L. Ed. 270; *R. R. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485.

Indeed, the learned counsel for defendant do not controvert this statement of the law, but complain bitterly that the court refused to submit to the jury whether plaintiff's negligence did not directly contribute to his injury. The defendant's answer specifically tendered this issue. It was submitted to the jury in the tenth instruction given by the court in the following terms: "The court instructs the jury that if you find

Klockenbrink v. St. Louis, etc., R. Co

from the evidence that, at the time the wagon was struck by the defendant's car, the plaintiff was not exercising ordinary or reasonable care, and that plaintiff's failure to exercise such care directly contributed to produce the injury of which plaintiff complains, then your verdict should be for defendant, unless you further find from the evidence that the motorman in charge of defendant's car saw, or by the exercise of ordinary care would have seen, that the wagon in which plaintiff was riding and driving was in danger of being struck by said car, in time to have prevented the accident complained of by the exercise of ordinary care." The court properly added the qualification upon which plaintiff's case was predicated. It has been so repeatedly ruled that it is not error to refuse an instruction when the same has already been given that it is deemed unnecessary to cite precedents to that effect.

This instruction is assailed because it is asserted that, if plaintiff's negligence directly contributed to his injury, he cannot recover at all. Clearly it is the law of this state that mere negligence without any resulting damage does not bar a recovery by a plaintiff. It is only when the plaintiff's negligence directly contributes to his injury that it precludes his recovery. *Moore v. Ry.*, 126 Mo. 265, 29 S. W. 9. The contention of defendant, then, in effect is that, if plaintiff is guilty of contributory negligence, then he can never recover, even though defendant recklessly and wantonly injured him after discovering his peril, and when by the exercise of ordinary care it could have prevented harm to him. This is not the law of this state. When a defendant sees, or by the exercise of ordinary care can see, the peril of a plaintiff, caused by the latter's contributory negligence, in time to avoid injuring him, then plaintiff can recover notwithstanding his contributory negligence. This is now the accepted and settled exception to the general rule that plaintiff's own contributory negligence bars a recovery. It was so expressly ruled in *Kellny v. R. R.*, 101 Mo. 67, 13 S. W. 806, 8 L. R. A. 783, and the doctrine of that case has been so recently reviewed and reaffirmed in *Morgan v. Wabash Ry. Co.*, 159 Mo. 262, 60 S. W. 195, that it would be a waste of time to repeat what has been so pertinently said in those cases.

This case is much stronger than the *Morgan Case*, in that in this case the plaintiff was driving along a public highway on which he had a perfect right to drive by day or night, and in so doing was not guilty of any negligence. His driving along said track under the circumstances only took on the hue of negligence from the fact that defendant also had a right to run its cars on said street, and that, unless plaintiff should keep a watch out, one of defendant's cars might be run against him. As said by Judge Marshall in *Oates v. Ry. Co.*, 168 Mo. 544 et seq., 68 S. W. 908: "The sum of the adjudicated cases bearing upon the relative rights and duties of street cars and citizens traveling in vehicles drawn by horses

Carver v. Minneapolis, etc., R. Co

or other animals is that both have a right to use the street, but that neither has an exclusive right. * * * Because a street car carries more people than any other kind of a conveyance, or because it is authorized to run more rapidly than a vehicle can ordinarily be driven, or because the rush and restlessness of the age make unreasonable demands for more and more rapid transit along the crowded thoroughfares of populous cities, it does not follow that a street car can be run in disregard of the rights of persons traveling by other means, nor that a street car company is exempt from the common-law duty of every one to exercise ordinary care, nor that it is only liable where its agents act wantonly, maliciously, and heedlessly."

While it was plaintiff's duty to pull out of the way of the defendant's car when it reached him, and while it was true the defendant had a superior right on its own tracks, it did not have a license to run its cars at a reckless rate of speed along a public highway, regardless of the danger of collision with other travelers thereon. It is true plaintiff did not count on the excessive speed of the car as negligence, and hence it was not an issue in the case; but the court very properly refused to declare that there was no negligence on account of any rate of speed, and the same may be said as to the refusal to charge that defendant could not be held liable for a failure to ring its bell or gong that night. The plaintiff had not counted on such failure, and whatever testimony went in on that point was admitted without objection, and defendant got the full benefit of its own evidence on that point. Although not made the basis of a recovery by plaintiff, the ringing of a bell as testified to by defendant's witnesses, or a failure to do so, was material to the main issue whether defendant did all it could to avoid the injury after its motorman discovered, or ought to have discovered, the plaintiff on the track. It was not entitled to an instruction declaring this evidence immaterial after introducing it, and after its failure to object to plaintiff's evidence that the gong was not sounded so as to apprise plaintiff of the approach of the car.

We think the case was fairly tried, and the judgment was for the right party, and it is accordingly affirmed. All concur.

CARVER v. MINNEAPOLIS & ST. L. R. Co.

(Supreme Court of Iowa, May 13, 1903.)

[94 N. W. Rep. 862.]

Injuries at Stations—Negligence of Mail Clerk—Dangerous Custom of Throwing Mail Bag from Train—Knowledge of Company.*

While an agent of the United States postal department in charge of a mail car is not a servant of the railroad company carrying mails, in such a sense that his negligence in throwing a mail bag from the train,

*See notes at end of case.

Carver v. Minneapolis, etc., R. Co

thereby injuring a bystander. is chargeable to the company, yet the railway company is responsible, in permitting the agent to pursue a dangerous course of conduct in throwing off mail bags at stations, if continued for a sufficient length of time to charge the company with knowledge thereof.

Same—Same—Liability for Injury to Licensee.

The liability of a railroad company for negligence in permitting a mail clerk to throw bags from the train in a manner dangerous to persons on the platform extends to injuries to all persons rightfully on the platform, whether passengers or not.

Assumption of Risk—Knowledge of Dangerous Custom.

The mere knowledge of the existence of a custom or condition which is dangerous is not sufficient to charge a person injured with the assumption of the risk thereof, unless such person has appreciated the danger involved.

Same—Same—Mail Clerk Injured by Mail Bag Thrown from Train.

A mail carrier who was injured while standing at the end of a platform by being struck with a mail bag thrown from a moving train did not assume the risk of such injury, although he knew of the custom of the mail clerk to throw the mail bags from the trains while in motion, where such custom was to throw the bags from the train, while passing the center of the platform.

Same—Dangerous Custom.

One who is injured while standing in a dangerous position assumes only such risks as are reasonably to be apprehended by him to himself in the position which he took, as incident to the dangerous usage of which he had knowledge.

Same—Same—Throwing Mail Bag from Train.

One who assumes the risk incident to throwing mail bags on a train while in motion does not thereby assume the risk of a mail bag being thrown from the train and striking him.

Licensees—Liability for Injury Caused by Throwing Mail Bag from Train.

A railroad company is liable to a person injured, while rightfully on the company's platform, by being struck by a mail bag thrown by the mail clerk from a moving train, where such custom has been so long continued as to charge the company with knowledge thereof, although the custom had been to throw the bags from the train at a different point on the platform.

Appeal from District Court, Webster County; S. M. Weaver, Judge.

Action for personal injuries. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

R. M. Wright, for appellant.

A. N. Botsford and Healy Bros. & Kelleher, for appellee.

McCLAIN, J. The injury for which plaintiff seeks to recover resulted from his being struck by a mail bag thrown from the mail car in a passenger train on defendant's road while the train was still in motion. Plaintiff, at the time of receiving the injury, was standing on the passenger platform of defendant's road at the town of Otho, and near the north end of such platform; the train coming from the south. He was thus standing on the passenger platform by reason of his employment, in which he had been engaged for about six years, as carrier of United States mails to and from the mail trains at this station.

It seems to be well settled, and is not specially questioned

Carver v. Minneapolis, etc., R. Co

in this case, that while an agent of the United States postal department, in charge of a mail car, is not a servant of the railroad company carrying mails under contract with the United States government, in such sense that the negligence of the agent in the matter of throwing a mail bag from the train, causing injury to a bystander, is chargeable to the railroad company (*Munster v. Chicago, M. & St. P. R. Co.*, 61 Wis. 325, 21 N. W. 223, 50 Am. Rep. 141), yet the railway company is responsible in permitting the mail agent to pursue a course of conduct with reference to the throwing off of mail bags at stations which is dangerous to bystanders, and if the course of conduct has been continued for a sufficient length of time, so that the railway company is presumed to have had knowledge thereof, its liability will be sufficiently shown (*Galloway v. Chicago, M. & St. P. R. Co.*, 56 Minn. 346, 57 N. W. 1058, 23 L. R. A. 442, 45 Am. St. Rep. 468; *Carpenter v. Boston & A. R. Co.*, 97 N. Y. 494; *Snow v. Fitchburg R. Co.*, 136 Mass. 552, 49 Am. Rep. 40; *Shaw v. Chicago & G. T. R. Co.*, 123 Mich. 629, 82 N. W. 618, 49 L. R. A. 308, 81 Am. St. Rep. 230). And the liability of the railroad company in this respect extends to injuries to persons who are rightfully on the platform, regardless of whether or not they are passengers or intended passengers. *Bradford v. Boston & M. R. R.*, 160 Mass. 392, 35 N. E. 1131. Indeed, we see no reason for any distinction, as to what will constitute negligence, between passengers and other persons rightfully on the platform at a railway station. *Galloway v. Chicago, M. & St. P. R. Co.*, supra.

There is no complaint of the submission of this case to the jury so far as the duty of the railway company to persons on the platform is concerned. But counsel for appellant contended in the lower court that plaintiff, having been aware of the usage on the part of the railway clerks to throw the mail bags from the trains before the trains came to a stop (the object being to have the bags drop on the platform, instead of north of the platform, when the train was coming from the south, and at a point where the mail car would necessarily be standing when the passenger car was opposite the platform), assumed the risk of this method of discharging the mail, and that, by reason of this assumption of risk, there was no negligence on the part of the railroad company, of which plaintiff could complain, in knowingly allowing the mail bags to be thus thrown from the train. Counsel asked an instruction in accordance with this view, which the court refused to give, although a proper instruction was given with reference to contributory negligence, and the refusal to give the instruction as to assumption of risk is now assigned as error. There is certainly some very eminent authority for saying that the doctrine of contributory negligence and that of assumption of risk do not necessarily cover the same ground, and that the fundamental distinction between the two is that where the

Carver v. Minneapolis, etc., R. Co

risk has been assumed there is no negligence, so far as the persons who has assumed the risk is concerned, in pursuing a course of conduct such as he has reason to anticipate, and the danger of which he must have fully appreciated. In other words, the doctrine of contributory negligence assumes that there has been negligence on the part of the defendant, and that it is thereupon necessary to determine whether the plaintiff has been in the exercise of such care that he may properly recover for injuries resulting from defendant's negligence—the rule being that, if his want of care has in any way contributed to the injury, he cannot recover, notwithstanding the fault of the defendant—while the doctrine of the assumption of risk rests on the principle embodied in the maxim, “*Volenti non fit injuria*”; that is, no tort whatever is committed in failing to protect from injury one who has voluntarily assumed the danger of the injury. *Leary v. Boston & A. R. Co.*, 139 Mass. 580, 2 N. E. 115, 52 Am. Rep. 733; *Mundle v. Hill Mfg. Co.*, 86 Me. 400, 30 Atl. 16; *Louisville, N. A. & C. R. Co. v. Corps*, 124 Ind. 427, 24 N. E. 1046, 8 L. R. A. 636; *Thomas v. Quartermaine*, 18 Q. B. D. 685. It may, perhaps, be true that the doctrine of assumption of risk, while it is usually applied in actions where the servant seeks to recover damages on account of the dangerous manner in which the business of the master has been carried on, resulting in his injury, and is properly applied wherever the relation of master and servant exists, whether the particular danger has been guarded against by the master in a contract with the servant or not (*Martin v. Chicago, I. R. & P. R. Co.* [Iowa] 91 N. W. 1034), is also applicable where the relation of master and servant does not exist between the person injured and the one whose course of dangerous conduct has occasioned the injury (*Miner v. Connecticut River R. Co.*, 153 Mass. 398, 26 N. E. 994; *Wood v. Locke*, 147 Mass. 604, 18 N. E. 578; 1 Thompson, Neg. [2d Ed.] § 184). Notwithstanding the authorities which we have cited, there seems to be still some doubt about the nature and scope of the doctrine of assumption of risk, as distinguished from the doctrine of contributory negligence. See dissenting opinion of Knowlton, J., in *Davis v. Forbes*, 171 Mass. 548, 51 N. E. 20, 47 L. R. A. 198, note. But at any rate, it is well settled that the mere knowledge of the existence of the custom or condition which is dangerous is not sufficient to throw the risk thereof upon the person having such knowledge, unless he has also appreciated the danger involved. *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155, 29 N. E. 464, 31 Am. St. Rep. 537; *Conley v. American Exp. Co.*, 87 Me. 352, 32 Atl. 965; *Mundle v. Hill Mfg. Co.*, 86 Me. 400, 30 Atl. 16; *Warren v. Boston & M. R. R.*, 163 Mass. 484, 40 N. E. 895; *Illingsworth v. Boston Electric Light Co.*, 161 Mass. 583, 37 N. E. 778, 25 L. R. A. 552; *Mahoney v. Dore*, 155 Mass. 513, 30 N. E. 366; *Thomas v. Quartermaine*, 18 Q. B. D. 685. In the case before us it

Carver v. Minneapolis, etc., R. Co

was found, by an answer of the jury to a special interrogatory, that the usage in regard to throwing mail bags from defendant's train at this station was to so throw them that they should fall on the platform in front of the station house, and not at the north end of the platform, which extended some distance beyond the station house. Assuming, then, that plaintiff knew that the bags were likely to be thrown off while the train was in motion, he was not chargeable with any knowledge of a risk involved in such practice, so far as he was concerned, for it was his custom to stand at the north end of the platform, where he was on this occasion. He did not assume, therefore, any and every danger that might arise from throwing the bags from the car while the train was in motion, and had taken the precaution to place himself in such situation as not to be injured by reason of this practice, and cannot be said to have assumed any risk incident thereto. The idea of counsel seems to be that plaintiff assumed every risk incident to the usage of which he had knowledge, while, conceding everything that can reasonably be claimed for the authorities cited by counsel, the true rule is that plaintiff assumed only such dangers as were reasonably to be apprehended by him to himself in the position which he took as incident to the usage of which he had knowledge. As illustrating this distinction as applicable to a very similar case, see *Muster v. Chicago, M. & St. P. R. Co.*, 61 Wis. 325, 21 N. W. 223, 50 Am. Rep. 141, where it was held that one going to a train to receive the mail to be thrown from the mail car was not precluded from recovering for injuries resulting from being thrown from a platform, the support of which was knocked down by being struck by a mail bag thrown from a moving train, where it appeared that the usage was to throw the bags off some distance from such platform. Under the evidence in this case, therefore, there was no occasion to instruct the jury with reference to assumption of risk, as distinct from contributory negligence, for, giving all the significance which can possibly be attached to it, in connection with the finding of the jury that the bags had never before been thrown off so as to imperil any one at the north end of the platform, there was no possible application for the rule.

We have assumed that in such a case as this there might, under some circumstances, be proper occasion to apply the doctrine of assumption of risk. But we are unwilling to even apparently indorse the recognition of that doctrine as applied to a case where the negligent course of conduct which it is claimed has been assumed and recognized is connected with the discharge of a duty to the general public. We should not be willing to have it thought possible for a municipal corporation, for instance, to escape liability to a person entitled to the use of its streets, by reason of its persistently, notoriously, and intentionally having made those streets dangerous for the use of the public. One who desires to avail

Carver v. Minneapolis, etc., R. Co

himself of a public privilege ought not to be said to have assumed the risk of defective streets in such sense that the city owes him no duty, under the maxim, "*Volenti non fit injuria.*" One who negligently incurs the danger of a defective street may not be entitled to recover for the injury received, but that is not on the theory of assumption of risk, involving no liability on the part of the city, but on the ordinary ground of contributory negligence, which assumes that the city is at fault as to a defect in the street, and defeats the plaintiff seeking to recover for an injury from such defect only on the ground that he also has been guilty of negligence. So in this case the plaintiff, and every other member of the public desiring to transact business or avail himself of the advantages of the service of defendant as a common carrier, and the carrier of mails under contract with the United States government, was entitled to go upon the station platform, and to assume that such platform was a reasonably safe place. Plaintiff was not bound to assume that, because on some previous occasions the defendant had allowed the mail bags to be thrown from its trains in a negligent way, such negligent conduct would be continued, but had a right to assume that it would be discontinued. No doubt, as to a peculiar danger, apparent to him, and which he could reasonably have avoided, he would be guilty of contributory negligence if he failed to use reasonable care in avoiding it. If, in a particular instance, the operation of the train would make a particular place on the platform dangerous, on being notified in any way—either by his own observation, or by advice of the servants of the company—of such danger, he should, if practicable, avoid being at such place and incurring the danger incident thereto; but this is the ordinary doctrine of contributory negligence, and is quite different from the doctrine that, by general notice of a dangerous course of conduct, one who seeks to avail himself of the privileges of the defendant's platform assumes the risk of such course of conduct. Any such rule would make it feasible for a railroad carrier, by posting notices on its platform, "This is a dangerous place," to relieve itself entirely from liability. Such a doctrine would be manifestly unreasonable. Counsel dwell on the thought that plaintiff actively participated in the dangerous course of conduct, by placing himself in position to throw the mail matter which he brought for the train into the open door of the mail car before the train had come to a full stop. But the risk involved in his attempting to do so was not the risk incident to the bags being thrown from the train while in motion. He had no control over that matter, had not been consulted about it, and had no occasion to protest, so long as, without contributory negligence on his part, he was able to secure the mail bags after they had been thrown out; and, as has already been stated, he was not guilty of contributory negligence in being where he was, unless he had reason to anticipate that the

Notes

mail bags would be thrown off so as to strike him at that place. The question of contributory negligence was properly submitted to the jury, and the finding was against the defendant on that issue.

It is further urged, however, in behalf of appellant, that if the course of negligent conduct on the part of the mail agent, as known to the defendant, was to throw off the mail from the moving train at about the middle of the platform, and not at the north end of it, where plaintiff usually stood, then, so far as plaintiff was concerned, the defendant was not responsible for the improper conduct of the mail agent in this instance in throwing the mail so that it would strike plaintiff at the north end of the platform. This idea was embodied in the instructions given by the court, and counsel contend that, under the finding of the jury that the mail bags had never before been thrown off at the north end of the platform, the jury should have found defendant not liable for plaintiff's injuries. But the instruction given, and which is to be treated as the law of the case for the jury, was that if, in the exercise of reasonable care on the part of the railroad company, it could not have anticipated that any accident or injury from the throwing of the mail bags at a point at or near the middle of the platform was likely to occur at the place where plaintiff stood at the time of his alleged injury, then no negligence could be charged against the company. But even if the mail bags had never before been thrown so as to imperil a person at the north end of the platform, nevertheless it was open to the jury to find that, in the exercise of reasonable care on the part of defendant, it could have anticipated an accident as likely to occur at that place from the general practice of throwing the mail bags from the train while in motion. The general practice was negligent; it imperiled the safety of persons on the platform; and we do not think that the jury was bound by the instruction to say that, if the bags had never before been thrown off at the north end of the platform, the usage, if persisted in, was not likely to imperil persons standing at that place. It was the general usage of throwing bags from the train while in motion, and not the usage of throwing them to the middle of the station platform, which constituted the negligence properly complained of.

We find no error in the action of the trial court, and the judgment is affirmed.

NOTES.

NEGLIGENCE OF RAILWAY POSTAL CLERKS—LIABILITIES OF RAILROAD COMPANIES.**General Rule.**

It may be stated as a general rule, unanimously supported by the comparatively few decisions in which this point is involved, that, while it is not primarily liable for the negligence of a mail agent on its train, a railroad company owes the duty of not permitting the continuance of dangerous habits of the agent in delivering heavy packages from the train in such manner as to endanger persons lawfully on its premises.

United States.—*Southern Ry. Co. v. Rhodes*, 86 Fed. 422.

Notes

Illinois.—*St. Louis, etc., R. Co. v. Wagner*, 90 Ill. App. 556 ; *Ohio, etc., R. Co. v. Simms*, 43 Ill. App. 260.

Kentucky.—*Williams v. Louisville & N. R. Co.*, 98 Ky. 247, 32 S. W. 934.

Massachusetts.—*Snow v. Fitchburg R. Co.*, 18 Am. & Eng. R. Cas. 161, 136 Mass. 552, 49 Am. Rep. 40

Michigan.—*Shaw v. Chicago & G. T. Ry. Co. (Mich.)*, 18 Am. & Eng. R. Cas., N. S., 131.

Minnesota.—*Galloway v. Chicago, M. & St. P. R. Co. (Minn.)*, 57 N. W. 1058.

Missouri.—*Sargent v. St. Louis & San Francisco R. Co. (Mo.)*, 58 Am. & Eng. R. Cas. 184.

New York.—*Carpenter v. Boston & A. R. Co.*, 21 Am. & Eng. R. Cas. 331, 97 N. Y. 494, 49 Am. Rep. 540.

Wisconsin.—*Muster v. Chicago, M. & St. P. Ry. Co. (Wis.)*, 18 Am. & Eng. R. Cas. 113.

In *Galloway v. Chicago, M. & St. P. R. Co. (Minn.)*, 57 N. W. 1058, it was held that while a railway company has no right to interfere with a United States mail agent in the discharge of his official duties, yet it has the right, and it is its duty, to prevent him, while on its trains, from continuing any dangerous practice, of which it has notice, which is liable to cause injury to passengers and others lawfully on its premises.

Throwing Mail Bags from Moving Trains.

In *Southern Ry. Co. v. Rhodes*, 86 Fed. 422, it was held that where it is the practice of the post-office employees to throw mail pouches from moving trains onto passenger station platforms, so as to endanger passengers, it is the duty of the railroad company to notify passengers of the danger, and take such further steps as may be necessary to prevent the continuance of the practice ; but this duty does not arise until the railroad company has had notice of such practice, either express, or implied from its long continuance.

A company is liable for an injury to a passenger who is injured while on a platform by a United States mail agent throwing a mail bag against him, where it appears that the company knew of the dangerous habit of throwing out the mail bags on the platform and took no steps to prevent it. So held in *Carpenter v. Boston & A. R. Co.*, 21 Am. & Eng. R. Cas. 331, 97 N. Y. 494, 49 Am. Rep. 540.

In *Williams v. Louisville & N. R. Co.*, 98 Ky. 247, 32 S. W. 934, it is held that railway companies are liable for injuries to persons rightfully on its depot platform, who are struck by a mail pouch thrown from a rapidly moving train. In this case it is said in the opinion : "The rule recognized in several cases is that a railway company which knowingly or habitually suffers mail bags thrown upon its passenger platform from rapidly moving trains is directly and individually liable to a person who may be injured thereby, while on such platform, and sustaining a contractual relation to the company. *Snow v. Railroad Co.*, 136 Mass. 552 ; *Muster v. Railroad Co. (Wis.)*, 18 Am. & Eng. R. Cas. 113. The defendant certainly owes some duty to those who are not passengers, but whose presence at the depot and on the platform is required for the purpose of receiving passengers or friends, or while there in the discharge of business arising between the company and the shipper."

Platform Obstructed by Mail Bags.

In *Sargent v. St. Louis & San Francisco R. Co. (Mo.)*, 58 Am. & Eng. R. Cas. 184, it is held that where mail bags are customarily discharged by postal clerks upon a passenger platform, it is the duty of the company to guard against injuries to passengers by reason of the presence of such mail bags, and this duty extends to every part of the platform.

Liability Depending upon Notice.

In *Muster v. Chicago, M. & St. P. Ry. Co. (Wis.)*, 18 Am. & Eng. R. Cas. 116, it was held that a railroad company is not responsible for the negligent acts of postal clerks or agents upon its trains of which it is not chargeable with notice. In this case it is said in the opinion : "We do not understand counsel as claiming that the railway company

St. Louis, etc., Ry. Co. *v.* Robertson

is liable for the negligent act of the postal employee, if it is otherwise free of negligence contributing to the injury of the plaintiff. Such a claim, if made, could not be sustained. The government compels the company to carry the mails, and designates the trains upon which the same shall be carried. It prescribes the kind of cars which shall be provided, and appoints clerks and agents to take exclusive charge of mails on the trains, and to receive and discharge the same. Such clerks and agents are paid by the government, and are answerable only to the government for the manner in which they shall discharge their duties. The railway companies upon whose trains such duties are performed have no control whatever over them, and it would be just as absurd to hold one of these companies responsible for the negligent acts of such government employees, which it had no means of preventing, as to hold the companies responsible for the negligent acts of passengers on their trains committed under like circumstances. We conclude that the mere act of the postal employee in throwing off the mail bag at the depot, conceding it to have been a negligent act, was not negligence on the part of the railway company."

Unlawful Rate of Speed.

Plaintiff's intestate went upon depot platform to get a paper from the train newsboy, and was hit and killed by the mail agent throwing the sacks from the train, which was running at a high and unlawful rate of speed. It appeared that the defendant company regularly permitted train boys to sell papers from the platform. It was held that the company was liable. *Onio & M. R. Co. v. Simms*, 43 Ill. App. 260.

A. R. Y.

ST. LOUIS, I. M. & S. RY. CO. *v.* ROBERTSON.*(Supreme Courts of Arkansas, Feb. 28, 1903.)*

[72 S. W. Rep. 893.]

Suit by Foreign Guardian—Substitution.

Where the suit is brought for an infant by a foreign guardian, who is not qualified to sue in the state, it is proper to allow an amendment substituting another person as next friend.

Wrongful Death—Accrual in Another State—Enforcement—Public Policy.*

Civ. Code La. art. 2315, provides that the right of action, in case of death, survives in favor of the minor children or widow, and in default of these in favor of the surviving father or mother, and also that the survivors thus mentioned can recover damages sustained by them by the death of the parent or child, or husband or wife, as the case may be. Sand. & H. Dig. § 5908, provides that for wrongs to person or property an action may be brought by the person injured, or, after his death, by his personal representatives. Section 5911 provides that for death by wrongful act the person causing the death shall be liable. Section 5912 authorizes an action for wrongful death by the personal representatives, and, if there be none, by the heirs at law; the amount recovered to be for the benefit of the widow and next of kin: *held*, that the enforcement in Arkansas of a cause of action for wrongful death accruing in Louisiana was not contrary to public policy.

Same—Same—Pleading Foreign Statute.

In suing in Arkansas for a death by wrongful act occurring in Louisiana, it is not necessary to set out the Louisiana statute in *hæc verba*, but it is sufficient to set out its substance and effect.

*See *Nicholas v. Burlington, etc., Ry. Co.* (Minn.), 16 Am. & Eng. R. Cas., N. S., 341, and foot-note.

St. Louis, etc., Ry. Co. v. Robertson

Injury to Employee—Negligence of Vice Principal and Fellow Servant Concurrent.†

When a freight train reached a station in Louisiana at which it should have side-tracked for a passenger train, the conductor was asleep; and the engineer, whose watch was slow, undertook to make the next station. In the collision with the passenger train, which ensued, a fellow servant of the engineer was killed. By the Louisiana law a principal is liable where the negligence of the vice principal contributes with that of a fellow servant to cause the injury: *held*, that the conductor's negligence (he being vice principal) contributed with that of the engineer, so as to charge the company.

Death by Wrongful Act—Element of Damages in Action for Death of Father.

In an action by an infant for damages for the negligent killing of its father, the evidence showed that the father was an honest, hard-working man, who had well provided for the child's care after the mother's death: *held*, that an instruction that the jury, in estimating damages, might consider such care, support, and sustenance, and such advantages, in the way of training and education, as might have been received if the father's death had not occurred, was supported by the evidence.

Appeal from Circuit Court, Saline County; Alexander M. Duffie, Judge.

Action by Anna E. Haisst, by her next friend, T. N. Robertson, against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Dodge & Johnson, for appellant.

Murphy & Mehaffy and Robertson & Martineau, for appellee.

HUGHES, J. In this case, Anna Elizabeth Haisst, a minor, was the real plaintiff, and, by amendment to the complaint by leave of the court, T. N. Robertson was her next friend, who represented and cared for her interest in the suit, which had been brought for her. There was no error in the allowance of the amendment by the substitution of T. N. Robertson as next friend, instead of the foreign guardian, H. E. Burnam. In discussing this question the Supreme Court of the United States, in *Morgan v. Potter*, 157 U. S. 195, 15 Sup. Ct. 590, 39 L. Ed. 670, said: "It is the infant, and not the next friend, who is the real and proper party. The next friend by whom the suit is brought on behalf of the infant is neither technically nor substantially the party, but resembles an attorney or guardian ad litem, by whom the suit is brought or defended in behalf of another." This is the doctrine of the more modern decisions on this question. *Whittem v. State*, 36 Ind. 214; *George v. High*, 85 N. C. 113. Though the suit was brought by a foreign guardian who was not qualified to sue in this state, the court ought not to have dismissed it—the infant being the real and proper plaintiff—but did right in appointing some one as next friend to look

†See *Howe v. Northern Pac. Ry. Co.* (Wash.), 5 R. R. R. 624, 28 Am. & Eng. R. Cas., N. S., 624; *Pool v. Southern Pac. Co.* (Utah), 16 Am. & Eng. R. Cas., N. S., 551, and note, 570.

St. Louis, etc., Ry. Co. v. Robertson

after her interest in the suit who was qualified to sue for her. *Hoskins v. White*, 13 Mont. 70, 32 Pac. 163; *Young v. Young*, 3 N. H. 345; *Johnson v. Blair*, 126 Pa. 426, 17 Atl. 663; *Tate v. Mott*, 96 N. C. 19, 2 S. E. 176.

Did the circuit court have jurisdiction of the subject-matter of this suit? The plaintiff Anna Elizabeth Haisst was a minor, residing in the state of Nebraska, and brought this suit to recover damages alleged to have been caused by the negligence of the defendant in the state of Louisiana, by the killing of William Haisst, her father. That William Haisst, the father, was killed in the state of Louisiana, while acting as fireman on defendant's train, without any negligence upon his part, in a collision between a freight train and a passenger train on defendant's railway about four miles from Howcott, in Rapides parish, is clear from the evidence in the case. That that collision was caused by the negligence of the servant or servants of the defendant on the defendant's train is equally clear from the proof in the case. A right of action therefore accrued to the said Anna Elizabeth Haisst. It was brought in Hot Springs county, Ark. The action is transitory. *Chicago, St. Louis & New Orleans Co. v. Doyle*, 60 Miss. 977. Will the courts of Arkansas enforce such right of action as this, arising in the state of Louisiana, by virtue of her laws? It is not a question whether the laws of Arkansas have any extraterritorial force. Counsel for appellant contend that the acts of Arkansas and the act of Louisiana giving the right of action for the wrongful killing of a human being are so dissimilar that such right accruing under the Louisiana statute cannot be enforced in the courts of Arkansas. But it seems to us quite evident that the two statutes are of similar import. They are founded upon the same principles, are aimed at the same evil, construed the same kind of action, and given for the benefit of the same class of individuals. In both the utter failure of redress at common law, when the injury ended in death, was the injustice for which a remedy was enacted; and in both the new action was given for the benefit of those who had suffered an injury as the consequence of the wrong. This fundamental agreement in the main and substantial characteristics of the two statutes is not affected by the differences of detail which the demurrer points out. *Stoeckman v. Terre Haute & I. R. Co.*, 15 Mo. App. 503; *Wooden v. W. N. Y. & P. R. R. Co.*, 26 N. E. 1050, 13 L. R. A. 461, 22 Am. St. Rep. 803; *Stewart v. B. O. R. Co.*, 168; *St. L. & S. F. Ry. Co. v. Brown*, 62 Ark. 254, 35 S. W. 225. Public policy in this state is not vitiated by the enforcement of the Louisiana statute in our courts.

The laws of Louisiana read as follows:

"Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it. The right of this action survives, in case of death, in favor of the minor children, or widow, of deceased, or either of them, or

St. Louis, etc., Ry. Co. v. Robertson

in default of these, in favor of the surviving father or mother, or either of them, for the space of one year. The survivors above mentioned can also recover the damages sustained by them by the death of the parent or child, or husband or wife, as the case may be." Civ. Code, art. 2315.

The Arkansas statutes (Sand. & H. Dig.) read as follows:

"Sec. 5908. For wrongs done to the person or property of another an action may be maintained against the wrongdoers, and such action may be brought by the person injured, or, after his death, by his executor or administrator against the wrongdoer, or after his death, against his executor or administrator, in the same manner and with like effect in all respects as actions founded on contracts."

"Sec. 5911. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or company or corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony.

"Sec. 5912. Every such action shall be brought by, and in the name of, the personal representatives of such deceased person, and if there be no personal representatives, then the same may be brought by the heirs at law of such deceased person; and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin, in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and, in every such action, the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person. Provided every such action shall be commenced within two years after the death of such person."

Did the complaint state facts sufficient to constitute a cause of action? It was not necessary that it should set out the Louisiana statute in *hæc verba* in pleading the statute. To set out the substance and effect of the statute was sufficient. *Hanley v. Donoghue*, 116 U. S. 1-7, 6 Sup. Ct. 242, 29 L. Ed. 535; *L., N. A. & C. Ry. Co. v. Shires*, 108 Ill. 628; *Stacy v. Baker*, 1 Scam. 418; *Consolidated Tank Line Co. v. Collier*, 148 Ill. 266, 35 N. E. 756, 39 Am. St. Rep. 181.

Is the verdict sustained by the evidence? The conductor, Farrar, was asleep or dozing when his train passed Howcott, where it ought to have been run onto the side track to let the approaching passenger train pass. The engineer of the freight disregarded his duty, and failed to side-track at How-

St. Louis, etc., Ry. Co. v. Robertson

cott. Consulting his watch, which was 50 or 60 minutes slow, he had concluded that he had time enough to reach Antoine, the next station ahead, before the passenger would reach it; and, disregarding his duty, under this mistake as to the time, he ran by Howcott without stopping, and without any signal from the conductor. This was evidently negligence on the part of the engineer, which contributed to the collision between the passenger train and the freight train, which collision caused the death of William Haisst. But William Haisst was a fellow servant with the engineer, and could not recover if the negligence of the engineer alone caused the injury. But did the negligence of the conductor, Farrar, contribute to the collision of the trains, and is the company liable for the combined negligence of the conductor and the engineer? It is held, under the decisions in Louisiana, that, if injury is caused by the combined negligence of a fellow servant and a vice principal on a railroad, the railroad company is liable, and that a conductor personates the company, and is a vice principal. It was the duty of the conductor to see to it that all the employees under him understood and discharged their duties. He and the engineer both had time-tables, and knew when and where to stop. The trains were running on time. He (the conductor) had means of signaling the engineer, and of stopping the train by the brakes; the brakeman being at his command when necessary. He knew or ought to have known when the freight train passed Howcott, and knowing that the passenger was on time, and would soon be at Howcott, and that it was all-important that his train should be side-tracked there to prevent the fatal collision, which occurred a few miles further on, it was his duty to have his train side-tracked at Howcott to await the passing of the passenger. As he was asleep at Howcott, and made no effort to have the freight stop there, it does seem that there can be no question that he was not in the discharge of a plain and very important duty, and that his negligence contributed to the collision which deprived the fireman, William Haisst, of his life; and, being a vice principal, the company is liable.

Was there error of law in the court's instructions to the jury? They are as follows: The court, on plaintiff's request, gave the following instructions: "(1) If you believe from the evidence that Wm. Haisst was in the employ of defendant as fireman on a locomotive drawing one of its freight trains on one of its tracks or lines of railroad in the state of Louisiana on the 7th day of February, 1899; that while in such employ the locomotive or train on which he was serving came into collision with a passenger train of defendant, or an engine drawing it, and that he was thereby killed, or so badly injured that he died in a short time thereafter; (b) that the freight train on which he was serving should have been side-tracked at Howcott, so as to let the passenger pass it, and that, if it had been so side-tracked, the collision would not have

St. Louis, etc., Ry. Co. v. Robertson

occurred; (c) that the conductor knew that Howcott was the proper place to take the side track with his freight train, and let the passenger train pass it, but that he was negligently asleep, dozing, or inattentive when Howcott was reached, and so failed to know when it was reached, and thereby negligently permitted the freight train to go ahead on the main track, and thereby caused the collision; (d) that under the unwritten law of the state of Louisiana, as it is and then was, the conductor of a railroad train in that state represents or personates the railway company, and that the company is liable, under said law, for any damages or injury caused to its other employees on the train by or through such conductor's negligence or inattention in conducting the train; (e) that under and by provision of the statute law of the state of Louisiana, as it is and then was, any person who by any act whatever causes damages to another is bound to repair the damage, and that the right of action therefore survives, in case of death, in favor of the minor children or widow of deceased who survive him, and that such survivors have also the right to recover the damages sustained by them by the death of the deceased; (f) that said William Haisst left no widow, but left the plaintiff Anna Elizabeth Haisst as his only child and heir at law, whose mother was then dead; (g) that he contributed to plaintiff's support, and that plaintiff is a minor and was damaged by his death—you should find for the plaintiff. (2) If from the evidence you find the facts and the law of Louisiana as stated in the foregoing instruction, then it makes no difference whether the injury or death of William Haisst was or was not contributed to by any negligence or mistake of the engineer. (3) If you find for the plaintiff, your verdict should be for such a sum of money as you believe from the evidence would be a just and fair compensation for all the pecuniary injury suffered by her by reason of the injury and death of the said William Haisst, and in arriving at this sum you may take into consideration such care, support, and sustenance, and such advantages and benefits in the way of training and education, both moral and intellectual, if any, as you may believe, from the evidence, she would receive from or through him if his injury and death had not occurred. (4) If you find from the evidence that the conductor of the freight train personated or represented the defendant, as vice principal, under the law of Louisiana, then he was not a fellow servant of the fireman." Defendant excepted separately to the giving of each of paragraphs "a," "b," "c," "d," "e," "f," and "g" of plaintiff's instruction numbered 1. It also objected to the giving of instructions 2, 3, and 4, and, its separate objections being overruled, exceptions were saved. Defendant asked the following instructions, which were given: "(1) The court instructs the jury that the mere fact that the intestate, Haisst, was killed in a collision on defendant's road while he was engaged in his duties as fireman, does

Cratt et ux. v. Albemarle Timber Co

not make the defendant liable to plaintiff in this suit for damages occasioned thereby; but the proof must show further, and show affirmatively, that the collision which caused his death was due to some negligence upon the part of the defendant." "(12) The court instructs the jury that they are not at liberty to take the aggregate of any such amounts for any such years, nor a sum which, at interest, would yield such amounts; but the true measure of damages is the present value of such sum, judged by the number of years that such contributions might be expected to continue, as shown by the proof. (13) The court instructs the jury that, in assessing damages in a case of this kind, they are not assessed by way of penalty or punishment nor of sentiment, nor to compel the defendant to contribute to the support of a minor, but are allowed only upon the basis of such pecuniary loss as the proof shows the party in interest has sustained; and this is to be determined by the rules given you in the previous instructions." We are of the opinion that there is no reversible error in the instructions. Particular objection is urged to the instruction as to the measure of damages—that the jury might take into "consideration such care, support, and sustenance, and such advantages and benefits in the way of training and education, * * * as you may believe, from the evidence, she would receive from or through him if his injury and death had not occurred." It is said there is no evidence in the record to warrant this instruction. It is shown that Wm. Haisst, the deceased, was an honest, hard-working, square man, and a good fellow. This, it seems, would warrant an inference that he would properly provide for his child; being governed by the material inclination of an honest, hard-working, and sober father, which the deceased was shown to be. He had provided for her care and keeping after her mother's death, and it was shown that she was treated by her parents as a child ought to have been treated. As was said in *Railway v. Sweet*, that was enough. "The attributes of such a character being shown in the father, the law would presume them of some value to his children, until the contrary was made to appear." *Ry. v. Madry, McIntyre v. Ry.*, 37 N. Y. 287; 1 Greenleaf on Ev. 33. We think that the evidence shows that the verdict is not excessive.

Finding no reversible error, the judgment is affirmed.

CRATT et ux. v. ALBEMARLE TIMBER CO.

(*Supreme Court of North Carolina, March 17, 1903.*)

[43 S. E. Rep. 597.]

Evidence.

In an action for cutting and removing timber from plaintiff's land, contrary to the terms of a contract providing that defendant should not cut timber less than 12 inches in diameter, testimony by plaintiff

Cratt et ux. v. Albemarle Timber Co

that he saw servants of defendant's contractor cutting and removing such timber is evidence, the sufficiency of which is for the jury.

Fires Set by Locomotives—Combustibles on Right of Way—Absence of Spark Arresters—Evidence.*

In an action for negligent burning of timber by sparks from an engine, evidence that defendant permitted tree tops, which were very inflammable, to remain so near the track as to be easily ignited by sparks and coal, there being no evidence that the engine was furnished with spark arresters, was sufficient to submit the issue of negligence to the jury.

Same—Same—Liability of Company Operating Logging Road.

A company operating a private railroad constructed for logging purposes is liable for fires caused by sparks from its engines igniting combustibles negligently permitted to remain on land necessarily used by it as a right of way, to the same extent as a public railroad company.

Independent Contractors—Question for Jury.

Plaintiff conveyed to defendant for five years the trees growing on a tract of land, and the right to enter the land and construct and operate such railroads on the land as might be necessary to remove the logs cut. Defendant entered into a contract with other parties by which they were to construct and operate the road and cut the timber "in accordance with directions of" defendant. Evidence was introduced showing that defendant's manager took an active part in the direction of the work, and that it was his duty to see that the requirements of the contract were complied with. Defendant listed for taxation all the property used in the construction and operation of the road: *held*, that whether the other parties to the contract were independent contractors or were subject to the control of defendant, was for the jury.

Instructions.

Where defendant did not request the court to make a charge more explicit, it could not raise an objection to the charge as not sufficiently explicit on appeal.

Montgomery, J., dissenting.

Appeal from Superior Court, Martin County; Winston, Judge.

Action by M. G. Cratt and wife against the Albemarle Timber Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

John L. Bridgers, for appellant.

Gilliam & Gilliam, for appellees.

WALKER, J. This action was brought to recover damages for wrongfully cutting and removing timber from the plaintiff's land, and for negligently burning other timber.

It appears that in August, 1895, the plaintiff and the defendant entered into a contract by which, for the consideration therein expressed, the former conveyed to the latter, for the term of five years, the pine and poplar trees standing and growing on a tract of land owned by the plaintiff, and particularly described in the complaint, and also the right and privilege of entering upon the land with its servants and teams, and constructing and operating such "railroads, tram-

*See foot-note appended to *Livermon v. Roanoke & T. R. Co.* (N. Car.), 5 R. R. R. 506, 28 Am. & Eng. R. Cas., N. S., 506.

Cratt et ux. v. Albemarle Timber Co

ways, and roads'' over and upon the said land as may be necessary for said purposes, and providing that the defendant should not cut trees measuring less than 12 inches on the stump, except for the purpose of being used in the construction and operation of the road.

The defendant afterwards entered into a contract with Ward & White, by which the latter agreed to construct the railroad upon said tract of land, and to cut the timber, and to deliver the same at certain designated points on the Wilmington & Weldon Railroad for shipment to Norfolk, and for that service a certain compensation was provided. It was further agreed that the defendant should furnish the rails, spikes, and other fixtures, and the engine and cars to be used in the "logging operations under the contract by Ward & White, the same to remain the property of the timber company." It was further provided that the contractors "will cut, haul, and deliver, so far as may be practicable, and in accordance with directions of the timber company, all the timber on the said land."

The plaintiff alleged that the defendant had cut and removed timber which measured less than 12 inches at the stump, and which was not used in the construction of the road; but the defendant denied the allegation, and contended that there was no evidence to sustain it. The plaintiff, in his own behalf, testified that he saw the hands cutting and removing the timber; and this was some evidence of the fact, the sufficiency of which was for the jury. As to whether the defendant is liable for what the servants of the contractors did, is a question which we will discuss hereafter.

The plaintiff further alleged that, in constructing the road, the contractors had cut down trees and left the tree tops lying within a few feet of the track, where they had become dry and very inflammable, and, by reason of the negligent operation of the engine, live coals or sparks were allowed to escape therefrom and lodge in the tree tops, which were about 12 feet from the rails, and they were thereby ignited, and the fire was carried directly from them to his timber, which was destroyed. The defendant denied that the timber was destroyed by any negligent act on its part, or that there was any evidence of negligence, and specially averred that it was not responsible for what Ward & White did, as they were independent contractors.

We think that there was evidence that the burning was caused by the negligence of Ward & White, for which the defendant is liable in damages. The plaintiff testified that he saw the fire, but could not tell when nor where it started. The witness Rogers testified that he saw the smoke, and went to the place where it was, and saw the fire burning in the tree tops, and that the engine had just passed. As there was no evidence that the engine was furnished with spark arresters, or otherwise properly equipped to prevent the

emission of sparks or the dropping of live coals, and as the treetops, which were very inflammable, were permitted to remain so near the track as to be easily ignited by sparks or coals, we are constrained to hold, upon well-settled principles which have frequently been applied by this court, that there was evidence of negligence which the court properly submitted to the jury. *Aycock v. Railroad*, 89 N. C. 321; *Ellis v. Railroad*, 24 N. C. 138; *Lawton v. Giles*, 90 N. C. 324; *Piggot v. Ry. Co.*, 54 E. C. L. 228; *Ins. Co. v. Railroad* (at this term) 43 S. E. 548.

It is just as well in this connection to discuss the question raised by the fifth exception to the charge. The court instructed the jury "that if the defendant permitted its right of way to become foul with trash and tree tops, and the fire originated in the tree tops, the jury should answer the third issue as to negligence, 'Yes,' and assess the damage under the fourth issue. There is no width of right of way specified, and, in the absence of that specification, a right of way is such width as is needed for the safe and prudent operation of the road." We are unable to find any error in this instruction. When the plaintiff granted to the defendant the right to construct a line of railway across his land for the purpose of removing the timber to be cut therefrom under the contract, this grant impliedly carried with it, as a necessary incident, the right to have and use a right of way of such width as was reasonably sufficient for the construction and safe operation of the road. This must needs be so, for otherwise the grant would be practically useless. In the case of *Waters v. Lumber Co.*, 115 N. C. 654, 20 S. E. 718, this court says: "In the light of the meager statement before us, we must hold that the court erred in instructing the jury that the plaintiff (the land owner) was entitled to compensatory damages for the injury done to the land in cutting and removing so much timber as it was reasonably necessary to remove in order to construct a way for the passage of lumber trains. Whether a way 21 feet wide was necessary for the purpose was a question for the jury under proper instructions. Construing the contract as we do, we conclude that, with the right to build a road sufficient for the passage of trains, the plaintiff by necessary implication agreed to surrender his claim to such damage to his land as might be incident to the skillful construction of what he had empowered Simmons to build. The same implication must grow out of the right to build a private railway as is held to arise in the case of a grant or condemnation for the use of a common carrier." Citing *Adams v. Railroad*, 110 N. C. 325, 14 S. E. 857, and *Fleming v. Railroad*, 115 N. C. 676, 20 S. E. 714.

The instruction given by the court in this case conformed strictly with the principle laid down in the case just cited, and the jury have found upon evidence, sufficient in law for

Cratt et ux. v. Albemarle Timber Co

that purpose, that the fire originated on the right of way, and was caused by the dropping of coals or sparks from the engine of the defendant, which was at the time being operated by the contractors, the coals or sparks having lodged in the tree tops or combustible matter on the right of way and ignited it, and that the fire was thereby carried directly to the plaintiff's timber. *Aycock v. Railroad*, supra.

It is contended that the liability of an individual or a private corporation owning a railroad, like the one described in this case, for setting fires is not the same as that of a quasi public corporation having the right to condemn land and to construct a railroad with a right of way of a certain width, and owing certain well-defined duties and obligations to the public. We are unable to perceive any difference in principle between them. The mere fact that the defendant has no chartered rights to build a railroad and to use locomotives and other dangerous machinery and appliances is surely no good reason for making a distinction in this respect in its favor. If any thing, it has been said, that fact rather makes against the defendant. "Where a company is not authorized by its charter to use locomotive engines it uses them at its peril, and is liable for fires caused by the emission of sparks, irrespective of negligence, and although it has taken all reasonable precaution to prevent injury." 13 Am. & Eng. Enc. 414; Wharton on Negligence, § 868; *Kendrick v. Towles*, 60 Mich. 363, 27 N. W. 567, 1 Am. St. Rep. 526; *Hilliard v. Thurston*, 9 Ont. App. 514. It is not necessary, though, that we should adopt and apply so rigid a rule. It is quite sufficient for the purposes of this appeal to say that the rule applicable to railroad corporations, which makes them liable for fires negligently caused by igniting combustible material on the right of way, has been applied to private railroads constructed for logging purposes (*Kendricks v. Towles*, supra), and private steamboat companies (*Hilliard v. Thurston*, supra). It seems to us that the rule applicable in such cases is the one which governs in the case of the owners of private property, for surely such companies cannot claim greater exemption than private landowners. The rule of the common law is that you must so use your own property as not to injure your neighbor's. In *Garrett v. Freeman*, 50 N. C. 78, it was held to be the duty of an individual using fire on his own premises to first remove such combustible matter as he could reasonably see would conduct it to another's fence, and the defendant was held liable in that case, of course, for failing to perform this plain duty to his neighbor. 13 Am. & Eng. Enc. (2d Ed.) 454, 463; *Higgins v. Dewey*, 107 Mass. 494, 9 Am. Rep. 63.

It must be true that in respect to the plaintiff, from whom the right to enter upon the land and construct the railroad was acquired, the defendant owed the duty so to exercise the right and use the privilege granted as not unnecessarily to

Cratt et ux. v. Albemarle Timber Co

injure his property. We have held that the defendant was entitled to a right of way of sufficient width to enable it to build and safely operate the road, but, if there was no right of way outside of the strip of land upon which the cross-ties and rails were laid, we incline to the opinion that the defendant would still be liable, if, in constructing the road or clearing a way for it, the trees were cut down and the tops left in close proximity to the track, where they would be liable to be ignited by sparks or coals falling from the engine, as the defendant certainly had the implied right to remove this combustible material when the road was complete, and the failure to do so was negligence. But it is not necessary to pass upon this question, and it is left open for decision if it should hereafter be presented.

In any view of the matter, it seems that the case was correctly submitted to the jury by the court upon the question of negligence.

Our attention has been called to the case of *Simpson v. Lumber Co.*, 131 N. C. 518, 42 S. E. 939, which now stands for rehearing in this court, and, having examined and considered it most carefully, we must decline to be governed by it in this case. The conclusion reached in that case is not in accordance with the well-settled rules of law, as we understand them, and, so far as it is in conflict with the principles herein declared, it is overruled.

It is further insisted that, if there was negligence which proximately caused the burning of the plaintiff's timber, it was not that of the defendant, but of Ward & White, who were independent contractors, and we will now consider this contention.

Where the contract is for something that may lawfully be done, and is proper in its terms, and there has been no negligence in selecting a suitable person to contract with in respect to it, and no general control is reserved either in respect to the manner of doing the work or the agents to be employed in doing it, and the person for whom the work is to be done is interested only in the ultimate result of the work, and not in the several steps as it progresses, the latter is not liable to third persons for the negligence of the contractor as his master. *Cooley on Torts* (2d Ed.) § 548, p. 646. The principle as thus stated, and which we believe to be the correct one, has been approved and applied by this court in *Waters v. Lumber Co.*, 115 N. C. 652, 20 S. E. 718. We are of the opinion that there was evidence sufficient to go to the jury to the effect that the defendant did reserve control over Ward & White, with whom the contract for the construction of the road and the cutting of the timber was made. The evidence tended to show that the defendant, through Jenkins, its manager, took an active part in the prosecution of the work, and that Jenkins was frequently in the woods looking after the business of cutting the timber and hauling it to the railroad

Peters v. Southern Ry. Co

station. The property of the defendant, such as engines, rails, spikes, and other things, was used by the timber company, and the contract provided that the cutting should be done under the direction of the defendant, and it was stated by one of the defendant's witnesses that Jenkins' duty was to look after the logging and to see that Ward & White did the cutting and logging in accordance with the requirements of the contract. It further appears that the defendant listed for taxation all of the property used in the construction of the road and in its operation. There was other testimony with reference to the acts and conduct of Jenkins, which, with that we have already mentioned, furnished sufficient evidence to be considered by the jury upon the question of the defendant's reserved control over Ward & White, and the matter was fairly and correctly explained to the jury in the charge.

The defendant further complains that the instructions were not clear and explicit in regard to the relation sustained by Ward & White towards it. We do not agree with the defendant, but, if it is correct, it had the right to request the court to make the charge more explicit, and, in failing to do so, it has waived any objection to the charge on that ground. *Kendrick v. Dellinger*, 117 N. C. 490, 23 S. E. 438.

Judgment affirmed.

MONTGOMERY, J., dissenting.

CONNOR, J., did not sit on the hearing of this case.

PETERS v. SOUTHERN RY. CO.

(Supreme Court of Alabama, Jan. 15, 1903.)

[33 So. Rep. 332.]

Wantonness—Speed of Train through Suburbs.

The running of a train at a speed of 50 miles an hour through the outskirts of a city is not of itself evidence of wantonness.

Same—Same—Lookouts—Injury to Person Using Footpath across Track.

In an action against a railroad company for injuries sustained by plaintiff while he was following a footpath over defendant's tracks in a village, it appeared that the train was running 50 miles an hour; that at the time of the accident the engineer was looking backward, and there was no evidence that he knew of plaintiff's danger, or of the use of the path: *held*, that there was no evidence of wantonness.

Directing Verdict.

The affirmative charge is not to be given where there is any material conflict in the evidence, or it authorizes a reasonable inference of facts unfavorable to recovery by the one asking it.

Railroads in Streets—Signals.

It is negligence for a railroad company to run a train within the limits of a city or town without the ringing of a bell or blowing a whistle at short intervals, as required by Code, § 3440.

Contributory Negligence.

In an action against a railroad company for injuries sustained by plaintiff by being struck by a locomotive while crossing the tracks, evidence held to show plaintiff guilty of contributory negligence.

Peters v. Southern Ry. Co

Appeal from circuit court, Jefferson county; A. A. Coleman, Judge.

Action by Joseph A. Peters against the Southern Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Bowman & Harsh, for appellant.

Smith & Weatherly and John London, for appellee.

DOWDELL, J. This is an action to recover damages for personal injuries received by the plaintiff, appellant here, from being run against and struck by defendant's locomotive. The complaint contained three counts; the first charging wanton or willful injury, and the second and third alleging simple negligence. In the second count the place of the accident is alleged to have been "at or near Gate City," and while plaintiff was crossing defendant's track, without averring that Gate City was a city, town, or village. In the third count the place of the accident is alleged to have been in a "certain village, town, or city known as 'Gate City'"; and in this count it is also averred that the engineer or other person having control of said locomotive "negligently failed to blow the whistle or ring the bell at short intervals on entering into or while moving within or passing through said village, town, or city, and as a proximate consequence thereof said engine or train ran upon or against plaintiff while plaintiff was engaged in or about crossing said railway in said city, town, or village, and plaintiff suffered," etc. The pleas of the defendant were not guilty to all of the counts, and to the second and third contributory negligence. On these issues the case was tried, and upon the conclusion of the evidence, at the request of the defendant in writing, the court gave the general charge to find for the defendant, and verdict and judgment were accordingly rendered. No questions are presented on the pleadings, the only error assigned being the giving of the general charge.

On the trial the only evidence adduced was that of the plaintiff and his witnesses, the defendant offering none. The evidence, without conflict, shows: That the plaintiff walked on the track of the defendant at a private footpath in the outskirts of Gate City, a town or village of about 1,200 or 1,500 population, and before he got out of the way of an approaching passenger train, was struck by the head block of the locomotive, and injured. That the path led across defendant's track to the Reed House, on the south side, where plaintiff lodged. That besides this house there were two other houses on that side, about 75 or 100 yards apart. There is neither averment nor proof as to the extent of the use of the path, or to numbers or frequency of persons crossing; nor any averment or proof as to knowledge on the part of defendant's engineer or other person in control of and operating the locomotive of the use of the foot way or path.

Peters v. Southern Ry. Co

That the train which struck the plaintiff was running at the rate of 45 or 50 miles an hour. There is no pretense that the act of running against and injuring the plaintiff was willful. On the contrary, the plaintiff's undisputed evidence showed that the engineer was at the time looking back in an opposite direction, and therefore did not see or know of plaintiff's presence on the track in front of the locomotive. And under the undisputed facts we are unable to see how it can be said that the injury was wantonly inflicted, unless it can be affirmed as matter of law that the speed of 50 miles an hour was of itself evidence of wantonness; and this, of course, cannot be stated as the law. It has been repeatedly held, before one can be convicted of wantonness the facts must show that he was conscious of his conduct, and conscious, from his knowledge of existing conditions, that injury would likely or probably result from his conduct, and that with reckless indifference to consequences he consciously and intentionally did some wrongful act, or omitted some known duty, which produced the injury. *Railroad Co. v. Martin*, 117 Ala. 367, 23 South. 231; *Burson v. Railroad Co.*, 116 Ala. 198, 22 South. 457; *Electric Co. v. Bowers*, 110 Ala. 328, 20 South. 345; *Railroad Co. v. Hall*, 105 Ala. 599, 17 South. 176; *Pipe Works v. Dickey*, 93 Ala. 418, 9 South. 720; and other cases might be cited. There was no evidence of knowledge on the part of defendant's engineer, or, as for that matter, of any other person on the locomotive, of plaintiff's peril, or presence on the track, or knowledge of existing conditions at the time and place of the accident that injury would likely or probably result to the plaintiff, or any one else, from the speed at which the train was being run. The general charge for the defendant under the first count we think was properly given.

The next consideration is whether the general charge should have been given on the second and third counts, which counted on simple negligence, and on the issue of contributory negligence, raised by the plea to those counts. The determination of this question is not wholly free from difficulty. We have held the rule to be that "the affirmative charge should never be given when there is any material conflict in the evidence, or when there is evidence which authorizes a reasonable inference of facts unfavorable to a right of recovery by the party asking the charge." *White v. Farris*, 124 Ala. 470, 27 South. 263. There was evidence tending to show that the train was being run within the limits of a city, town, or village without the ringing of the bell or blowing the whistle at short intervals, as required by the statute. Code, § 3440. This was negligence on the part of defendant's employees, and for any injury resulting to the plaintiff as a proximate consequence of such negligence the defendant would be liable, unless the plaintiff was himself guilty of negligence which contributed proximately to his hurt. And this brings us to a consideration of the main question in the case, and that is

Peters v. Southern Ry. Co

whether the facts show without material conflict that the plaintiff was guilty of contributory negligence. The facts without dispute show that the plaintiff was injured while in the act of crossing the defendant's track along a private footpath which led across said track. While the plaintiff had the right to cross the track without becoming a trespasser in so doing, yet this right was one to be exercised with due care. It must be conceded that if, in the exercise of this right in crossing, he had failed to stop, look, and listen for an approaching train, he would have been guilty of negligence in such failure, and for any injury received as a proximate consequence thereof there could be no recovery of damages, except for wanton or willful misconduct on the part of the defendant or its agent. It is equally clear, as a proposition of law, that any other want of due care in the exercise of the right in crossing the track would constitute negligence, and for any injury resulting as a proximate consequence there could be no recovery. Does the evidence show an exercise of due care by the plaintiff, or rather, does it not show without material conflict that there was a failure to exercise due care? The plaintiff, testifying in his own behalf, swore that he, in company with one Hendricks, was walking along the footpath that led to and across defendant's tracks, and that when they came to the crossing of the railroad they stopped near the tracks, and engaged in conversation, waiting for a freight train on a parallel track, and beyond the track next to and upon which plaintiff was hurt in his effort to cross, which was going east, to pass; that as soon as the freight train had cleared the way by about a car and a half or two car lengths plaintiff proceeded to within eight or ten inches of the rails of defendant's track, and there he again stopped to look and listen before entering upon the track, and that he looked first to the east up the track, and then to the west down the track, and, neither seeing nor hearing an approaching train, he proceeded to cross; that he had taken two steps, and was midway between the rails, when his companion, Hendricks, who was behind him, halloed to him to look out; that he looked, and saw an approaching train coming from the east and going west, and that it was right on him, and within 25 feet of him; that as soon as he saw it he turned back, and did all he possibly could to get off the track and save himself; that he cleared the rails, but was struck by the head block of the engine. Hendricks, testifying in behalf of the plaintiff, swore that when he saw the approaching train and halloed to the plaintiff to look out it was then 150 feet away. Another witness for the plaintiff testified to the same effect. The approaching train came around a curve in a cut, and the undisputed facts show that from where plaintiff testified that he stopped to look and listen to the end of the curve next to him, in the direction from which the train was coming, the distance was 260 feet, and that it was in the daytime, about 1 o'clock in the afternoon,

Peters v. Southern Ry. Co

and no obstruction to prevent plaintiff from seeing the train for that distance. The plaintiff also testified that at the time his sight and hearing were both good. The testimony of all of the witnesses put the speed of the train at from 45 to 50 miles an hour. The distance between the rails of the track was 4 feet and 8 inches. Taking the greatest speed at which the evidence showed the train was running,—50 miles an hour,—it requires only a simple mathematical calculation to show the time required for the train to cover the intervening space of 260 feet. It required a fraction over $3\frac{1}{2}$ seconds, and in which time one walking at the ordinary gait of 3 miles an hour would have gone the distance of 16 feet, which would have placed him at least 9 feet beyond the track, estimating the width between the rails at 4 feet and 8 inches, and including the 10 inches,—that being the distance from the rail at which the plaintiff stopped to look and listen before proceeding to cross,—making a distance of $5\frac{1}{2}$ feet. This would have put the plaintiff on safe ground. And in the same time that it required the train to cover the intervening space of 260 feet, one walking at a gait of 2 miles an hour, would have gone 9 feet, which would have cleared the track by 3 feet and 6 inches and saved him from collision; and any slower pace than 2 miles an hour would not have been the exercise of due care in crossing a railroad where an approaching train around a curve could not be seen a greater distance than 260 feet, in this day of rapid transit by the use of steam power. The plaintiff says, when he looked up the track the train was not in sight. Then, under the admitted facts as to measurement of the distance, the oncoming train must have been even more than 260 feet away. In the face of these undisputed facts as to speed and distances, can it be said that the mere statement of the plaintiff in evidence, however conscientiously made, that he stopped, looked, and listened before entering upon the track, that he neither saw nor heard a train approaching, that as soon as he saw it coming he turned back, and did all he possibly could to save himself, raises up a material conflict in the evidence as to his failure in the exercise of due care and prudence in his effort to cross? We think not. To have stopped, loitered, or lingered upon the track in crossing it, or to have walked with indifferent leisure in crossing, would have been a want of due care, and consequently negligence. When facts are admitted which conclusively establish another fact, the mere denial by a witness of the existence of the fact so established does not and should not create that material conflict in evidence which would require a submission of the issue to the jury. In the case of *Artz v. Railroad Co.*, 34 Iowa, 154, 159, in discussing the question before us, it was there said: "But it is urged by the appellee's counsel that the plaintiff testifies that he did both look and listen to see and hear the train, but did not; and that this testimony shows that he was not guilty of contributory

Central of Georgia Ry. Co. v. Main

negligence, or that, at the very least, it made that a question of fact for the jury. The difficulty, however, with the position is that, the conceded or undisputed facts being true, this testimony cannot, in the very nature of things, be also true. It constitutes, therefore, no conflict. Suppose the fact is conceded that the sun was shining bright and clear at a specified time, and a witness having good eyes should testify that at the time he looked he did not see it shine; could this testimony be true? The witness may have been told that it was necessary to prove in the case that he did look, and did not see the sun shine. He may have thought of it with a desire that it should have been so. He may have made himself first believe it was so, and this belief may have ripened into a conviction of its verity; and, possibly, he even may testify to it in the self-consciousness of integrity. But, after all, in the very nature of things, it cannot be true, and hence cannot, in the law, form any basis for a conflict upon which to rest a verdict. A man may possibly think he sees an object, which has no existence in fact, but which it may be difficult, if not impossible, to prove did not exist, or was not seen. But, an object and power of sight being conceded, the one may not negative the other." The following cases are to the same effect: *Marland v. Railroad Co.* (Pa. Sup.) 16 Atl. 623; *Myers v. Railroad Co.* (Pa. Sup.) 24 Atl. 747; *Payne v. Railroad Co.*, 38 S. W. 308, 136 Mo. 562; *Railroad Co. v. Pounds*, 27 C. C. A. 112, 82 Fed. 217. While the precise question before us has not been decided by this court, the principle involved has been tacitly recognized and applied in a number of cases, among which are the recent cases of *Railroad Co. v. Fennell*, 111 Ala. 356, 21 South. 324, and *Railway Co. v. Foshee*, 125 Ala. 199, 27 South. 1026. Our conclusion is that the trial court committed no error in the giving of the affirmative charge as requested in writing by the defendant.

There being no error shown in the record, the judgment of the circuit court will be affirmed.

CENTRAL OF GEORGIA RY. CO. v. MAIN.

(*Supreme Court of Alabama, Jan. 20, 1903.*)

[33 So. Rep. 480.]

Railroads—Killing Animals—Action—Market Value—Evidence.

In an action for the alleged negligent killing of a mule by a train, it was proper not to permit defendant, on cross-examination of plaintiff, to ask him how much he paid for the mule, three months before the accident, at a place 24 miles from the accident; such price not being a fact on which any reasonable inference as to the market value of the mule, at the time and place it was killed, could be based.

Appeal from circuit court, Bullock County; A. A. Evans, Judge.

Wabash R. Co. v. Ordelheide

Action by W. C. Main against the Central of Georgia Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

G. L. Comer, for appellant.

T. S. Frazer, for appellee.

TYSON, J. The single assignment of error is predicated upon the refusal of the trial court, upon objection, to permit defendant on cross-examination, to ask plaintiff how much he paid for the mule some three months prior to its being killed by one of defendant's locomotives. The purpose of the inquiry, it is fairly inferable, was to show the market value of the mule at the time and place it was killed; the place being some 24 miles distant from where the plaintiff purchased it. The price paid by plaintiff was not a fact on which any reasonable inference as to the market value of the mule, at the time and place it was killed, could be based. *Roden v. Brown*, 103 Ala. 324, 15 South. 598; *Railroad Co. v. Moore*, 109 Ala. 393, 19 South. 804; *Clothing Co. v. Lischkoff*, 109 Ala. 136, 19 South. 436.

Affirmed.

WABASH R. CO. v. ORDELHEIDE.

(Supreme Court of Missouri, March 4, 1903.)

[72 S. W. Rep. 684.]

Fires Set by Locomotives—Contract to Hold Harmless—Constitutional Law.

A contract by which a railroad company allows one to erect a warehouse on its right of way, he to hold it harmless from damage by fire therein, is not unconstitutional.

Same—Liability in Absence of Negligence.

Rev. St. 1899, § 1111, providing a railroad company shall be responsible for damage to one whose property is destroyed by fire communicated by locomotives in use on its road, renders it liable, regardless of negligence.

Same—Contract to Hold Harmless—Public Policy.

A contract by a railroad company to relieve itself from liability for fire in a building, communicated thereto by its negligence, is not against public policy, not being with a passenger or shipper with regard to a contract of carriage.

Jurisdiction.

The probate court, under Rev. St. 1899, § 192, has jurisdiction of a demand for money due under a contract by testator to hold plaintiff harmless from damage by fire.

In banc. Appeal from Circuit Court, Warren county; E. M. Hughes, Judge.

Suit by the Wabash Railroad Company against Alvina Ordelheide, executrix. Judgment for plaintiff. Defendant appeals. Affirmed.

This is a demand presented to the probate court for allow-

ance against the estate of defendant's testator. The claim grows out of the following circumstances: Plaintiff railroad company, in 1892, leased to the testator, Ordelheide, in his lifetime, a portion of the land embraced in its right of way in its switch limits at its station at Wright City on which to erect an elevator and warehouse in which to carry on a business for his own use and benefit. Among other provisions in the lease was the following: "Witnesseth, that the party of the first part (the railroad company) for and in consideration of the sum of one dollar per annum, in advance to said party of the first part paid by said second party and upon the express condition and stipulation that said second party shall assume all risk of fire from every cause, and shall hold and keep harmless said first party from any and all damage whatsoever, from fire or any other cause to any building or buildings that may be erected on the land herein leased or their appurtenances or contents, which guarantee enters into and forms part of the consideration that induces said first party to make this lease," etc. The lessee erected his warehouse and elevator as contemplated in the lease, and business was conducted therein until April 6, 1895, when the building and its contents were destroyed by fire communicated by a passing locomotive on plaintiff's railroad. There was in the building when it was destroyed an iron safe, of the value of \$400, which was destroyed in the fire, and which belonged to a firm under the name of Ordelheide & Kamp, of which defendant's testator was a member. There was also property stored in the building belonging to the firm of Strack & Astroth, of the value of \$820.25, which was likewise destroyed. Those two firms sued the railroad company for these losses, and recovered judgments, Ordelheide & Kamp, for \$400, and Strack & Astroth for \$820.25. The railroad company defended the suits, and when judgments were rendered against it in the circuit court appealed to the St. Louis Court of Appeals, but both judgments were affirmed in that court. The plaintiffs in both those suits alleged for their causes of action, respectively, that the fire which destroyed the building was communicated by sparks which the railroad company negligently suffered to escape from a locomotive on its railroad. Pending this litigation Ordelheide died, and the defendant in this case qualified as executrix of his will. After those judgments were affirmed in the Court of Appeals the railroad company paid them both in full, and then presented its claim for indemnity under the clause in the lease above quoted against the estate of Ordelheide, deceased. That is what this suit is about. The probate court allowed the claims, and placed them in the fifth class. The executrix appealed to the circuit court, where trial was had, and judgment was rendered for plaintiff for \$1,230.25, from which judgment the executrix appealed to the St. Louis Court of Appeals, and the cause was afterwards transferred to this court in obedience to a writ of mandamus,

Wabash R. Co. v. Ordelheide

for the reason that a constitutional question was raised by the defendant's answer in the circuit court.

L. J. Dryden, H. W. Johnson, and C. W. Wilson, for appellant.

Geo. S. Grover, for respondent.

VALLIANT, J. (after stating the facts). 1. The answer sets up that the contract sued on is in violation of several provisions of our state constitution, which are specified in appellant's brief as follows: That the railroad company, by attempting to avoid liability for its own negligence, violates section 14, art. 12, which declares railroads to be public highways and railroad companies common carriers. That, the purport of the contract being to convert the right of way into a place for private business, it is in violation of section 20 of the Bill of Rights, which declares that private property should not be taken for private use. That it violates section 7, art. 12, which forbids a corporation to engage in any business not authorized by its charter. That it violates section 5, art. 12, in that it attempts to abridge the police powers of the state. As the learned counsel for appellant have merely stated these propositions in their brief, and have not fortified them by any argument, we presume that they have concluded that there is no force in them. Without, therefore, entering into a discussion to which we are not invited by the brief of appellant, we will only say that we do not perceive any infringement of the constitution in the contract sued on.

2. The defense in this case, according to the brief of appellant, really rests on two grounds, viz.: First, that the contract sued on was only intended to indemnify the plaintiff for damages that it might sustain in having to pay fire losses under the requirements of section 1111, Rev. St. 1899; and, second, that if it is construed to cover damages plaintiff is required to pay for fire losses caused by its own negligence, it is against public policy, and therefore void.

It would be no defense to this action if appellant's first point should be conceded. Section 1111, Rev. St. 1899, is as follows: "Each railroad corporation owning or operating a railroad in this state shall be responsible in damages to every person and corporation whose property may be injured or destroyed by fire communicated directly or indirectly by locomotive engines in use upon the railroad owned or operated by such railroad corporation, and each such railroad corporation shall have an insurable interest in the property upon the route of the railroad owned or operated by it, and may procure insurance thereon in its own behalf for its protection against such damages."

That statute renders the railroad company liable when property is destroyed by fire communicated from a locomotive in operation on its road, regardless of negligence. Where the action against the railroad company is based on the fact that

Wabash R. Co. v. Ordelheide

the loss occurred by fire communicated by an engine in operation on the railroad, an allegation in the petition that the fire escaped because the engine was defective, or because the servants of the company in charge of it were negligent, is mere surplusage, and tenders no triable issue. A judgment against a defendant on such a petition is not an adjudication that the defendant was guilty of negligence, but that the plaintiff's property was destroyed by fire communicated by a locomotive on defendant's road. The statute makes the railroad company an insurer of the property along its line against loss by fire so communicated, and as if in compensation to the railroad for this compulsory liability the law gives it an insurable interest to that extent in all the property along its line. The law of negligence has nothing to do with a case under that statute. What the law has made immaterial, a party cannot, by inserting it in his pleading, make material. Under the contract sued on the defendant's testator insured the plaintiff against the loss it might sustain on account of fire in that building. The statute gave the plaintiff an insurable interest in the building and the property in it, to the extent of the plaintiff's liability under the statute, the loss was established in the most conclusive manner, and the plaintiff is entitled to recover.

But if we should admit the question of negligence as an issue in the case the defense has no foundation on that fact. When we say that the law will not permit a common carrier to make a contract to relieve itself from liability for its own negligence, we mean that it will not be allowed to do so in contravention of its duty as a common carrier. As between the shipper or the passenger on the one side, and the common carrier on the other, the latter is liable for its acts of negligence, anything in the contract for transportation to the contrary notwithstanding. But that rule of law, founded as it is on public policy, does not prevent a corporation engaged in the business of a common carrier from taking insurance to indemnify itself against damages it may be required to pay a shipper or a passenger an account of the negligence of its servants.

This very point has been so recently decided by this court that it is unnecessary now to do more than refer to that decision. *R. R. Co. v. Southern Ry. News Co.*, 151 Mo. 373, 52 S. W. 205, 45 L. R. A. 380, 74 Am. St. Rep. 545. In that case the plaintiff railroad company had taken a contract from the defendant news company for indemnity against damages the plaintiff might have to pay for injury through negligence of its servants to an agent of the news company traveling on the railroad. The same defense was urged there as here—that the contract was against public policy—but this court, per Brace, J., after holding that the news agent was a passenger, said: "But the contract in question is not with a passenger; it is not with a person to whom the company owed

Illinois Cent. R. Co. v. Scheible

a duty as a common carrier of passengers; nor does it in terms, as it could not in effect, attempt to relieve the railroad company from any of its duties or liabilities as such. The contract is simply one of indemnity, by which the news company agreed, for a valuable consideration, to indemnify the railroad company against loss which the latter might sustain by reason of the duty it would incur to the news agent as a common carrier of passengers, in carrying out the contract." Then follows a review of the latest and best authorities on the subject, sustaining that view of the law, and showing that it applies not only to such contracts affecting property in the hands of a railroad company for transportation, but passengers also. Therefore, if it should be conceded that the contract with the defendant's testator was one to indemnify the plaintiff against loss for having to pay damages because of the negligence of its servants in running its trains, still it is a valid contract, and the plaintiff is entitled to recover.

3. It is averred in the answer that the probate court did not have jurisdiction of this case. As there is no argument made on that point in the brief for appellant, we do not understand the ground on which the plea is founded. The claim is a plain demand for money due the plaintiff under a contract made by the testator in his lifetime. There is no doubt of the jurisdiction of the probate court in such case. Section 192, Rev. St. 1899.

4. It is stated in the briefs on both sides that there was a suit brought by Ordelheide in his lifetime against the railroad company for damages for the destruction of the building by fire, and that that suit is now pending in this court on appeal, having been transferred here from the Court of Appeals. The judgment that may be rendered in that case, however, can have no influence in this case. It is a different cause of action; and although it is between the same parties, yet it involves a different subject-matter, and the issues are not the same. Any discussion of that case would be out of place at this time.

There is no error in the record before us, and the judgment is affirmed. All concur.

ILLINOIS CENT. R. CO. v. SCHEIBLE.

(*Court of Appeals of Kentucky, Feb. 3, 1903.*)

[72 S. W. Rep. 325.]

Fire Set by Locomotive—Evidence—Other Fires.*

In an action against a railroad company for damages by a fire set by its engines, evidence that the company's engines, shortly before and during the time of the injuries, emitted large quantities of sparks and started many fires in the vicinity of plaintiff's property, and that cinders covered the ground along the track and out beyond the right of way in the vicinity of the premises, is admissible,

*See note appended to *Texas & P. Ry. Co. v. Rutherford* (Tex.), 3 R. R. R. 334, 26 Am. & Eng. R. Cas., N. S., 334.

Illinois Cent. R. Co. *v.* Scheible

though the railroad company's servants testified that the engines causing the fire were equipped with suitable appliances, in proper condition.

Same—Condition of Engines—Question for Jury.

In an action against a railroad company for damages by fire set by its engines, it is a question for the jury how the engines were operated, and whether the spark arresters were in proper condition at the time of the fire, though two of the company's witnesses testified—the one, that he examined the engines on their arrival at the terminus the night of the fire; the other, that he examined them before they left on their run that morning; and both, that the engines were properly equipped and in proper condition to prevent fire.

Appeal from circuit court, Hardin county.

“Not to be officially reported.”

Action by G. C. Scheible against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. F. Marriott, J. M. Dickinson, and Pirtle & Trabue, for appellant.

L. A. Faurest, for appellee.

NUNN, J. This appeal is from a judgment of the Hardin circuit court for \$400, in favor of appellee against appellant, for the loss of rails, posts, fruit trees, and timber trees. It was alleged by the appellee that this loss was occasioned by five different fires started by defendant's engines; all of the fires having occurred between April 8, 1901, and August 21, 1901. The appellant admits four of the fires—the small ones—doing damage to the extent of \$67.43. Appellant states that no report of the fires was made at the time, and it was unable to ascertain the engines from which the sparks were emitted, and for that reason could introduce no evidence as to the condition of the engines. But appellant claims that the fire which caused the only considerable damage occurred on April 9, 1901, and was caused by one or the other of two engines, No. 4 or 363, and that it was conclusively shown that at that time said engines were furnished with the most perfect screens and spark arresters, and that they were in perfect order; and appellant further claims that the lower court erred to its prejudice in permitting appellee to prove by many witnesses that appellant's engines, shortly before and during the time he claimed to have sustained the losses, emitted large quantities of sparks and cinders and started and caused many fires along its road on and in the vicinity of appellee's farm, and that cinders from the size of a pea to the size of a man's thumb cover the ground along the track, and out beyond appellant's right of way, on and in the vicinity of appellee's farm; and he cites two authorities to support his contention. One is the case of *N. N. & M. V. R. R. Co. v. Terry*, 16 Ky. Law Rep. 316, which is not reported in full, and is an opinion by the superior court, and which seems to support appellant's contention. The other is the case of *L. & N. R. R. Co. v. Dalton* (Ky.) 43 S. W. 431—opinion by Judge Haselrigg. As

Illinois Cent. R. Co. v. Scheible

we understand this opinion, it is against appellant's position. The court in that opinion used this language: "Before liability can be fastened on the company for want of proper screens on its engines, or because of their defective condition, there must be some evidence to show such want or defective condition—such as that an unusual quantity of live sparks were being emitted while the train was going at an ordinary rate of speed, or the same engine started several successive fires on the same trip, or the like. In the case before us there is no evidence or circumstances of this character to rebut the testimony of a number of witnesses for the company who testified as to the perfect condition of the appliances after a thorough examination immediately after the fire." In this case the evidence of the witness Hart shows that one of these engines started a fire on the same day, very near the fire complained of; and there is much proof in this case that the engines of appellant, during the time mentioned, emitted large quantities of live sparks and started fires in that vicinity. In the case referred to, the court said that the jury were not at liberty to reject the testimony of the railroad's witnesses, but, in effect, saying that, with such evidence before them as in the case before us, it was a question of fact for them to determine as to the condition of the spark arrester and the management of the engine at the time the sparks were emitted and the fire started. It is well settled in this state that a railroad company is not liable for injuries resulting from sparks escaping from its locomotive if it is furnished at the time with the best and most-approved screens and spark arresters in practical use when these appliances were in perfect order, if not otherwise guilty in the operation of its engines. In the case of *L. & N. R. R. Co. v. Samuel's Executors* (Ky.) 57 S. W. 235, the above principle was approved, and in that case and in that connection the court used this language: "The law is well settled in this state that a railroad company, authorized by its charter to use steam power, has necessarily the right to use fire as a means of generating steam; and it is not liable for injuries resulting from the sparks escaping from its locomotive if it was furnished at the time with the best and most-approved screen and spark arrester in practical use, when these appliances were in perfect order, if not otherwise guilty of negligence in the operation of its engine. But it is equally well settled that in an action against a railroad company to recover for loss by fire alleged to have resulted from negligence in operation, or for failure to have the spark arrester in proper condition, the testimony showing that sparks and cinders escaped from the locomotive in unusual quantities was competent, and will of itself warrant the presumption that the arrester was out of order, or was improperly adjusted, and that the defendant was consequently guilty of negligence in this regard." And again: "The question in that

Ortolano v. Morgan's L. & T. R. & S. S. Co

case was whether it was competent to show, about the time when the fire occurred, that sparks and burning coals were frequently dropped by other engines passing on the same road and upon previous occasions, and it was held that such testimony was competent." In the case of *The Kentucky Central Railroad Co. v. Barrow*, 89 Ky. 642, 20 S. W. 165, this court, by Judge Lewis, said: "The evidence on the trial of which appellant complains was, substantially, that trains frequently set fire to fences and grass at other places in the vicinity of appellee along the line of that road, and at different times during the fall of 1881. It was also stated that the trains usually passed with the screen or fender up or laid back." The court sustained this evidence and affirmed the case. To the same effect is the case of *The L. & N. R. R. Co. v. Taylor*, 92 Ky. 57, 17 S. W. 198.

As stated before, appellant contends that when its two witnesses, McGariger and Turner, testified that the particular engines which started the fire were provided with screens or fenders that would effectually prevent the escape of sparks or fire from the chimneys of the locomotives, this concluded the case, and that the jury were not at liberty to reject the evidence of these two witnesses. McGariger said that, when the engines arrived at Louisville that night, he examined them, and found the screens to be all right and in proper position. Turner said that before the engines left Paducah he examined them, and found that the screens were all right and in proper position. And they both stated that these screens were of the best and most-approved appliances for the arrest of sparks and cinders. The appellant did not introduce those in charge of the said engines, Nos. 4 and 363, to show how said engines were managed and operated—whether properly or not—at the time and while passing the place where the fire started, nor show the condition and position of the screens and spark arresters at that time. And for these reasons it was a question of fact for the jury to determine as to how the engines were managed and operated, and as to whether or not the screens and spark arresters were in proper position and condition.

Perceiving no error, the judgment is affirmed, with damages.

ORTOLANO *et ux.* v. MORGAN'S L. & T. R. & S. S. Co.

(*Supreme Court of Louisiana, March 2, 1903.*)

[33 So. Rep. 914.]

Action for Tort—Damages—Interest.

Interest should ordinarily be allowed on a judgment liquidating the damages in an action for tort from its date, and not from judicial demand.

Accident at Crossing—Obstructed View—Care Required of Trainmen.

Where obstructions (specially those placed there by the railroad company itself) near the lines of railroad tracks mask parties who

Ortolano v. Morgan's L. & T. R. & S. S. Co

are at or near or approaching them from the view of engineers or firemen upon trains, it is the duty of the company to see that special precautionary steps be taken to guard against increased danger arising therefrom. This is particularly required and exacted when approaching crossings (either public or private), when there are reasons to believe that there may be persons in exposed positions at or near the track.

Same—Same—Same.*

The fact that the happening of an accident could not be averted by the stopping of a train is no excuse why proper signals and warnings from the train to the parties in danger should not have been given.

Same—Same—Same.†

Parties in charge of a railroad train do not discharge their whole duty by pursuing the regulation methods of giving notice and warning at a particular time or place where special circumstances call for additional warnings and signals. The precautions to be adopted and the steps to be taken in aid of safety increase as the danger of accident and injury is increased.

(Syllabus by the Court.)

Appeal from Judicial District Court, Parish of Jefferson; Jerome L. Gaudet, Judge.

Action by Paulo Ortolano and his wife against Morgan's Louisiana & Texas Railroad & Steamship Company. Judgment for plaintiffs, and defendant appeals. Amended.

Alfred E. Billings and Denegre, Blair & Denegre, for appellant.

Louis Hermann Marrers, Jr., and Loys Charbonnet, for appellees.

Statement of the Case.

NICHOLLS, C. J. The plaintiffs are the father and mother of Rosalino Ortolano, a boy five years of age, who, they alleged, was killed while crossing the railroad track of the defendant corporation at its intersection with the public road about 300 feet below the bridge leading to and crossing Harvey's Canal. They prayed for judgment for \$45,000 damages against the defendant, alleging that their said child died of injuries received on Easter Sunday, April 7, 1901, by being run down and struck by an engine (with a caboose attached) of the defendant about 4:30 p. m.; that at said time no train was in sight of said child, who was then unconscious of any danger, and unable to protect himself in the premises; that, before he could clear said track entirely, one of the engines of the defendant, with caboose attached, in charge of its employees and agents, for whom it is responsible, came dashing along said track at a very high and unlawful and negligent rate of speed, and ran down and struck said child, and inflicted horrible mutilation and injuries upon him, which

*As to whether it is negligence per se to fail to give crossing signals, see *Bowen v. Southern Ry. Co.* (S. Car.), 18 Am. & Eng. R. Cas., N. S., 331, and foot-note, 332; *Edwards v. Atlantic Coast Line R. Co.* (N. Car.), 23 Am. & Eng. R. Cas., N. S., 38, and foot-note, 39.

†Statutory signals as measure of company's duty, see *Tessmer v. New York, etc., R. Co.* (Conn.), 15 Am. & Eng. R. Cas., N. S., 164, and note, 173 et seq.

Ortolano v. Morgan's L. & T. R. & S. S. Co

caused him unspeakable pain, and brought about his untimely death.

They specially averred that said accident was brought about solely and entirely by the gross negligence, incompetency, and want of skill of those in charge of said train, for which said defendant company was liable; that neither petitioners nor said child in any way contributed to said accident; that said employees in charge of said train had ample time to stop the train, and thus save the life of the child, but that they were not attending to their duties; that they were not at their posts at the time; that they failed to see the child altogether, although he could have been seen in time to prevent the accident; that they failed to give any signals of any kind, and kept on at the furious rate of speed without even stopping the engine after killing the child.

That the actual damages of the child for the awful suffering which was inflicted on it, mentally and physically, the indescribable horror of its condition, the shocking mutilation of its body, the pain and horror consequent to the injuries which the child suffered, which right of actions survived in the petitioners, could fairly be estimated at a sum of not less than \$25,000.

That the anxiety, sorrow, and pain, etc., which had been caused to them by the careless and negligent killing of their child could fairly be estimated at a sum not less than \$10,000.

That there was due to them for the loss of the companionship and society and the loss of support from their child a sum which could be fairly estimated at a sum not less than \$10,000.

The defendant answered under reservation of an exception of "no cause of action" filed by it, which the court had overruled. It pleaded first the general issue. Further answering, it averred that, "if the son of the plaintiffs, at time and place alleged in their petition, was struck, injured, and killed by one of its engines (which it denied), it was so struck and injured and killed by and through its own and plaintiffs' negligence and imprudence, which contributed and was the proximate cause of said injury and killing."

The case was tried without a jury, and judgment was rendered by the court in favor of the plaintiffs against the defendant for \$10,000, with legal interest from judicial demand until paid, and costs.

Defendant appealed.

It is a matter placed beyond dispute that Rosalino Ortolano, a son of the plaintiffs, about five years of age, died on Easter Sunday, April 7, 1902, in Jefferson parish, near Harvey's Canal, from the effects of wounds inflicted upon him by an engine (with caboose attached) which was in charge of officers and employees of the defendant, then proceeding on its way from Lafayette to New Orleans. The child, from the moment it was struck, remained in an almost insensible condition, and

Ortolano v. Morgan's L. & T. R. & S. S. Co

died in half an hour or less. The accident occurred at a point of the line of the defendant company's railroad some 460 feet nearer New Orleans than the east end of the railroad bridge which crosses Harvey's Canal, and at the intersection with the railroad track of a neighborhood private crossing, over which the employees of the Cypress Lumber Company, those of Robert Harvey's brick manufactory and dairy, and other industrial establishments in the immediate vicinity of Harvey's Canal pass daily in large numbers going to and returning to their homes and work. There are two of these crossings, a few feet apart, running parallel to each other and to Harvey's Canal, and perpendicularly to the Mississippi river. The child was standing, when struck, upon the lower of the two crossings,—that is to say, the one farthest from the bridge, and nearest to New Orleans on the river side,—and just outside of the rails, sufficiently close to the rails to be struck by some part of the passing engine.

The track of the Morgan's Railroad runs parallel with the Mississippi river, and not very far back from it. Harvey's Canal is about 90 feet wide, and is spanned by a bridge constructed over it by the defendant as part of its line. Just east (next to the New Orleans side) of the canal the defendant has constructed a bridge tender's house and a toolhouse, and across the crossing, where the child was struck, and about 10 to 14 feet from the river side rail, it had erected a gate, with open spaces between the cross planks, which was rarely closed, but permitted to swing open towards the railroad track.

We are called upon to determine whether, under the circumstances and conditions the child was struck, defendant's officers and employees were at fault or not, and, if so, whether there be any reason why plaintiffs should not recover damages.

As usual in such cases, there is conflicting testimony. The district judge, who saw and heard the witnesses, and, with the consent of counsel of both sides, viewed the premises with them, reached the conclusion (for reasons assigned in a lengthy written opinion) that defendant was legally responsible, and rendered judgment against it.

We have carefully examined the record, and we find no error in the judgment other than the amount of damages awarded. Defendants insist that, even if its officers and employees were not at fault, plaintiffs cannot recover, as they were guilty of contributory negligence in permitting a child of that age to go so near their track. The plaintiffs are people in humble life, with slender means, dependent upon their labor for support, and unable to employ servants. They have a number of small children, and it was manifestly impossible for the mother, engaged in household duties, to have her eyes constantly upon them. This child, on the day in question, was with a number of other children, who had gone to the neighborhood of defendant's track, and were there playing marbles. There is no reason to suppose the mother

knew where it was. She testified that she thought it had accompanied its father, who had gone to work in his truck garden, some distance off. The child, to get where it was, had to pass a number of houses in which families lived, some of the members of which were sitting upon their galleries that Sunday afternoon, and likely to intercept it if thought to be passing into danger.

On this subject of contributory negligence by the parents as barring their right to themselves recover damages for injuries to their child it has been said: "Even in an action by the parent or master, however, it is to be remembered that he must be actually in fault in order to bar his recovery on the ground of his contributory fault. This branch of the rule has sometimes been overlooked, but it has been well pointed out and enforced in later cases, especially in Pennsylvania. Where a parent or guardian has done all which can be reasonably expected of one in his circumstances, he is not debarred from recovery by the mere fact that he has not thrown as many restraints around his child for its protection as would be reasonably expected from parents having more means at their command. Thus a poor woman earning her daily bread is not necessarily in fault because she does not restrain her child from wandering in the street. In these and all other similar cases all the circumstances are to be taken into account; and the question to be determined is whether the plaintiff took as much care of his child as reasonably prudent persons of the same class and the same means ordinarily do." *Shearman & Redfield on the Law of Negligence*, vol. 1 (5th Ed.) § —.

In estimating what care is required of a parent, Jaggard (on Torts, § 278) says: "Domestic exigencies, as the sickness of the mother, or her exhausted condition, are proper matters for consideration. Thus, where a sick mother sends her boy on a necessary errand across the street, such an act is not necessarily contributory negligence. * * * But the parent is bound to exercise care with reference to circumstances, and is not bound to anticipate carelessness on the part of others. And if the defendant, in the exercise of ordinary care, could have averted the parents' negligence, the infant or his representative may recover. If, however, the danger of the child could have been discovered by the defendant in time to avoid injury to it by the exercise of ordinary care, neither the parent's nor the child's right to recover is barred by this alleged contributory negligence in allowing it to be at large unattended."

We do not think the situation in this case, as disclosed by the testimony adduced, was such as to cut off the plaintiffs' right to recovery. We are satisfied that the whistle was not blown and the bell was not rung either when the engine emerged from the bridge nor at any time thereafter before it reached the crossings.

We are also satisfied that the speed of the engine when it

Ortolano v. Morgan's L. & T. R. & S. S. Co

reached and passed through the bridge was not reduced to 12 miles an hour, nor that, when it emerged from the bridge (when the speed was admittedly increased), it was only increased to 18 miles an hour. Though plaintiffs' witnesses were not expert witnesses on this subject, we think, where an engine is traveling at such speed as to call at the time for exclamations of surprise from persons seeing it who lived along the line of road, and were accustomed to seeing engines pass at all times of the day, their testimony is entitled to weight. Mr. Robert Harvey and Mr. Mathews, gentlemen living at Harvey's Canal, spoke of the speed before the accident occurred, and a Mrs. Bartello said that, on seeing it approaching, she exclaimed, "My God! where are my children?" We are convinced that the engine was running at an unusual rate of speed, and, in view of the existing conditions, at a dangerous rate of speed.

If true it was that the speed was reduced to 12 miles an hour in passing through the bridge, it should not have been increased, but should have been kept reduced until it passed the crossings, which were only a few feet below the bridge crossings, which were crossed at times as many as 600 times a day, according to testimony in the record. There was no reason shown for this speed. It is not claimed that the engine was called upon to clear the way for other trains, and it was returning to and would soon reach the terminus of the road, there to be put away for the night. It was particularly imprudent to increase the speed of the engine at half past 4 o'clock in the afternoon of a Sunday when the workmen in the mills were freed from work, and were likely to be constantly crossing the tracks. It was also great imprudence and negligence to increase the speed at that place, if true it was, as is claimed by the defendant, in attempting from another standpoint to shield itself from liability, that the line of vision of the engineer and firemen was cut off to a very great extent by obstructions which it had itself placed near its left-hand track—the track the view of which would be to some extent additionally masked from the engineer by the boiler.

We find from the record that just so soon as the engine emerged from the eastern or New Orleans end of the bridge, the fireman betook himself immediately to shoveling coal in the furnace, leaving the engineer exclusively in charge of the lookout upon the left-hand track of the road. He could well have postponed and should have postponed doing this work at such a place, at such a time, and under existing conditions, until after the crossings had been passed. There was no occasion for his firing up at that precise time, but certainly, if he did give up watching himself the left-hand side of the track, and leaving it to be watched by the engineer, and therefore practically unguarded for the time, he should, before doing so, have rung his bell, and called upon the engineer to continue to do so, and to blow his whistle. Neither he nor

Ortolano v. Morgan's L. & T. R. & S. S. Co

the engineer was justified, under the circumstances, in approaching this obstructed track and dangerous crossings at such speed without proper and reiterated warnings. There were a number of children playing in close proximity to the right-hand track of the road, who, had the whistle been blown and the bell been rung, could, and doubtless would, have guarded the child, even had he himself not understood the meaning of the signals, and not protected himself. We are not warranted in assuming, for the benefit of the defendant, that the child itself would not have been placed upon its guard. We may say here, in connection with the presence of the children just referred to, that it is strange, if the engineer was keeping a strict lookout, that he should not have seen them. He enumerates specifically the persons he saw along the track, and yet does not refer to them at all. He says (as also does the fireman) that he saw nothing of the boy who was struck, and did not know he had been struck until the next day. He says the child, in approaching the left-hand track, must have been masked by the obstructions along that track, and emerged from behind the obstructions only after he had got so close to that track that he (the engineer) could not see him across the boiler. The existence of that condition of things might exonerate the engineer personally from blame for not seeing the child, but it could not be set up as a defense by the defendant company. It had no right to place itself obstructions upon or near its line in manner as to intercept the view of the engineer, and leave part of its track really without a lookout and unguarded. If physical conditions should be such as unavoidably to bring about a situation of that character, the company could be called upon by every means and instrumentalities in its power to minimize the danger. It should see that a special lookout be kept on the obstructed side of the line until the danger point be passed. It should not permit the party in charge of that side of the track to withdraw from that duty just at that critical moment, to do other work not then necessarily called for. It should reduce the speed if necessary, and give repeated danger warnings and signals. If the gate referred to in the testimony was an obstruction to the view, the defendant, having erected it, and having control over it, should have removed it either entirely or to another place. *Shear. & Red. Negligence*, vol. 2, §§ 417, 460, 463; *Jaggard on Torts*, § 256 (p. 882); *Am. & Eng. Ency. of Law*, vol. 4, 911 (and note), and 920; *Delaware R. R. Co. v. Shelton*, 55 N. J. Law, 342, 26 Atl. 937; *Louisville R. R. Co. v. Hackman* (Ky.) 30 S. W. 407; *Hubbard v. Railroad Co.*, 162 Mass. 132, 38 N. E. 366; *Shaber v. Railroad Co.*, 28 Minn. 103, 9 N. W. 575; *State v. Boston R. Co.*, 80 Me. 430, 15 Atl. 36.

The engineer and other officials of the defendant in their testimony referred to the fact that the crossings in question were not highways, or public, but private crossings; that,

Ortolano v. Morgan's L. & T. R. & S. S. Co

therefore, the company was not called upon to put up whistling posts, or to give any special signals or warnings. They further referred to the further fact that the engineer on this occasion was authorized by the rules of the company to run at the speed he did.

There is, of course, a recognized difference in law for certain purposes between a public and a private road. It may be that the fact that a particular crossing may be a public crossing should carry with it as a consequence that the railroad company should be called upon to establish a whistling post, and give certain signals on approaching it; but it by no means follows that, because a crossing is a private crossing, the company and its employees should ignore its existence, and the special dangers attendant upon approaching it, and be released from all care, prudence, and caution in doing so. Employees of a company, by conforming to its rules, may be released from blame as between themselves and their employer, but if the rules themselves be such as to cause them to do something which they were not justified in doing, or in failing to do something which they were called upon to do, the rules would not save the legal situation, so far as the company was concerned in its relations with the others and with the public. The rules would be a detriment and injury to it.

In *Downing v. Railway Co.*, 104 La. 519, 29 South 212, we said: "It is a mistake to suppose that by pursuing the regulation method of giving notice by the ringing of a bell or following out any prescribed mode of giving warnings, parties in charge of a railroad train perform their whole duty under every contingency or on all occasions. The precautions to be adopted and the steps to be taken in aid of safety increase as the danger of accident and injury is increased, and their sufficiency is to be gauged by what is called for by the special circumstances of each case."

In *Lampkin v. McCormick*, 105 La. 422, 29 South. 954, 83 Am. St. Rep. 245, we repeated that warning saying: "It may be that these obligations were not imposed by general ordinance or statute, but there are certain obligations imposed upon railroad corporations which exist independently of convention or ordinance or statute. There is a duty imposed upon every one, whether natural persons or artificial persons, to avoid by proper care doing injury to others through their fault." See the views of this court on the same subject expressed in *Sundmaker v. Yazoo & Miss. Railroad Company*, 106 La. 112, 30 South. 285. The case as presented, even from the point of view urged by defendant, is one where a railroad crossing, at which a very large number of persons have been in the habit for a number of years of legitimately crossing, and the approach to which by the persons crossing is obstructed, on the side opposite to that on which the engineer is on the lookout, from the view of the engineer by obstructions placed on the line of view by the railroad company

Ortolano v. Morgan's L. & T. R. & S. S. Co

itself, has been crossed by an engine and caboose moving at a very great and dangerous rate of speed, without having given the precautionary signals of approach which prudence and a due regard for the safety of the public at the crossing called for, and when at the same time the fireman in charge of a lookout on the obstructed line of view has left his post, and intrusted the duty of looking out on his side to the engineer, who, by reason of the obstructions, could not see parties at or approaching the crossing in time to save them from injury. We cannot relieve a railroad company from liability for injuries received under such conditions.

We reaffirm the doctrine announced in the *Downing* and *Lampkin* Cases as to the duty of railroad employees when approaching danger points. We repeat what was said in the *Downing* Case—that to run a train at a high rate of speed, and without precautionary signals, or with signals manifestly insufficient to meet the requirements of a proper warning of approach, where trainmen have reason to believe that there are persons in exposed positions on the track (as over unguarded crossings in a populous district of a city, or whether the public are wont to cross on the track with such frequency and numbers as to be known to those in charge of the train), they will be held to a knowledge of the probable consequences of maintaining great speed without warnings, so as to impute to them reckless indifference in respect thereto, and render their employers responsible for injuries therefrom, notwithstanding there was negligence on the part of the injured, and no fault on the part of the servants after seeing the danger. The doctrine is not based on the idea that they should sooner have observed the danger, however, but on the ground that they knew of its existence, of the presence of people in positions of peril, as a matter of fact, without seeing them at all in the particular instance.

It is urged that at the time the child came near the track the engine could not have been stopped by any known appliances. Conceding that statement to be true, it would not follow that the child could not have been saved. Had proper warnings been given, the child might have saved itself by withdrawal from its position, or by the assistance of others acting for its protection. Its playmates might have possibly saved it in this instance. We are satisfied that the child's life could have been saved by proper care and action taken by the employees of the defendant, even after he had got into a position of danger. While we think judgment should be rendered in favor of the plaintiffs against the defendant, we are of the opinion that the amount awarded for damages is too large, and that the judgment appealed from should, as to amount, be reduced. There is error, also, in decreeing that the amount awarded should bear interest from judicial demand. Interest should commence to run only from the date of judgment. *Preston v. Slocomb*, 1 La. Ann. 382; *Green v. Garcia*,

Cooper v. Charleston & W. C. Ry. Co

3 La. Ann. 702; Wright v. Abbott, 6 La. Ann. 569; Black v. Carrollton R. R. Co., 10 La. Ann. 39, 63 Am. Dec. 586; Robertson v. Green, 18 La. Ann. 28.

For the reasons herein assigned, it is hereby ordered, adjudged, and decreed that the judgment appealed from be amended by reducing the amount of the judgment from \$10,000 to \$4,000, and further amended by making the amount of the judgment bear legal interest from date of the judgment of the district court, the 18th of March, 1902, until paid, and that, as so amended, the judgment be affirmed; costs of appeal to be paid by the appellee.

COOPER v. CHARLESTON & W. C. RY. CO.

(*Supreme Court of South Carolina, Feb. 11, 1903.*)

[43 S. E. Rep. 682.]

Accident at Crossing—Failure to Give Signal—Common Law.

A complaint alleging that, while plaintiff was driving near a place where defendant's track and trestle crosses the highway, defendant ran one of its trains, without any warning of its approach, on such trestle, frightening plaintiff's mule, to her injury, states a cause of action at common law, not a cause of action for failure to give statutory signals.

Same—Same—Same.*

Independently of statute, it is the duty of those in charge of a train to give notice of its approach at all points of known or reasonably apprehended danger.

Same—Same—Same.

It is not negligence, at common law, for a railroad company to fail to give signals on approaching a highway which it crosses on a trestle.

Appeal from Common Pleas Circuit Court of Laurens County.

Action by Dollie Cooper against the Charleston & Western Carolina Railway Company. Judgment of nonsuit. Plaintiff appeals. Affirmed.

F. P. McGowan, for appellant.

Simpson & Cooper, for respondent.

GARY, A. J. This is an appeal from an order of nonsuit. In order to understand clearly the issues involved, it will be necessary to refer to the second and third paragraphs of the complaint, which are as follows:

“(2) That the public highway leading from Laurens Court House towards Augusta, Ga., at or near Badgett's Mill Place, in said county and state, descends a steep hill to Burnt Mill creek, and ascends a steep hill from said creek, and has on either side of said descent and ascent rough and dangerous precipices, and at or near said place the track and trestle of the defendant passes over and across said highway, having a

*See preceding case and foot-note.

narrow passage through the timbers of said trestle for the public highway and the travel along the same, and that a traveler upon said highway, in passing said locality, is unable to see, and has difficulty of hearing, approaching trains.

“(3) That on or about the 16th day of June, 1902, while the plaintiff, in company with another lady, was traveling said highway from Laurens Court House towards her home, in said county, in a buggy drawn by a mule, and having arrived at the place aforesaid, where the defendant's track and trestle passes over and across said highway, and being wholly unaware of any approaching train, then and there, the defendant, without giving any warning of its approaching train, so carelessly and negligently operated and run one of its locomotives, with a freight train attached thereto, on said trestle, and over and across said highway, that the said mule driven by the plaintiff, while in the act of crossing under said railroad track and through said trestle, became so frightened and panic-stricken that it caused the plaintiff to be suddenly and violently thrown from the buggy, giving to plaintiff a painful and serious cut across the face and head, and causing other and grave injuries to her person.”

The defendant denied the material allegations of the complaint, and set up the defense of contributory negligence. At the close of the plaintiff's testimony the defendant made a motion for a nonsuit on the following grounds:

“(1) There should be a nonsuit, because this action is not brought under the statute, and on that ground there is no statutory violation of duty on the part of the defendant.

“(2) In no possible view of this case can plaintiff rely upon any allegation of negligence in the failure to give signals, because he has not alleged that as one of the causes of the injury.

“(3) Even if this action is intended to be brought under the statute, there must be a nonsuit, for the reason that the statute of South Carolina relating to signals at crossings does not apply to crossings of this character.

“(4) It is not the duty of a railway company, at common law, to give signal, by blowing its whistle or ringing its bell at crossings of this character, and therefore the failure to do so was not negligence in this case, and a nonsuit should be granted on this ground.

“(5) There is not a particle of testimony to show any negligence, unless in the failure to give signals; and, this being true, nonsuit should be granted.

“(6) Even if the evidence shows any negligence at all, it was the remote, and not the proximate, cause of the injury, and therefore there should be a nonsuit.”

In granting the order of nonsuit, his honor the presiding judge said: “The way I construe this complaint, it is brought under the statute—neglecting to give statutory signals. They allege that the train went over the trestle without giving

Cooper v. Charleston & W. C. Ry. Co

any warning of the approaching train. Now, if you take it under the common law, as I understand it, the only thing necessary for a train running over its road is simply to keep an ordinary lookout—observe due care and caution not to collide with any one. Where they are running over their road, the common law imposes upon them the obligation to keep an ordinary lookout, so as not to collide with anybody." He also stated at length the reasons why the action could not be sustained under the statute.

The appellant's first exception is as follows: "(1) Because his honor erred in holding that the action was brought under the statute requiring railroads to give signals, and that there was no cause of action unless there was a collision at a crossing." His honor's construction of the complaint was erroneous, for the following reasons: (1) The complaint makes no reference whatever to the statute. (2) It does not allege that the plaintiff was injured by collision with the engine or cars of the defendant. (3) It does not allege that the plaintiff was injured at such a crossing as is contemplated by the statute. (4) It does not allege that the engineer or fireman failed to ring the bell or sound the whistle at the distance of at least 500 yards from the place where the railroad crosses any public highway, street, or traveled place, and that the bell was not kept ringing or the whistle sounding in the manner provided by statute. (5) Section 2 of an act entitled "An act to regulate the practice in the courts of this state, in actions ex delicto for damages," approved 21st February, 1898 (22 St. at Large, p. 693), is as follows: "Sec. 2. That in all cases where two or more acts of negligence or other wrongs are set forth in the complaint as causing or contributing to the injury for which such suit is brought, the party plaintiff in such suit shall not be required to state such several acts separately, nor shall such party be required to elect upon which he will go to trial, but shall be entitled to submit his whole case to the jury, under the instruction of the court, and to recover such damages as he has sustained, whether such damages arose from one or another, or all of such acts or wrongs, alleged in the complaint." This act gave the plaintiff the right to allege in her complaint acts of negligence at common law as well as those arising under the statute. The acts of negligence set out in the complaint are appropriate to an action at common law. Therefore his honor erred, in any event, when he ruled that this action was brought exclusively under the statute.

The second exception assigns error as follows: "(2) His honor erred in holding that at common law a railroad was only required to keep an ordinary lookout, so as not to collide with any one, and that it was not required to ring its bell or blow its whistle before running its train over and across a public highway." In 8 Enc. of Law, 412, the rule is thus stated: "Independently of statute, it is the duty of those in charge of

Cooper v. Charleston & W. C. Ry. Co

a train to give notice of its approach at all points of known or reasonably apprehended danger." The cases of *Murray v. R. R. Co.*, 10 Rich. Law, 227, 70 Am. Dec. 219, *Fletcher v. R. R. Co.*, 57 S. C. 205, 35 S. E. 513, *Mack v. R. R. Co.*, 52 S. C. 323, 29 S. E. 905, 40 L. R. A. 679, 68 Am. St. Rep. 913, and *Mason v. R. R. Co.*, 58 S. C. 70, 36 S. E. 440, 53 L. R. A. 913, 79 Am. St. Rep. 826, lend support to this statement of the law. The presiding judge therefore stated the doctrine too broadly.

The third assignment of error is as follows: "(3) He erred in holding that the statutes requiring signals applies only where a railroad crosses a highway on the same level, and not where the railroad crosses the highway on a trestle." We have already shown that this is not an action arising under the statute. Therefore the requirements of the statute are not properly before the court for consideration.

The fourth exception assigns error as follows: "(4) He erred in not holding that section 2132 of Townsend's Code requires railroads to blow the whistle or ring the bell five hundred yards before crossing on a different level." What has just been said is applicable to this exception.

The fifth, sixth, and seventh exceptions are as follows: "(5) He should have held, independently of the statute, that the common law required the defendant to give some signal of the approach of its train to a public crossing, although on a different level, in order for the public upon the highway to keep out of danger. (6) He erred in holding that the failure of defendant to give signals of the approach of its trains and the running of its trains was not the proximate cause of the injury. (7) He should have held that the defendant was required to give some warning of the approach of its train, so as not to frighten the animals of the traveling public, and there was testimony tending to show that the negligence of defendant in not giving any signal, and in the rapid running of its train, was the proximate cause of the injury, and the case should have been submitted to the jury." These exceptions will be considered in connection with the additional grounds upon which the respondent relies for sustaining the order of nonsuit, which are as follows: "(1) Even if plaintiff's action is not brought under the statute, but at common law, she cannot recover, because it is not the duty of the defendant to give any signal on approaching crossings under its tracks, and the failure to do so was therefore not negligence. (2) Even if the defendant was bound at common law to give a signal, the failure to give it was not the proximate cause of the injury in this case. Under the statute, a plaintiff may recover if the failure to give signals at crossings contributes even remotely to the injury. This is not true in an action at common law, but in such cases the failure to give signals must be the proximate cause of the injury. This was not proven to be the case here. (3) In no possible view of this case,

Cooper v. Charleston & W. C. Ry. Co

whether brought at common law or under the statute, was there any evidence tending to show that any negligent act of the defendant was the approximate cause of the injury." In the case of *Jenson v. Ry. Co.* (Wis.) 57 N. W. 359, 22 L. R. A. 680, the court, in discussing a crossing similar to that described in the complaint, uses the following language: "Such crossings are to be encouraged, in order to secure the safety and security of the public, as crossings at grade are always dangerous. * * * All the statutory regulations and liabilities on the subject of railroad crossings apply only to such as are constructed at even grade with the highways. * * * Common reason teaches that this crossing is very different from the common railroad crossing at the grade of the highway, not only in fact, but in all its incidents and relations to the traveling public. There is no danger at such a crossing of any collision of railroad trains or cars with man, beast, or vehicle on the highway. It cannot be the direct cause of any physical injury to any person or thing on the highway. The train passing over this bridge can cause no injury to persons or property on the highway, other than or different from their injury while passing on a highway parallel to the railroad. The only possible injury a railroad train can inflict on persons or property in the highway is by frightening horses while drawing vehicles or being ridden, and causing them to run away and do damage, as in this case. Only horses unused to such a place would be frightened, and only horses hard to hold or not well subdued would run away or get beyond the control of the driver, so that it is not common that any injury would happen even from this cause. It is certainly no wrong for the train to be run over such bridges in the usual and ordinary way, and even in this way some horses going under the bridge or being near it at the same time might be frightened by it. The trains must necessarily make considerable noise going over the bridge. They cannot be run without it. It is not by any means certain that a train would make less noise going over slowly than faster. What degree of noise must it make to frightened horses? A horse liable to be frightened would be by the train passing over the bridge at any rate of speed. There are too many contingencies, conditions, and uncertainties about it to make it a rule of law that a high rate of speed would be the proximate cause of an injury caused by horse running away through fright from the noise of the train. To be a rule of law, the injury from such a cause must not only be proximate, but usual or common, and to be expected or that could be anticipated. * * * The danger from such bridges of frightening horses is no greater in fact and no more common than from the railroad running near and parallel to a highway. It would seem to be no more reasonable to establish a rate of speed for the trains in passing such places in one case than in the other. * * * As to ringing the bell and blowing the

Green v. Los Angeles Terminal Ry. Co

whistle, they are only required, if at all, in order to avoid frightening horses, and with that view to warn the traveler on the highway to stop. Where should he stop, and how near the bridge? If near the bridge, and his horse is liable to be frightened and run away, he will be in a much more dangerous condition than if he should drive on and take his chances, for the horse, facing the train rushing over the bridge, would turn suddenly around to escape danger, and upset the carriage.

* * * I am not sure but that the company might make itself liable by blowing the whistle and ringing the bell so near such a bridge crossing as to frighten teams passing under it on the highway." We have quoted at length from the foregoing case for the reason that its reasoning is conclusive of the question under consideration.

The respondent's second additional ground is not properly before the court for consideration, as it was not made one of the grounds of the motion for nonsuit. The first and third additional grounds are sustained, and this is sufficient to support the order of nonsuit.

It is the judgment of this court that the order of the circuit court be affirmed.

POPE, C. J., concurs in the result.

GREEN v. LOS ANGELES TERMINAL RY. CO.

(*Supreme Court of California, July 8, 1902.*)

[69 Pac. Rep. 694.]

Accident at Crossing—Failure to Stop and Look Again.*

Deceased, when within 30 feet of the railroad, stopped, looked up the track, and found it clear for a space of 800 feet. She then, without again stopping or looking up or down the track, proceeded to cross, and was struck by a train running between 25 and 30 miles an hour: *held*, that deceased was not guilty of contributory negligence as a matter of law.

Contributory Negligence—Finding—When Disturbed.

In an action against a railroad for an accident causing death, a finding that there was no contributory negligence on the part of deceased will not be set aside unless such negligence affirmatively appears as a conclusion of law from the undisputed facts.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; M. T. Allen, Judge.

Action by Joseph Green against the Los Angeles Terminal Railway Company for damages for the death of his wife. From a judgment for plaintiff, and an order denying a motion for a new trial, defendant appeals. Affirmed.

Gibbon, Thomas & Halsted and Goodrich & McCutchen, for appellant.

R. A. Ling and Edwin A. Meserve, for respondent.

SMITH, C. This is a suit brought by the plaintiff to recover damages for the death of his wife, alleged to have been

*See foot-note appended to *Louisville & N. R. Co. v. Cooper* (Ky.), 1 R. R. R. 230, 24 Am. & Eng. R. Cas., N. S., 230.

Green v. Los Angeles Terminal Ry. Co

the result of the negligent operation of the defendant's railroad. The plaintiff recovered judgment for the sum of \$5,000 and costs; and the appeal is from the judgment, and from an order denying the defendant's motion for new trial.

It is found by the court that at the time of the accident the defendant's train "was being run and operated in a very dangerous and grossly negligent and careless manner, as to its rate of speed and failure to sound ordinary signals of warning," and that the accident to the deceased was the result of the negligence of the defendant and its employees; "that before crossing or attempting to cross the defendant's railroad track [the deceased] used ordinary care, and did what an ordinarily prudent person would have done under the circumstances"; and that she "did not by her own carelessness or negligence in any way contribute to said accident." But it is claimed by the appellant, in effect, that these are inconsistent with the more specific findings, and that upon the latter the conclusions of the court and the judgment should have been different. The case, as presented by the specific findings, is as follows: The defendant's railroad runs easterly along Humboldt street, in Los Angeles city, crossing at right angles Avenues 21 to 26, inclusive, and from the last crossing leaving the street by a sharp curve to the northward. Humboldt street, between Avenues 22 and 23, is crossed at an angle of 30 degrees by "a wide, hard-beaten path, regularly traveled by pedestrians," which runs from a point on Avenue 23 south of Humboldt street, northwesterly, across vacant lots, to Avenue 22, in the vicinity of the house where the plaintiff and deceased lived. The distance along the path from its intersection with the south line of Humboldt street to its intersection with the railroad track is about 30 feet; and from the former point, looking easterly, one can see the track to the curve at Avenue 25, a distance of about 800 feet, but not beyond. The deceased was killed at the intersection of the path above described with the railroad in the afternoon of November 15, 1899, while it was still light, by a train coming from the east. She was then passing along the path to her home; and when she came to Humboldt street, and had entered thereon, "she looked up defendant's track in the direction from which the train * * * was coming," and "there was [then] no train on the defendant's track in sight from where she was." The deceased then, without again stopping or looking up or down the track, proceeded to cross the street and railroad, following the path, and as she stepped upon the track was struck by the engine of defendant's train coming from the east, and fatally hurt. The train at the time of the accident was running down grade, without using steam, and making but little noise,—"at an excessively high and dangerous rate of speed" (between 25 and 30 miles per hour). No whistle was blown on the engine from the time it passed a point beyond the curve, out of sight of the deceased, until within 10 or 15 feet of her, and just as the engine was about to strike her; nor was the

Green v. Los Angeles Terminal Ry. Co

bell rung before or while crossing any of the streets until just above where the accident occurred. As the train rounded the curve "the engineer in charge of the engine * * * saw [the deceased], and knew that she was walking on said path, and crossing said Humboldt street, ahead of said train, and that she gave no evidence of knowledge of the approach of said train," and, "notwithstanding said facts, * * * did not slacken or lessen the speed of said train, or attempt to give [deceased] warning of its approach, * * * until the train was within 10 or 15 feet of the point of the accident," though it is found he could have stopped the train within 200 feet after starting to do so.

The above facts are not disputed by the appellant's counsel, except as to the rate of speed, the failure of the engineer to sound the signals required of him, and his failure to slacken speed until within 10 or 15 feet of the deceased. But on the last point the engineer's own testimony is explicit to the same effect as stated in the finding, and as to the others it is admitted that the evidence is conflicting. The facts found must therefore be taken as established. We do not understand that this is disputed by the appellant; but the point made is that the deceased, after stopping at the south line of the street and looking up the track for an approaching train, should have again looked and listened for the approaching train, and that, as a matter of law, her failure to do so in itself constituted negligence. But it is difficult to imagine on what principle this contention could be sustained, or, if it could, how it could be material. On the question of contributory negligence the burden of proof is on the defendant; and here there was absolutely no evidence of such negligence, except that she did not look up the track for an approaching train in passing from the south line of the street to the track. Certainly we cannot say that the inference of negligence from these facts is irresistible, or, as a matter of law, that they constituted negligence; and, unless this can be said, the contention must fail. For, to set aside the finding of the court that there was no contributory negligence on the part of the plaintiff, "such negligence must affirmatively appear as a conclusion of law from the undisputed facts." *Schneider v. Railway Co.*, 134 Cal. 482, 487, 66 Pac. 734 et seq. Indeed, in this case the evidence tended to show that the deceased took all the care to avoid danger required of her. When she looked up the track and found it clear for the space of 800 feet, she was near enough to cross with safety, had the train been running at any but an excessive rate of speed.

I advise that the judgment and order appealed from be affirmed.

We concur: CHIPMAN, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

HOUSTON & S. RY. CO. v. KANSAS CITY, S. & G. RY. CO.*(Supreme Court of Louisiana, Feb. 2, 1903.)*

[33 So. Rep. 609.]

Right of One Company to Cross Track of Another.

A reasonable and practicable crossing will not be denied if it be in the interest of the public that it be granted.

Same—Statutes.

Although there is no statute regulating the expropriation of a crossing of one railroad by another, the general statute upon the subject will afford the right to obtain crossing when the business of the road and of the public are in need of a new depot.

Same.

Rights of way are acquired subordinate to the public's right to other roads. The test is necessity and public interest. The right of the road at the place selected will not be more materially impaired than it would be if another place for the crossing be selected.

Crossings—Interlocking Devices.*

Safeguards and protection at crossings are highly important. They should be general, and not limited to one crossing. The right to require interlocking devices and other safety appliances is left open for consideration in proceedings, if instituted to that end.

Crossings—Necessity.

The jury of the vicinage are peculiarly competent to judge of the necessity of allowing one railroad to cross the line of another at a particular place, and to assess the amount to be paid therefor. Unless their finding is manifestly erroneous, it will not be disturbed.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Caddo; Alfred Dillingham Land, judge.

Action by the Houston & Shreveport Railway Company against the Kansas City, Shreveport & Gulf Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Alexander & Wilkinson, for appellant.

William Henry Wise and Edward Beverly Herndon, for appellee.

BREAUX, J. Plaintiff sued for a judgment expropriating a crossing for its road over defendant's road.

Its new depot and platform are on Southern avenue in the city of Shreveport.

They were built because thought more convenient to the public, and needed by the increasing transportation business of plaintiff. The old depot building was not adequate to the business. Its location was inconvenient. The necessity for change and improvement in depot accommodation is sustained by the testimony.

In order to reach this new depot it is necessary to cross the two legs or prongs of defendant's wye in that city. Defendant bought its right of way at this particular place from plaintiff.

*See, as to whether railroads may be compelled to furnish interlocking devices, Minneapolis, etc., R. Co. v. Cedar Rapids, etc., Ry. Co. (Iowa), 23 Am. & Eng. R. Cas., N. S., 152, and foot-note.

Houston & S. Ry. Co. v. Kansas City, etc., Ry. Co

In the deed plaintiff had reserved the right (with two tracks) to cross the property it sold to defendant at points near, but not at, the same place as that now claimed by plaintiff.

In its petition plaintiff relinquishes its right reserved as just stated, provided it succeeds, for a reasonable price, in securing the crossing now sued for.

Plaintiff avers that the damage and inconvenience to the defendant company would not be greater in case its petition is granted than it would be at the crossing it (plaintiff) reserved as before stated; that it (plaintiff) offered to exchange these rights, but that the defendant refused.

As well state now that defendant seeks to meet this contention of plaintiff for another crossing than that reserved by averring that it is true it (plaintiff) has reserved a right to cross its (defendant's) track, as before stated, but that this crossing (reserved by plaintiff) would be over the main track more practicable, and not over the defendant's wye.

Defendant also urges in this connection that, if plaintiff has reserved a right to a crossing at a place that would be dangerous, the relinquishment of this right should not be considered, when plaintiff asks for a crossing at least equally as dangerous at another place; that the wye is the only convenient way the defendant company has of coming into the city. The testimony shows that the crossing sought by plaintiff is over an ordinary construction of defendant's road, and the crossing will be an ordinary crossing similar to others in that part of the country—double guard rails, bolted with plates.

In fine, defendant stands on the price it has paid for its right of way and for an uncrossed wye. The necessity to change the grade enters into the issues of the case. Also the use of safety appliances said to be now used by railroads at crossings, the use of interlocking switches or gates, and the employment of a watchman. The defendant particularly urged in the district court that, if the crossing was allowed, some protection should be required by the jury, either by using interlocking switches, watchman, or gates, and asked the judge to instruct the jury that it was competent for them, if they found for plaintiff, to impose the requirement of defendant to use safety appliances, such as experience and "common use have demonstrated to be necessary to the safety of the traveling public or the employees on the trains while making the crossing." (We copy from the instructions requested, and which were submitted to the district judge.)

The charges were refused, and defendant excepted. The court, on the contrary, instructed the jury that it had nothing to do with any question as to how the crossing should be made, or the appliances used; that its duty was to find whether there was necessity for the expropriation, and, in that case, the damages to be awarded.

The jury returned for the right of way, and allowed \$200

Houston & S. Ry. Co. v. Kansas City, etc., Ry. Co

damages for the strip of land. Other facts will be considered in discussing the issues of the case. From this judgment the defendant appeals.

We are led to infer from the testimony that the crossing is needed in public interest; that the new depot will offer greater facility and some economy to consignees of property in matter of transportation to the city of Shreveport, and better accommodation to passengers.

The general manager of plaintiff's road testified that the new crossing would not increase or decrease its revenues; that the new depot will be a convenience to the public, and the charges will be less. It therefore follows that the case presents a question in which the public is interested. It is from that point of view that we have considered the issues, and from these premises we think that plaintiff is entitled to a judgment of expropriation, even if the following article of the Constitution (article 271) only gives an unavailing right because it does not point out how it shall be enforced, and although in this state there is no statute referring particularly to the right of one road to cross another.

But "the general law contains provisions for expropriation whenever it becomes necessary for the public use." Civ. Code art. 2626.

The freight received at the old depot is handled with greater difficulty than it will be at the new depot, and there are no passenger facilities at the old depot. From the point of view of the public interest to which we have referred, it is evidence, to our best thinking, that the application for the crossing falls within the terms of the general law of expropriation of the state.

"This right is based on public interest and necessity. The rights of the public are superior to the interest of any particular company, and the public have the right to demand the construction of railroads across the lines of other railroad companies." Elliott on Railroads, vol. 3, p. 1116.

The work of Lewis on Eminent Domain contains rules upon the subject of expropriation in the absence of statutory regulation. Vol. 1, § 268.

"Convenience and economy are looked to in deciding whether or not the right to cross will be adjudged." In re St. Paul R. Co. (Minn.) 33 N. W. 701.

The issues as made up and presented do not lead to the inference that the objection under discussion is defendant's principal ground of defense.

A civil engineer of defendant's road, on his cross-examination as a witness, when asked if the objection was that defendant did not want plaintiff to cross at all, and if there was not intention to throw obstacles in the way, and let everybody stay as they are, said, "No"; that the object was to maintain the facilities they had, and not let them be depreciated; and added: "No, sir; I am not a Chinaman"—

dispelling by his utterance all thoughts of impassable walls of the Chinaman's country.

It was commendable enough on the part of defendant's company to oppose all crossing threatening to impair defendant's service at the particular point.

In our view of defendant's insistence in this regard, we have carefully examined into the facts on this issue. There is conflict in the testimony. Its weight satisfies us that the inconvenience would not be much less at any other place. The decisions upon the subject do not compare inconveniences with great minuteness, and hold that the slightest preponderance in that regard should be held as determinative after a selection has been made.

We quote from one of the decisions upon this point:

"That railroad crossings are inconveniences, particularly where they are on grade, and frequent, is indisputable. But the law in regarding railroads as public necessities, has not extended its generous privileges to them altogether, without some possible attending inconveniences. Among the latter are lawful crossings, intersections, and connections of a rival company without legally competing for transportation of freight.

"The matter when left to the court presents a question of fact." Elliott on Railroads, vol. 3, § 1120.

Viewed in that light, the testimony would not, in our view, justify a change to another point.

"The location of a crossing is sustained as prima facie correct, and, in the absence of all evidence to the contrary, will be considered a just measure of what is essential." Dietrichs v. L. & N. W. R. Co. (Neb.) 13 N. W. 624.

It must not be overlooked (although litigants are not always careful to remain within bounds of their rights) that plaintiff is itself interested in securing a safe crossing. If another point were selected, the same stoppage (of defendant's tracks) would be necessary at the crossing. There is conflict of testimony regarding the grade. It would be less at other places, but not to an extent to justify us in changing the present location. But defendant's further contention is that there would be less injury done if plaintiff located its line in a more direct course, and did not follow the curve it has.

This plaintiff meets by showing that depots are usually approached by the train at a tangent, as in this instance, and that it would be inconvenient to approach a depot in a direct line; to illustrate: perpendicular to the depot, or at any other angle. This has the appearance of being reasonable, and is not outweighed by the contention that the crossing should be selected at some point above or below the wye.

But defendant avers that, on account of the frequent trains crossing at the point in question, public travel should be protected by what is known among railroadmen as an "interlock-

Marsh v. Western New York & P. Ry. Co

ing switch''; a gate; with such other safety appliances as may be necessary in order to minimize the danger.

From the brief we excerpt the following:

“It may be that the jury have no right under the law to pass on this question of how the crossing shall be protected, or say what means, even those in common use, should be adopted by the crossing road to prevent collisions or accidents; but the exercise of the right should be protected somewhere or somehow.”

We agree with learned counsel. There is, or there should be, authority to that end in the railroad commission, or in the court, or perhaps in both, and for that reason we will reserve whatever right defendant may have to performance in this respect.

Plaintiff suggests (and there is testimony upon that subject) that the defendant is attempting to obtain in asking for these safety appliances that which it has failed to do for its own crossings. No one will deny that every reasonable precaution should be taken to protect life, avoid loss, prevent accidents, not only at one, but at all, crossings, to the extent necessary. These matters can be considered in connection with rights reserved when defendants will claim them judicially.

This brings us to the question of damages. In expropriation cases this court has always held that the amount of damages is peculiarly within the province of a jury of freeholders.

There is no middle ground. It must be found by the jury, or the large amount asked by defendant must be allowed. Between the two, we have arrived at the conclusion to let the verdict remain as found by the jury.

For reasons assigned, the verdict and judgment are affirmed. To the defendant is reserved the right as mentioned in the body of our opinion.

Plaintiff and appellee to pay costs of appeal.

MARSH v. WESTERN NEW YORK & P. RY. CO.

(Supreme Court of Pennsylvania, Jan. 5, 1903.)

[53 Atl. Rep. 1001.]

Wrongful Death—Right of Action.

Under Act April 26, 1855 (P. L. 309), only the widow of one killed by the negligence of another can maintain an action to recover damages for his death, though he may have left children surviving him.

Same—Assignment of Claim.

The right of action of a widow to recover damages for the wrongful death of her husband, being one for unliquidated damages in an action sounding in tort, is not capable of assignment before verdict.

Appeal from court of common pleas, Warren county.

Action by Critt Marsh, guardian of Ella Lockeby, against

Marsh v. Western New York & P. Ry. Co

the Western New York & Pennsylvania Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Plaintiff presented this point: "(13) Where the deceased left a widow and a child or children, while the widow is the legal party upon the record, her recovery is for the benefit of herself and children, and one-third of the value of the life of the husband and father is for the benefit of the widow, and two-thirds thereof for the child or children; but the widow may assign her right and interest in the amount to the child or children, and in such cases the whole of it is for the benefit of the latter. Answer. Affirmed." Defendant presented this point: "(9) The suit, as it now stands, is not brought in the name of the widow, but by assignment for use of guardian. The action is not so assignable, and the plaintiff cannot recover. Answer. This is refused." Verdict and judgment for plaintiff for \$4,400.

Argued before McCOLLUM, C. J., and MITCHELL, BROWN, MESTREZAT, and POTTER, JJ.

J. Ross Thompson and O. C. Allen & Son, for appellant, H. J. Muse, for appellee.

POTTER, J. Orlando Lockeby was employed as a brakeman by the defendant company. A freight train upon which he was engaged in the line of his duty was derailed on the evening of October 11, 1899, and he was killed. The defendant company was charged with negligence in failing to keep the roadbed in safe condition, and the rolling stock in proper repair, and this suit was brought to recover damages for the death. In such a case, if the deceased were a married man, the right of action to recover damages for his death would clearly be in his widow, and in her alone. This is fixed by the terms of the act of April 26, 1855, as has been repeatedly pointed out by the decisions of this court. The subject was fully discussed, and the act of assembly clearly construed, in Railroad Co. v. Decker, 84 Pa. 419. It was there distinctly shown that, if the deceased left a wife and children, the widow alone is qualified, under the act of assembly, to bring suit. Attention was called to the fact that under a previous act of assembly (that of April 15, 1851) the right of action was given to the widow of any such deceased, and that "the object of the act of 1855 was not to take away the right of action given to the widow by the act of 1851. On the contrary, it recognizes her right," and provides for the distribution of the damages.

It is here contended by counsel for the plaintiff that one Rose Lockeby was the lawful wife of the deceased. If this were the case, he should have brought the action in her name, as the widow. He did not do so, however, but began the action in the name of a guardian of Ella Lockeby, who is set forth in the declaration, as the sole surviving child of Orlando.

Marsh v. Western New York & P. Ry. Co

Lockeby. Afterwards, and within one year from the date of the death, an amendment was prayed for and allowed which introduced the alleged widow, Rose Lockeby, as coplaintiff. Subsequently, by another amendment, the names of the parties plaintiff and defendant were changed, and the name of Rose Lockeby, as a plaintiff in her own right, was withdrawn, and the action was left to stand in the name of Rose Lockeby for the use of the guardian of Ella Lockeby. The only apparent reason for this course seems to have been the refusal on the part of Rose Lockeby to appear and prosecute any claim upon her own behalf. There was evidence that she had executed in favor of her daughter an assignment of all her right and interest in any claim for damages which she might have against the defendant company in this case, and in any verdict which might be obtained. Counsel seems to have considered this as an assignment by the widow of her right of action. If so, it was a mistake. The claim is, at most, one for unliquidated damages, in an action sounding in tort, and is therefore, under the authorities, not capable of assignment before verdict. A case in point is *Rice v. Stone*, 1 Allen, 566, where it is said that it is a principle of law "applicable to all assignments that they are void unless the assignor has either actually or potentially the thing which he attempts to assign. A man cannot grant or charge that which he has not." In the same opinion there is a reference to *Prosser v. Edmonds*, 1 Younge & C. 481, which sustains the doctrine that a bare right to file a bill or maintain a suit is not assignable. The opinion in that case says: "It is a rule, not of our law alone, but of all countries, that the mere right of purchase shall not give a man a right to legal remedies. The contrary doctrine is nowhere tolerated, and is against good policy. All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce."

In the present action, as the suit now stands, the alleged widow is not a party plaintiff. For this reason, the defendant, by its ninth point, asked for binding instructions in its favor. The refusal of this point is made the subject of the appellant's nineteenth specification of error, and this assignment must be sustained. The eleventh specification, in 'so far as it complains of the affirmance of the right of the widow to assign her right of action, is also sustained. It is unnecessary to consider the questions raised by the remaining assignments of error.

The judgment is reversed.

SHATTO *v.* ERIE R. CO.*(Circuit Court of Appeals, Sixth Circuit, March 18, 1903.)*

[121 Fed. Rep. 678.]

Railroads — Crossings—Injuries—Speed Ordinance—Violation—Signals.*

Where a railroad company ran its train over a city street crossing which was much used at a higher rate of speed than was permitted by a city ordinance, and without giving any warning signals, by reason of which plaintiff was injured while going over the crossing, such facts constituted a sufficient showing of negligence on the part of the railroad company to justify a submission of such issue to the jury.

Same—Contributory Negligence.

Plaintiff approached a railroad crossing in a city, with which he was familiar, at about 4:30 in the afternoon. The wind was blowing strongly from the south, and his view of approaching trains from the north was obstructed by a freight train standing on a switch track nearest him and by high board fences, dwelling houses, piles of lumber, etc. Plaintiff had his ears covered, and, as he approached the crossing, looked and listened, and, hearing no train, continued driving his horse at a trot until within 100 feet of the track, when the horse began prancing or single-footing. Plaintiff drove between the cars of the freight train, which had been cut at the crossing, and when his horse got his head beyond the cars he swerved and jumped to the left, when plaintiff was struck by a train approaching from the north on the main track: *held*, that plaintiff's failure to stop before driving on the track under such circumstances was contributory negligence as a matter of law.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

W. S. Anderson and Murray & Koonce, for plaintiff in error.
C. D. Hine and John H. Clarke, for defendant in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge. This case was brought to recover for personal injuries sustained by the plaintiff as the result of a collision between one of the engines attached to a train of the defendant company and the vehicle in which the plaintiff was attempting to cross the track. Upon hearing the testimony for the plaintiff, the trial judge directed a verdict in favor of the company upon the ground of the contributory negligence of the plaintiff at the time of the collision. This proceeding brings into review the correctness of that instruction.

It may be conceded at the outset that there was testimony sufficient to make a case to be submitted to a jury as to the negligence of the company in running its train at the time at a higher rate of speed than was permitted by the ordinance of the city of Sharon, Pa., within the limits of which city the accident happened, and that there was a failure on the part of the company to give the warning signals required by the exigencies of

*Violation of ordinance limiting speed as negligence, see foot-note appended to *Edwards v. Chicago & A. Ry. Co.* (Mo. App.), 2 R. R. R. 333, 25 Am. & Eng. R. Cas., N. S., 333.

Shatto v. Erie R. Co

the situation in approaching the crossing of a much used street. We may, therefore, consider the case upon the theory that the negligence of the company was sufficiently proven, and turn our attention to the question of contributory negligence.

The railroad runs north and south, or nearly so, through a part of the city and across a number of streets, one of which, known as "Ohio Street," crosses the track of the defendant company at an angle, the street running approximately east and west. At a distance about 1,700 feet north of the crossing the passenger station is situated. Crossing Ohio street the defendant company has two tracks. Thirty feet to the west of the main track is the track of one of the divisions of the Lake Shore & Michigan Southern Railroad Company. At a distance of 7 feet and 8 inches east of the east rail of the defendant's main track there was a side track crossing Ohio street parallel with the defendant's main track. This side track extended above and below Ohio street for a considerable distance. On this siding, at the time of the accident, there was standing a train of freight cars, the train having been cut in two so as to permit a space for the passage of people and vehicles of from 9 to 12 feet in width. The view from Ohio street to the east of the crossing up the track to the north was obstructed by high board fences, dwelling houses, piles of lumber, a lumber mill, and the standing cars. At the time of the accident, for a distance of at least 225 feet east of the crossing on Ohio street, no view could be had of a train approaching the crossing from the north. Under these conditions a person approaching from the east on Ohio street could not, because of the freight cars and other obstructions, see up the track to the north until within two feet of the main track. On February 18, 1900, the plaintiff, accompanied by his brother-in-law, started to drive from his home to the west side of the city. In so doing, he drove along Ohio street, approaching this crossing from the east. Ohio street is a much-traveled street, and a common thoroughfare for the people of the city. It was in the afternoon, about 4:30 o'clock. The ground was covered with snow, and the wind was blowing strongly from the south. The plaintiff and his companion were riding in a phaeton with the curtains down, the former driving, and occupying the right-hand seat. The plaintiff's testimony tended to show that at a point from 200 to 225 feet east of the crossing he and his companion moved to the front of the seat, one looking north, and the other south, and listening for a train; that at a point about 90 feet east of the crossing he looked out around the buggy top, but could see nothing to the north because of the cars on the siding above; that about 25 feet back from the track they looked and listened again, and heard nothing; that he started to drive through the opening between the cars; when his horse got his head beyond the cars, he swerved, and jumped to the left

Shatto v. Erie R. Co

at an angle down the track; that the horse gave a second jump, and jerked the buggy off the ground, then into the middle of the track. The plaintiff testifies that his horse was going three or three and a half miles an hour just before he went past the freight cars. It appears that the plaintiff did not stop. He testifies that he and his companion were looking and listening from a point about 250 feet east of the crossing, and heard no train. The day was cold, and the plaintiff had on "ear tabs." The plaintiff was familiar with this crossing. Until within about 100 feet of the track, the horse was driven at a trot; after that, he was "prancing" or "single-footing." At a distance of 30 or 40 feet from the crossing, the horse pricked up his ears as though he heard something coming from behind. The plaintiff looked back, but saw nothing.

The principles which govern the determination of questions of contributory negligence in cases like the one at bar are well settled. The law requires of one approaching a railway crossing the exercise of his faculties of sight and hearing to avoid injury. While the standard is the care of ordinarily prudent persons under the same or similar circumstances, such care requires that in approaching a situation so dangerous as a railway crossing a person shall at least look and listen at such short distance from the crossing as to enable him to pass in safety. In some jurisdictions it is held that in all cases the traveler approaching the crossing must stop, look, and listen. This court has not gone so far as to require stopping in all cases. Under the peculiar circumstances of the case in *Cincinnati, N. O. & T. P. Ry. Co. v. Farra*, 13 C. C. A. 602, 66 Fed. 496, this court held that it was not contributory negligence, as a matter of law, for Mrs. Farra to drive upon the crossing without stopping. In that case, Judge Lurton, delivering the opinion of the court, said:

"We are not prepared to say that, ordinarily, it would not be the duty of one approaching the crossing to stop and look and listen, if the view of the crossing was obstructed, and the sense of hearing materially affected by the noise of the vehicle in which the person was driving. The Pennsylvania rule, which seems to make it the duty to stop under all circumstances, regardless of obstructions to the view or obstacles to the hearing, has not met with general acceptance, and seems calculated to condone carelessness and recklessness by railroad companies at public crossings, where the rights and duties of the public and the company are reciprocal. Neither are we prepared to say that the duty of stopping is imperative in all cases where the track is obscured."

Where the view of the track is obscured so that one's vision can be of no service in enabling him to know of the approach of a train, and the traveler is required to rely upon his sense of hearing only, it must be an exceptional case which excuses one from stopping and listening before going into the danger

HARRIS v. ATLANTIC C. L. R. Co.*(Supreme Court of North Carolina, March 17, 1903.)*

[43 S. E. Rep. 589.]

Accident on Track—Evidence—Instructions.

Where, in an action against a railroad company for killing plaintiff's intestate on a railroad bridge, the conductor of the train testified for defendant that the train was required to stop in sight of the drawbridge, and that when the train came in sight of the bridge the whistle was sounded, and the train stopped 400 or 500 yards from the bridge, and then proceeded again, and that he saw intestate on the right-hand side of the track near the bridge, and that she walked ahead and went on the bridge, when he signaled the train to stop, a requested instruction that when intestate went on the bridge the train was only about 75 yards from her, and she could have seen the same, and heard it, if she had been at all careful, was properly refused.

Instructions.

The trial court is not required to give special charges in the language of the request.

Same.

Where a requested charge is partly erroneous, the trial court is not required to give that part which is good.

Accident on Track—Last Clear Chance—Evidence.

Where, in an action for the killing of plaintiff's intestate by walking on a railroad bridge, the jury found that deceased was killed by defendant's negligence, and that she was not guilty of contributory negligence, it was not necessary for the jury to pass on the issue as to the last clear chance.

Same—Negligence—Sufficiency of Evidence.

Plaintiff's intestate went on a railroad track at a point where she could see a train from the direction from which the train which struck her approached for 500 yards, and, seeing no train, and knowing that none was due at that time, she started to cross a railroad bridge. It was the rule for trains approaching the bridge to stop before reaching it, and when intestate was about half way over the bridge she saw a train coming, and attempted to retrace her steps. The train was being backed over the bridge with no lookout on the front car, and, though the conductor testified that he saw intestate on the bridge, no effort was made to stop the train, and she was struck and killed: *held*, that the proof of defendant's negligence was sufficient to support a recovery.

Contributory Negligence.*

That deceased went on a railroad bridge, where she was killed by being struck by a train while evidence of contributory negligence, did not constitute negligence per se.

Same—Care Due Trespasser on Track.†

In an action against a railroad company for killing plaintiff's intestate while she was walking on defendant's railroad bridge, an instruction that in considering whether defendant was negligent the jury should consider whether it failed to do what an ordinarily prudent and skillful person would have done under the circumstances was not error.

Montgomery, J., dissenting.

Appeal from Superior Court, Edgecombe County; Winston, Judge.

*See *Weeks v. Wilmington & W. R. Co.* (N. Car.), 5 R. R. R. 28, 28 Am. & Eng. R. Cas., N. S., 28.

†As to the care due trespassers and licensees on track, see footnote appended to *Cannon v. Cleveland, C., C. & St. L. Ry. Co.* (Ind.), 1 R. R. R. 53, 24 Am. & Eng. R. Cas., N. S., 53.

Harris v. Atlantic C. L. R. Co

Action by D. H. Harris, administrator of the estate of one Denton, deceased, against the Atlantic Coast Line Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

John L. Bridgers, for appellant.

Gilliam & Gilliam and Kitchin & Allsbrook, for appellee.

DOUGLAS, J. This is an action for damages for the killing of the plaintiff's intestate through the alleged negligence of the defendant. The material facts are substantially set forth in the following testimony of the witness Manning: J. W. Manning, for plaintiff, testified: "I am 79 years of age. On the morning of January 26, 1891, left home with Mrs. Denton and her little boy, six years old. I went with them to the Tar River railroad bridge. We went across the field, and entered upon the railroad track about 150 to 200 yards of the bridge, walked down the track to the bridge. At the bridge we stopped and talked, looked back, and saw and heard no train. No trains were usually passing at that hour—this between 9 and 10 o'clock in the morning. She asked me to stay there until she got over the bridge. She started to cross the bridge, but had not reached the draw, when I heard the train. I called to her to come back. She started, holding the boy by the hand. The boy stumbled, and she was dragging him. She returned as soon as I called to her to do so, and had gotten within a few feet of the end of the bridge—just near enough to reach my hand—when the train struck her. I did not go on the bridge, but stood at the end of it beside the track. There is a 'stop post' near the bridge, 20 or 25 yards from the end of the bridge, where trains usually stop. This train did not stop there. Did not blow, that I heard. The train was composed of 11 flat cars, 3 shanty cars, and an engine; flat cars ahead, 3 shanty cars, and then engine. Train moving backward. I did not see any one on the shanty cars or flat cars until the train was close to the bridge. Then conductor came running to end of flat cars, and motioning to Mrs. Denton to get to one side. Train was then not 20 feet from her. No lookout until then, that I saw. Did not see him signal the engineer. Train did not slacken its speed until after it passed the 'stop post.' Did not stop until after it had run over Mrs. Denton. One on track at the end of bridge can see the train 400 to 500 yards, and Mrs. Denton could be seen some distance by one on the train. Have seen trains pass over bridge frequently. The rule and custom is for trains to stop at 'stop post' on each side of the bridge. There is also a 'blow post' about one-half mile of the bridge. Rule for trains to blow there. Did not hear this train blow there. Mrs. Denton was killed, and her little boy injured." There was further evidence to the same effect; and in fact, while there was some contradiction as to the minor statements, the principal facts were practically admitted. What-

ever contradiction there might be was a matter for the jury. The conductor in charge of the train testified in part that the train was required to stop in sight of the drawbridge, so that it could be seen if the draw was open; that when it came within sight of the bridge the whistle was sounded, and the train was stopped 400 or 500 yards from the bridge, and then proceeded again; that he saw a woman on right-hand side of track near bridge, but supposed she saw the train; that she walked ahead, and went on bridge, and he then signaled the train to stop. This testimony is not very clear, but, in any event, the conductor saw the deceased as she went upon the bridge, and probably saw her when he stopped the train 400 or 500 yards from the bridge.

We are not attempting to find facts, or to weigh the evidence, but simply reciting portions of it to show its general bearing as applied to the defendant's exceptions. For instance, the defendant's seventh assignment of error is as follows: "That the court refused to instruct the jury as requested in that part of defendant's seventh prayer which reads as follows: 'That when she went on the bridge the train was only about 75 yards from her, and she could have both seen and heard it, if she had been at all careful.' " This is a request for the court to find three distinct facts—the distance of the train and the ability of the deceased both to see and hear it. The court had no such power, and, if it had, would hardly find such facts contrary to the defendant's own testimony.

There are 15 assignments of error, none of which, in our own opinion, can be sustained. Thirteen of them are directed to the refusal of the court to give the defendant's prayers for instructions. Nearly all were intrinsically erroneous, and could not have been given as requested. Those that were correct were either given as requested or included in his honor's charge to the fullest extent to which the defendant was entitled. Upon a request for special instructions the court is not required to charge in *ipsissimis verbis* of counsel, even when the prayer is correct. *Norton v. Railroad*, 122 N. C. 910, 29 S. E. 886; *Cox v. Railroad*, 126 N. C. 107, 35 S. E. 237; *Railway Co. v. Horst*, 93 U. S. 201, 23 L. Ed. 898; *Railway Co. v. Volk*, 151 U. S. 73, 14 Sup. Ct. 239, 38 L. Ed. 78. Nor is the court required to dissect an erroneous prayer, and to give that part that is good to the exclusion of the other. The judge may do so in his discretion, as he has done in the case at bar; but the two are generally so intermingled as to make the attempt difficult if not dangerous.

With so many exceptions relating to prayers of such length, it is neither necessary nor practicable to discuss them separately and in detail. Every material question in this case is practically decided in *McLamb v. Railroad*, 122 N. C. 862, 29 S. E. 894, and *Bogan v. Railroad*, 129 N. C. 154, 39 S. E. 808, 55 L. R. A. 418. The case at bar is in one material aspect stronger than either of those cases, as the jury found all

Harris v. Atlantic C. L. R. Co

the issues in favor of the plaintiff. After finding that the deceased "was killed by the negligence of the defendant company," and that the deceased was not guilty of contributory negligence, it was not necessary for the jury to pass upon the third issue—as to the last clear chance; but they have done so, and we see no reason to disturb their verdict. The wording of that issue was as follows: "Notwithstanding the negligence of the deceased, if guilty of such negligence, could the defendant have avoided the injury by the exercise of ordinary care?" It was necessary for a recovery by the plaintiff that the first issue—as to the negligence of the defendant—should have been found in his favor, as there can be no recovery unless the injury is the result of some negligence on the part of the defendant. When such primary negligence is found, the next inquiry is as to the contributory negligence of the plaintiff. If he has not been guilty of such negligence, then he is at once entitled to the issue of damages. If he has been guilty of contributory negligence, and yet the defendant might, notwithstanding the negligence of the plaintiff, have avoided the injury by the exercise of ordinary care, the plaintiff can still recover. The nature and effect of these issues have been fully discussed by this court in the recent case of *Curtis v. Railway Co.*, 130 N. C. 437, 41 S. E. 929. There was certainly evidence tending to prove the negligence of the defendant.

The mere fact that the deceased went upon the railroad bridge was in itself some evidence of contributory negligence, to be considered by the jury in connection with all the surrounding circumstances. It was not negligence per se, but only evidence tending to prove negligence, which might be nullified or rebutted by other controlling circumstances. The courts are more and more abandoning arbitrary definitions and distinctions as to negligence, and coming down to the rule of the prudent man. Would a woman of ordinary prudence, in like circumstances with the deceased, looking up a straight track for 500 yards, and seeing nothing, knowing that no trains were then due, and that, if a train were to come, it would be required by rule and custom to stop before reaching the bridge, have undertaken to cross the bridge, when she had no other convenient means of reaching her destination? The jury might well have answered such a question in the affirmative.

One of the defendant's exceptions is that the court instructed the jury that "in this cause you will, in considering whether the defendant was negligent, consider whether or not it failed to do what an ordinarily prudent and skillful person would have done under the circumstances." We see no error therein. It is certainly correct as an abstract proposition of law. If the court had said nothing more, and had left the jury to apply the law as best they could, there would have been an error of omission; but this was but a small part of a long and

Lake Street El. R. Co. v. Burgess

elaborate charge, in which every phase of the case was presented to the jury. Indeed, it might be questioned whether the charge as a whole was not too favorable to the defendant.

The judgment of the court below is affirmed.

MONTGOMERY, J. (dissenting). The going by a wayfarer upon a railroad trestle or bridge so high that it would be dangerous to get off by leaping to the ground is per se negligence. In the case of *Little v. Railroad*, 118 N. C. 1072, 24 S. E. 514, this court said: "It was conceded and settled in *Clark v. Railroad*, 109 N. C. 430, 14 S. E. 43, 14 L. R. A. 749, that one who attempts to walk across an elevated trestle so high that it is dangerous to jump from it to the ground is negligent, and that, where he is injured by a train while crossing, it is the duty of a jury to find in response to an issue involving the question that he contributed by his own carelessness to cause the injury." In *McLamb v. Railroad*, 122 N. C. 862, 29 S. E. 894, the defendant asked the court to instruct the jury that upon the whole evidence the plaintiff's intestate was guilty of contributory negligence. In the opinion of this court in that case it was said by way of parenthesis that that instruction was not given for the reason that the third issue—as to the negligence of the deceased—was, by consent of the plaintiff, answered in the affirmative before the charge of the court was read. Plaintiff's intestate there was killed while walking on a trestle.

I think his honor should have instructed the jury that the plaintiff, as a matter of law, was guilty of contributory negligence in going upon the trestle. That being so, it was highly important that the third issue, which involved what is called the "last clear chance" on the part of the defendant, should have been submitted to the jury upon full and thorough instructions in the light of negligence on the part of the plaintiff's intestate.

LAKE STREET EL. R. CO. v. BURGESS.

(*Supreme Court of Illinois, Feb. 18, 1903.*)

[66 N. E. Rep. 215.]

Injury to Passenger—Hole near Elevated Railway Platform.*

Where a passenger on a dark night stepped into an unguarded hole between two cars and the platform of an elevated railroad station, believing it to be the platform of the car she was about to board, and it was shown that the space between the cars was usually protected by a trellis gate, which at the time of the accident had been removed, the question of the carrier's negligence was for the jury.

Same—Same—Who Are Passengers.

Where plaintiff boarded a shuttle car on a city street, which connected with an elevated railroad, and plaintiff was carried to a plat-

*As to a carrier's duties with respect to stations and stopping places, see monograph appended to *Muhlause v. Monongahela St. Ry. Co. (Pa.)*, 2 R. R. R. 131, 25 Am. & Eng. R. Cas., N. S., 131.

Lake Street El. R. Co. v. Burgess

form station erected between two elevated tracks, where she waited for the elevated train, on which she intended to continue her journey, and she was injured by falling between two cars as she attempted to board the train, she was a passenger, and entitled to the exercise of more than ordinary care by the carrier.

Evidence.

In an action for injuries to a passenger, it was not error to permit a pencil drawing of the cars, showing the space where the injury occurred, to be used for the purpose of aiding the jury in understanding the testimony, though such drawing was not strictly accurate, where it was neither introduced in evidence, nor taken by the jury to its room.

Sufficiency of Declaration.

Where a declaration set forth the relation of passenger and carrier, and averred that it was defendant's duty to use due care in providing suitable gates or other safeguards to prevent persons from falling between the cars, and that defendant failed to do so, by reason of which plaintiff was injured, the declaration was sufficient to support a verdict for plaintiff, as against a motion in arrest of judgment.

Appeal from appellate court, First district.

Action by Kate Burgess against the Lake Street Elevated Railroad Company. From a judgment in favor of plaintiff, affirmed by the appellate court (99 Ill. App. 499), defendant appeals. Affirmed.

Clarence A. Knight and William G. Adams, for appellant.

William A. Doyle and Thomas E. Rooney, for appellee.

RICKS, J. This is an appeal from a judgment of the appellate court affirming a judgment of the circuit court of Cook county for \$2,500 in favor of appellee and against appellant in a suit for damages for injuries received by her while attempting to board a train operated by appellant. It appears from the evidence that appellee on the 23d day of September, 1896, boarded a shuttle car of appellant, running from Market and Madison streets, and paid her fare, to be carried thence to Austin, a suburb, where she resided, and was taken in this car to the main line of the appellant, at Canal and Lake streets, in Chicago, at which last-mentioned point she left the shuttle train, to transfer to a train going west on the main line. This shuttle car ran only from the point of starting to Canal street and return, and was used to carry passengers to appellant's main line, at Canal street. The station platform at that place is located between the tracks, which spread at that point, one running on either side of the platform, and is therefore called an "island platform." The platform of the station is on the same level as the platform of the cars, with a space between just wide enough to provide for the clearance of the cars. After the plaintiff had waited a short time at this island platform, the west-bound train arrived. This train consisted of three cars and a motor car. Prior to the day before the accident these trains had been propelled by steam, but on account of repairs the motive power had been changed to electricity. She started from the bench on which she had been sitting, and walked towards

Lake Street El. R. Co. v. Burgess

the train. As she approached, she observed vacant seats in the rear end of the front or motor car, and her mind was attracted to getting in, and getting one of these seats. Although she had ridden over the road seven or eight years, she had not before then entered a train on this line, made up and propelled as this one was. She stated that on approaching the train she was calm, was not excited, and was watching and endeavoring to avoid injury, and, on account of the darkness, mistook the place where the opening was to be the platform of the front or motor car. It was in the night. The place was dark, and not lighted. The motor car on this side had no platform, and, instead of stepping upon the platform, appellee stepped between the motor car and the car behind it, fell to the track below, and sustained serious injuries. It was alleged in the declaration that the defendant carelessly, negligently, etc., failed to provide suitable safeguards between the cars to prevent passengers, while attempting to board the trains, from being precipitated into the space between the cars.

It is first contended by the appellant that the court erred in refusing to peremptorily instruct the jury to find the appellant not guilty. If appellee was a passenger, it was the duty of appellant to exercise the highest degree of care, skill, and diligence for her safety, consistent with the mode of conveyance employed, as long as she remained a passenger. There was evidence in the record tending to show that this space between the cars was usually protected by a trellis gate, and at the time of the accident the gate had been removed, leaving an unguarded hole, that a passenger might, in the dark, easily mistake for the platform of a car; that appellant had accepted appellee as a passenger, and had placed her upon this island platform to wait for its connecting car; and that appellant was derelict in its duty, in providing appellee this unsafe and dangerous place in which to board the connecting line. Whether or not appellant was negligent in the discharge of its duty, or appellee was negligent in not correctly determining whether this was a platform she was stepping on, was a question for the jury.

But it is contended by appellant that appellee was not a passenger, and that appellant's only duty was to exercise ordinary care to prevent injuries that might be reasonably expected to follow from the failure to maintain a gate across the opening between the car and platform. The evidence shows that this island platform, on which appellee was placed by appellant to take a connecting car, was 35 feet above the ground, with trains running on either side, and that she was placed there by appellant, knowing that she would take a connecting line on its own system within a short time. It is said in *Chicago & Eastern Illinois Railroad Co. v. Jennings*, 190 Ill. 478, 483, 60 N. E. 818, 820, 54 L. R. A. 827: "It is not necessary, to create the relation, that the passenger should have entered a train; but if he is at the place provided for

Lake Street El. R. Co. v. Burgess

passengers, such as a waiting room or platform at the station, with the intention of taking passage, and has a ticket, he is entitled to all the rights and privileges of a passenger."

It is insisted by appellant that the court erroneously refused its instruction numbered 15. The substance of this instruction was given in appellant's instructions numbered 4 $\frac{1}{2}$, 10, 11, 16, and 24.

Appellant complains that the circuit court erroneously admitted a pencil diagram of the cars in evidence, and incorporates in the record what is said to be an original pencil sketch, purporting to show the rear end of the front or motor car, the front end of the adjoining car, and the platform and opening into which appellee claims to have fallen, and also the station platform. There was no writing on the sketch, except the words indicating the points of the compass, and the figure "18" in the space between the motor car and the front end of the platform of the adjoining car, and the characters "2 $\frac{1}{2}$ ft.," in the space of the platform or entrance of the car back of the motor. Appellant's claim agent was placed on the stand by appellee, and this drawing exhibited to him; and he was inquired of as to its accuracy, and replied that, as far as he could tell, it seemed to be correct. Afterwards his attention was called more specifically to the sketch, and he stated that the corner of the motor car did not seem to be quite as rounding in the sketch as it was in fact, and that it gave appearance of greater space in the space where appellee claimed to have fallen than was really there, and spoke of other minor inaccuracies. Appellee then offered the sketch in evidence, and upon objection by appellant's counsel the court said: "You offer it as a sketch, simply to aid the jury in arriving or understanding their testimony, but not as a correct sketch of the car. It will not be introduced in evidence. You can use it in making your argument, but not to go into the jury room, except there is no better. It may be used, not as a perfect sketch of the car or the location, but as an aid to the jury in understanding the testimony of the witnesses in respect to the cars." The court further said: "Of course, gentlemen, this is not meant as a picture of the car or the location there,—I mean of the location; but any lawyer, or anybody, has a right to sit down with a pencil there, and make a sketch of any kind that tends to represent the location and the things in controversy, and that goes in simply as an aid to the jury. It is not intended except as an aid to the jury." It is not contended that the jury was permitted to take this sketch to the jury room, nor can it be seriously contended that it was admitted in evidence. It was used in argument as a means of illustration, and we can see no error in its being so used. *Brown v. Galesburg Pressed Brick & Tile Co.*, 132 Ill. 648, 24 N. E. 522.

It is insisted the declaration is insufficient to support the

McMichael v. Illinois Cent. R. Co

judgment. The declaration sets forth the relation of passenger and carrier, and avers that it was the duty of appellant to use due and proper care in and about the providing of suitable and proper connecting gates or rails, or other safeguards, to prevent persons from falling between the cars, and that the appellant negligently failed to do so. While the facts showing this duty might have been more fully stated, yet "if, from the issue, the fact omitted and fairly inferable from the facts stated in the declaration may fairly be presumed to have been proved, the judgment will not be arrested." *Pennsylvania Co. v. Ellett*, 132 Ill. 654, 24 N. E. 559. We think the declaration in this case sufficient to support the verdict, and the motion in arrest of judgment was properly overruled.

Finding no error in the record, the judgment will be affirmed. Judgment affirmed.

MCMICHAEL v. ILLINOIS CENT. R. CO.

(Supreme Court of Louisiana, March 30, 1903.)

[34 So. Rep. 110.]

Injury to Female Passenger—Fall While Alighting at Night—Moving Car—Liability.

Plaintiff sued for damages caused by her falling from the upper steps of one of defendant's trains while she was alighting, in the nighttime, from the train.

The preponderance of the testimony shows that the car was in motion. She was warned not to alight, and still persisted, although she was told of the danger.

It is evident that she was nervous at the time, and acted with impulsiveness; and the court, with the facts shown, did not find it possible to allow damages.

Same—Same—Same—Assumption of Risk.*

A lady passenger takes risks who attempts to alight in the nighttime, with a parcel in her hand, when the car is in motion.

Evidence.

Physical facts of the nature of those pleaded by plaintiff, shown in part by testimony, will not, under the rules of evidence, outweigh the testimony of a number of witnesses to the contrary of the theory based upon these physical facts.

(Syllabus by the Court.)

Appeal from Judicial District Court, Parish of Tangipahoa; Robert R. Reid, Judge.

Action by Ella McMichael against the Illinois Central Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed.

Hunter C. Leake and Bolivar E. Kemp, for appellant.

Milton Alexander Strickland and William H. McClendon, for appellee.

*As to whether it is contributory negligence to alight from a moving car, see foot-note appended to *Lindsay v. So. Ry. Co. (Ga.)*, 3 R. R. 748, 26 Am. & Eng. R. Cas., N. S., 748.

Statement of the Case.

BREAUX, J. Plaintiff, owing to personal injuries received in a fall, while leaving defendant's train at Amite City, sued for damages in the sum of \$2,500.

The questions are of fact, and render it necessary to carefully read the testimony of each witness, and to weigh and compare all the incidents attending the fall.

Plaintiff avers, in substance, that she was a passenger of the Illinois Central Railroad Company from New Orleans to Amite, due at Amite at 9:30 p. m.; that before arriving at Amite City she requested the porter to assist her in alighting from the train on its arrival at Amite City; that on approaching the depot the porter came, in accordance with her request, took her baggage, and walked toward the platform, plaintiff following; that before she could descend the car steps she was, by a sudden forward movement or jerk, violently thrown to the ground, and thereby she became unconscious, and remained in a condition of unconsciousness until the afternoon of the following day. Her head was severely cut and injured, the cut leaving a permanent scar. Her arm was badly torn and bruised. She was confined to her room, and required the services of a physician for a week. She suffered bodily pain and mental anguish.

As well here state that there is no dispute regarding the personal injuries sustained. They were as alleged by plaintiff.

The defense sets up negligence, carelessness, and inattention, and alleges that she alone was at fault for the fall.

Plaintiff is a graduate of a female college; has been teaching for 20 years; is an intelligent witness in her own behalf. She has traveled on railroads, and has some knowledge of their movements. She swears that she had a heavily packed valise, one pasteboard box about a foot square, and two small curtain poles about one inch in diameter and about five feet in length; and that she told the porter to see that her baggage was taken off, which he did. That she took up the two curtain poles. The train stopped. She went to the door, turned to go down the steps (she was facing the east coming down the steps), and at that moment the train pulled up or jerked, and she was thrown down, and rendered unconscious, as before stated. She was wounded on the left side, and holes were cut through the left sleeve of her dress. She thought that the train was not in motion when she stepped from the door to the platform just prior to alighting. She did not step on the platform, but walked down the steps, and she was just in the act of stepping from the platform to the first step, recalling the incidents as well as she could. She had not reached the bottom step. The train moved—jerked—and she fell.

Plaintiff says that she well knew the danger of alighting from a moving train, and that she did not attempt to alight while the train was in motion. The witness positively says,

McMichael v. Illinois Cent. R. Co

"The train was not moving when I left the coach and passed to the platform." Witness also states that she occupied, while in the train, the third or fourth seat from the north end of the east side.

A witness for plaintiff (Tate) testified that he picked up plaintiff's pocketbook and gloves near where she fell. It seemed to this witness that some one had placed the box and valise of plaintiff near the place where she fell, one near the other; not as they would have been had they fallen down at the place. He noticed "some rods or something lying on the top of the valise."

The pasteboard box was untied at the time of the accident, it was found untied as plaintiff swore it was, and none of its contents were missing. Plaintiff also swore that she had her pocketbook in her hand, and her gloves, on leaving the car.

We infer from the testimony of this witness that plaintiff fell some distance before the train arrived at the stopping place.

The contradiction between the testimony for defendant and that for plaintiff is irreconcilably conflicting. We can only say that some one is woefully mistaken. All the witnesses for the defendant substantially agree in stating that the car was in motion at the time.

G. W. Andrews, of Summit, Miss., a passenger, in answer to preliminary questions propounded, said that he follows a trade, and that his family consisted of six children; that, although the lady was a stranger to him, he was moved to suggest to her, because of the danger, not to go out on the platform; that there would be plenty of time to get off when the train would stop; that he placed his hand on the door, near which he was sitting, in front, to keep her from going out; that, as she insisted upon passing, he withdrew his hand from the door; that the train made only one stop; that she carried a few parcels in her hands; that there was no unusual jerk of the train; that no porter was assisting in carrying her parcels; and that there was nothing done by the trainmen to lead a person to believe that it was the proper time to leave the coach; and that he saw no occasion for this passenger to leave the coach.

A Mr. H. T. Waterer, of Lexington, Miss., a farmer, and who occasionally ships cattle, was another passenger. He corroborates this statement in every particular, mentioning that he and Mr. Weiner, an attorney at law, who has had 18 years' experience as a practitioner at law (he is local counsel of defendant's road), of Durant, Miss., were sitting near at the time, and heard the witness say: "Don't you go out. You are liable to get hurt. You have plenty of time to get off;" that the train was in motion, and that it made only one stop; noticed no jolt, jerk, or lurch of the train.

Mr. Weiner, above referred to, testified that he was a passenger on the night in question, and the car which he and the

McMichael v. Illinois Cent. R. Co

lady who is the plaintiff occupied was very much crowded; that she seemed to move with difficulty, owing to the parcels she carried; that his intention was to assist her, as he realized the danger to which she was exposing herself in stepping on the platform while the car was in motion. He does not know that she noticed him. To quote from the testimony, "But her act was such as to deter me from making any further move;" that she "appeared to be rather impatient or nervous"; that Mr. Waterer, near him, exclaimed, "Why, she is all right; she has already gotten off;" and that the train was still in motion when he made the remark. He did not see any porter about at the time, and that no train had left the coach in advance of the plaintiff. He observed no jerk of the train. "I knew that the train was moving too fast for passengers with baggage to go out on the platform." In answer, on cross-examination, he said that he was actuated at the time by a feeling which is always interpreted as one which elevates humanity. He said, "A man hardly knows what his motives are at the time of an accident of this kind."

Mr. S. E. Willis, of Clinton, Miss., who swore that he was a minister of the gospel, occupied at the time in teaching, said:

"As we were pulling into the town of Amite City, the porter announced our arrival to the place, and immediately a lady got up and walked to the door of the coach. There she hesitated for a moment. I don't know just how long. Then she opened the door, and stepped out on the platform, pulling the door to behind her. At the same time the train was moving pretty rapidly. I saw no more of her, for it was dark out there. The lady had something in her hands. One thing appeared to be a roll about three or four feet long, and parcels."

He did not "know just how long it was before the train made a full stop; surely it was not less than fifteen or twenty seconds."

Dr. A. E. Davenport, a practicing physician at Tishomingo, Ind. T., who was a passenger on the train, testified:

"Yes, my attention was directed to a lady who had been sitting behind me as she passed by me in going to the front door of the car. She brushed by me, in her effort to get to the front, in a very hasty manner, carrying a number of parcels; among others, a long pole, which I think was a window pole. Some time before I reached the station house at Amite City, La., she appeared to be very impatient to go out upon the platform of the car. As she placed her hand on the knob, a gentleman stepped between her and the door. As to what he said to her, I do not know. He seemed to be protesting with her about something, but I did not understand its purport; but, after he had spoken to her as detailed, she seemed not to heed him, but apparently paid no attention to him, and pushed by him, and walked out, while the train was still in motion."

McMichael v. Illinois Cent. R. Co

This was about two minutes, the witness estimated, before the train came to a full stop. In his opinion, there was nothing to indicate that it was the proper time to leave the coach; and that after the stop some one came to him and said that a lady passenger had been hurt, caused, the passenger stated, "by her jumping off the train before it had stopped. This was immediately after the train had stopped. In a few minutes several persons passed my car, carrying a lady, who seemed to be injured physically."

The conductor and the engineer testify that the train was in motion at the place the plaintiff fell.

We will state here, as pertinent to the issue, that plaintiff said on her cross-examination as a witness that she did not stop after leaving her seat, "only to turn and tell some friends, who were sitting on the west side of the car, one seat back of me, good-bye. Back of my seat, I mean. These friends reside in or near Magnolia, Miss." Their testimony was not taken.

The lady has a youthful face and white hair, to which we refer only to state that witnesses for defendant, who were not acquainted with her, refer to this as fendering it easily possible for them to say that it was plaintiff to whom they refer in their testimony, as this fact attracted their attention at the time.

The question of distance enters into the decision. The train consisted of 11 cars going north—a mail coach, express, baggage, and day coaches. Plaintiff, defendant contends, was in the second day coach. In the fall she must have been about 305 feet from the front or north end of the train. She was found about 11 feet south of the second day coach, or 76 feet from its front.

The cars are 65 feet in length, except the express, which is 60 feet. The length of the engine is 50 feet; total, 500.

The engineer testified that he stopped his engine 165 or 175 feet north of the depot, 6 or 7 feet south of Mulberry street. The depot at Amite City is located between Mulberry street on the north and Oak street on the south, and the distance between them is 400 feet.

Plaintiff, her counsel states, was found lying on the gravel walk 12 feet north and 150 feet south of the depot.

Plaintiff complains of the fact that the flagman of the road was not produced as a witness in this trial, in order to have testimony to throw light on the question of distances, in regard to which other witnesses have testified.

The judge of the district court rendered judgment for plaintiff for \$500. From this judgment defendant appeals.

Opinion.

Under any theory it is evident that plaintiff left the train in which she was a passenger before it had arrived at the place at which it stopped the last time, if it stopped twice.

Plaintiff's counsel's insistence is that the train stopped with the baggage car opposite the depot, and again when the

McMichael v. Illinois Cent. R. Co

conductor alighted and walked to where the plaintiff was immediately after the fall.

This view is not borne out by the testimony, although such a stop would harmonize with the physical facts, and is, perhaps, the only way to account for them (on plaintiff's theory) with any degree of certainty.

The physical facts, as set forth by plaintiff and the testimony of defendant, do not agree.

It is a trite saying "that actions speak louder than words." At the same time, they do not, because not reconcilable, from a reasonable point of view, with testimony, always outweigh the testimony. The physical facts do not demonstrate that the evidence is untrue.

The decided preponderance of the testimony is that the train was in motion, and it was dangerous to alight at the time. If the testimony of six disinterested witnesses, not in the employ of the company (contradicted only by plaintiff) be true, then we are forced to the conclusion that plaintiff must have been careless. The law is well settled that a passenger, particularly a lady passenger, who has parcels with her, should not seek to alight while the train is still running. The physical facts do not establish conclusively that the cars were not running. All the witnesses except plaintiff testified that the car was running at a rate too fast to alight without incurring some risk of an accident.

After all, it is more reasonable to conclude that in some way unknown to any one the parcels, unopened, and in order, were on the ground near where plaintiff fell, than to conclude that all the witnesses except plaintiff have disregarded the truth in order to prevent this lady from receiving an amount for injuries sustained.

The physical fact before referred to is not independent of all human agency. It may be that the parcels were laid on the ground by another than the porter, or even by the lady passenger herself.

She, in the excitement of the moment, may have been more imprudent than she imagined, but may have held on to her parcels with more tenacity than she thinks.

Another embarrassing feature about this case is the fact that the district judge before whom the case was tried rendered a judgment for plaintiff. We entertain great respect for his judgment. It is with hesitation that we differ from him on this occasion.

He did not hear all the testimony. There were witnesses examined under commission. By this we are, as to those, on the same plane as he was. Taken as a whole, we leave the case convinced that the train was in motion, and that it was imprudent to alight before it had stopped.

We have carefully weighed all the testimony, and give due credit to all the witnesses—those for plaintiff as well as those for defendant—for desiring to testify truthfully. We find

Denny v. North Carolina R. Co

that the weight of proof is with defendants. It only remains for us to set aside the judgment.

It is therefore ordered, adjudged, and decreed that the judgment appealed from is avoided, annulled, and reversed. It is further ordered, adjudged, and decreed that plaintiff's demand be rejected, and her suit is dismissed, at her costs in both courts.

DENNY v. NORTH CAROLINA R. CO.

(Supreme Court of North Carolina, April 14, 1903.)

[43 S. E. Rep. 847.]

Carriers—Injuries to Passenger—Nonsuit.*

A passenger on defendant's train went upon the platform of the car, in anticipation of the train's stopping at a regular stopping place, and stood on the steps of the car in violation of defendant's rule (known to him) forbidding passengers to go on the platform while the train was in motion. The train ran by the regular stopping place. There was no evidence that the conductor was on the platform, or knew or had any cause to think that plaintiff was there, or invited him to go there. A sudden jerk of the train threw plaintiff off, and he was injured. The speed of the train was about 8 or 10 miles an hour when he fell: *held*, that plaintiff was properly nonsuited.

Appeal from Superior Court, Guilford County; Neal, Judge.

Action by W. R. Denny against the North Carolina Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Scales, Taylor & Scales, for appellant.

King & Kimball, for appellee.

CONNOR, J. This is an action to recover of the defendant damages for personal injuries alleged to have been sustained by the plaintiff while a passenger on the train of the defendant's lessee. The portion of the evidence necessary to be considered in passing upon the exceptions to the ruling of his honor is as follows: The plaintiff testified: That he purchased a ticket of the agent of the defendant's lessee at Greensboro from that point to McLeansville, a station on the road, and paid therefor the sum of 25 cents. That he went into the defendant's car, and after the train left Greensboro the conductor came through the car to gather tickets of the passengers. That he handed the conductor the ticket; calling his attention to the fact that he wished to get off at McLeansville, and saying, "Do not forget me." He spoke loud, and the conductor nodded his head, and he understood that the conductor heard him. As the train approached McLeansville, it was a little late, and was going at a pretty rapid speed. Plaintiff kept his seat until after the train had blown the

*As to whether it is contributory negligence for a passenger to stand on the platform of a moving car, see foot-note appended to *Southern Ry. Co. v. Roebuck* (Ala.), 2 R. R. R. 204, 25 Am. & Eng. R. Cas., N. S., 204.

Denny v. North Carolina R. Co

regular station whistle, about a mile from the regular stopping place. The whistle blew to stop at the station. Plaintiff knew that it meant for the train to stop at the station. Some time after the whistle blew, the plaintiff got up and went to the end of the car, and by that time the train had gotten nearly to the stopping place. He got up because he knew that the train was getting near the station, knew the whistle had blown, and knew that they had promised to stop there and let him get off. There is a regular stopping place there—a regular platform. The train stops there only long enough for a person to get off. On this occasion it did not stop at the regular stopping place, but ran past about 150 yards. After it passed the regular stopping place it began to slow up, and continued to get slower. Just as it was coming to the stopping place the plaintiff went out on the platform, and after it had gone 75 or 100 yards past the stopping place the plaintiff got on the steps, and then the train got slower and slower. It was going too fast for him to get off, and he was waiting for it to get slow enough. He was holding with his left hand to one of the rods, and there was a sudden jerk of the entire train, and at the same time his hold was broken, and he had to pick his way the best he could to the ground. The jerk broke his hold and caused him to go off then. The snatch of the car which broke his hold was really the cause of the injury. The train did not stop entirely until after he fell. When this jerk came, the speed was quickened and the train ran on some distance. The plaintiff also testified in regard to his injuries. Upon cross-examination he testified that he had seen the notice posted up by the door that persons must not get on the platform while the train was moving, and that he knew that was the rule of the company; that, if he had kept his seat until the train stopped, the accident would not have happened; and that it would not have happened if they had not jerked the train; and he also knew that it was the rule of the company to stop at the regular, prepared platform. A. M. Rumley, a witness for the plaintiff, testified that the train was running about 8 or 10 miles an hour when he fell. The defendant moved to nonsuit the plaintiff. The motion was denied, and defendant excepted. At the conclusion of the evidence the defendant renewed its motion to nonsuit the plaintiff. The motion was allowed, and judgment rendered dismissing the action "as upon nonsuit." The plaintiff excepted and appealed, assigning as error the ruling of the court upon defendant's motion.

The plaintiff relies upon the principle announced by this court in *Nance v. Railroad*, 94 N. C. 619. The correctness of the rule laid down in that case has not been questioned by any decision of this court, nor are we disposed to do so now. We fully approve it. It was the obvious duty of the defendant to stop its train at the station named on the plaintiff's ticket, and permit him to get off safely; and if the movement

Denny v. North Carolina R. Co

of the train had been brought gradually slower, until it had been brought "nearly—almost—to a full stop," it would not have been negligence for the plaintiff to go out of the car on the platform, and step to the platform of the station. Merri-
mon, J., speaking for the court, says: "By 'nearly—almost—to a full stop' is meant very slow; a slight, gentle, creeping movement." The learned justice further says: "The reasonable inference was that it was intended by such stoppage to let passengers get on and off the train. At least, the feme plaintiff might draw such inference. There was therefore at least an implied suggestion from the conductor that she could do so." In that case the allegation in the complaint was that the train had already slackened its speed to nearly a "full stop," when there was no real or apparent danger; that the car had reached the usual place for getting off, and when it was safe and without danger for her to do so she stepped off, and, while in the act of doing so, was by a sudden jerk thrown down and injured. In *Tillett v. Railroad*, 118 N. C. 1031, 24 S. E. 111, the plaintiff was on the train, and before he could, by the exercise of reasonable diligence, procure and occupy a seat, the car was brought into sudden and violent collision with another car in making a coupling, when the plaintiff was thrown down and injured. The court sustained a verdict for the plaintiff. There can be no doubt that a sudden or violent jerk, movement, or collision of the train by the engineer, while the train is at a station where passengers are known to be or have the right to be, in the act of alighting from or going upon the cars (and in this is included leaving their seats for exit or passing to their seats), is *per se* negligence, and the company is liable for any injury sustained thereby. It is also well settled that if the passenger be invited by the conductor or other employee of the company, whose duty it is to assist or advise passengers in that respect, and to know the dangers, to alight, he may rely and act upon such invitation, unless the danger in doing so is apparent. *Wood on Railways*, 1297.

In the case before us the train was a little late, and was running at a rapid speed. When it blew for the station, the plaintiff left his seat and went to the end of the car. The train at that time had got nearly to the regular stopping place. Knowing that it stopped only for a moment, he stepped out upon the platform. By that time the train was nearly 75 or 100 yards past the stopping place, and the plaintiff got on the steps, and the train began to get slower. It is manifest that the train was moving at a high rate of speed as it passed the platform. The plaintiff says that he knew the rule, and saw the notice posted up by the door that passengers must not go upon the platform while the train is in motion. It was negligence for him to go there, and to go upon the steps of the car. The train at the time he was thrown from the car was moving at the rate of about 8 or 10 miles an hour. He

Denny v. North Carolina R. Co

says, "It was going too fast for me to get off, and I was waiting for it to get down slow enough." He says that the conductor was not on the platform, and he never "heard him say a word." We think that, upon the plaintiff's own evidence, there was no negligence shown on the part of the engineer. The duty to avoid jerks and sudden movements is imposed only when the train has stopped at a station for passengers to get off and on. While the train is in motion, and in the absence of evidence, there is no presumption that a jerk is caused by his negligence. It was his duty to bring the train to a stop without danger or injury to passengers on the inside, or getting on and going to their seats. He cannot be presumed to know or anticipate that passengers, in defiance of the rules, have gone upon the platform, and are standing upon the steps of the car while in motion. If it were shown in evidence that the engineer needlessly or carelessly caused a sudden and violent jerk of the train while in motion, and passengers who were not guilty of contributory negligence were injured thereby, the company would be liable. We must be understood as dealing with the case before us, or such as come directly or reasonably within the rule. There is no suggestion in the plaintiff's evidence that the conductor was upon the platform, or knew or had any cause to think that the plaintiff was there. "No recovery can be had if the cars are under such motion as to render it obviously dangerous for a person to attempt to leave them." Wood on Railways, 1304. The plaintiff says that he went upon the platform to wait for the train to slow down enough to enable him to get off. It was that very thing which, for his own safety, he was notified not to do. "The plaintiff must have been aware of the dangerous position in which he placed himself. He was warned of this danger by the regulation of the defendant forbidding passengers to ride upon the platform." Malcom v. Railroad, 106 N. C. 64, 11 S. E. 187. "The general rule is that passengers who are injured while attempting to get on or off a moving train cannot recover for the injury." Browne v. R. Co., 108 N. C. 34, 12 S. E. 958. In Lambeth v. Railroad, 66 N. C. 494, 8 Am. Rep. 508, Mr. Justice Dick uses the following language: "That it is contributory negligence to 'attempt to alight' from a moving vehicle, although, in consequence of the refusal of the carrier to stop, the passenger will be taken beyond his destination, unless he is invited by some employee of the carrier, whose duty it is to see to the safe egress of the passengers from the conveyance. The mere fact that the train fails to stop, as was its duty, or as the conductor promised to do, does not justify a passenger in leaping off, unless invited to do so by the carrier's agent, and the attempt was not obviously dangerous." This language is approved in Burgin v. Railroad, 115 N. C. 673, 20 S. E. 473. The fact that the conductor had promised to stop the train at McLeansville in no manner affected or increased the obligation to do so. If it made any impression at all upon the mind of

Southern Ry. Co. v. Crowder

the plaintiff, it would seem that it should have assured him that he might safely wait until the train stopped, as it was slowing down. The distinction between the case before us and *Johnson v. Railroad*, 130 N. C. 488, 41 S. E. 794, is clear. This case is peculiarly similar to that of *Scheiber v. Chicago, St. Paul & Min. R. Co.*, 61 Minn. 499, 63 N. W. 1034, in which it is held: "The plaintiff was a passenger upon the defendant's railroad train, operated by steam, and it was approaching the station at a dangerous rate of speed. He went, in anticipation of its stopping, and for the purpose of being ready to get off when it should stop, upon the platform of the car, and stood upon the steps thereof, and was thrown therefrom by a sudden jerk of the train. There was no evidence of any necessity for him to assume such position, or invitation, express or implied, by the defendant's agent in charge of the train for him to do so. Held, that he was guilty of contributory negligence, as a matter of law." The same rule is announced in *Jammison v. C. & O. R. Co.*, 92 Va. 327, 23 S. E. 758, 53 Am. St. Rep. 813; *Goodwin v. Boston & Me. R. Co.*, 84 Me. 203, 24 Atl. 816. There is an obligation imposed upon the passenger to observe the reasonable regulations of the company in entering, occupying, and leaving the cars. If a party be injured in consequence of the known violation of such regulations, the company is not responsible. *Turnpike Road v. Cason*, 72 Md. 377, 20 Atl. 114.

We think that upon the plaintiff's evidence, considered in the light most favorable to him, his honor properly entered judgment of nonsuit. We find no evidence of negligence on the part of the defendant. Affirmed.

SOUTHERN RY. CO. v. CROWDER.

(*Supreme Court of Alabama, Dec. 18, 1902.*)

[33 So. Rep. 335.]

Injury to Wife—Action by Husband—Damages—Loss of Wife's Services—Statutes.

Code, § 2521, providing that the earnings of the wife are her separate property, but she is not entitled to compensation for services rendered to or for her husband or family, and section 2527, providing that for all injuries to the person the wife must sue alone, do not prevent the husband recovering for loss of his wife's services to himself and family, to which he has a marital right, and her companionship, through the wrongful injury of her.

Same—Same—Same—Husband Acting as Nurse—Loss of Salary.

The amount of salary which a husband loses while waiting on and nursing his wife cannot be recovered of one who wrongfully injured her, but, he having so lost a month, he may recover the value of his services rendered to her.

Injury to Passenger—Jerks and Jolts of Car—Pleading.*

A complaint for injury to a passenger on a train states defendant's

*As to the liability of carriers for injuries to passengers from jerks or jolts of trains or cars, see monograph appended to *Freeman v. Metropolitan St. Ry. Co.* (Mo. App.), 3 R. R. R. 584, 26 Am. & Eng. R. Cas., N. S., 584.

Southern Ry. Co. v. Crowder

negligence with sufficient certainty and definiteness by averments that defendant negligently failed to safely carry her, but so negligently and unskillfully conducted itself in that regard that she was thrown to the floor.

Same—Same—Freight Trains—Common Knowledge.

It is matter of common knowledge that jerks and jars ordinarily attend the handling and running of freight trains, and more than that of regular passenger trains, so that it is error to submit to the jury whether one who became a passenger on a freight train had such knowledge.

Harmless Error.

The asking of an improper question cannot be complained of by a party to whom the answer was favorable.

Injury to Passenger—Jerks and Jolts of Car—Cross-Examination of Brakeman.

Asking on cross-examination a brakeman, who had testified to the manner in which a train was stopped and as to his putting on brakes to stop it, and that it was stopped without any unusual jar or jerk, what is the difference between a long train and a short train, with reference to stopping it, and whether, if there is air on two-thirds of the cars, he would have to put up as many brakes or as soon as if he had air on only a part of it, is proper cross-examination.

Same—Same—Same—Expert Testimony.

Such questions are not objectionable as calling for expert opinion.

Exclusion of Testimony.

Where a witness testifies without a question being asked him, a motion to exclude is the proper remedy.

Appeal from city court of Birmingham; Chas. A. Senn, Judge.

Action by J. M. Crowder against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

There were four counts in the complaint. The first count was as follows: "The plaintiff claims of the defendant the sum of three thousand dollars, for that on, to wit, the 22d day of July, 1899, the defendant was a common carrier of passengers for hire between the towns of Decatur, Alabama, and Huntsville, Ala.; and on said day Mary B. Crowder, who was then, and still is, the wife of plaintiff, was a passenger on defendant's train from said Decatur to Huntsville, and the said defendant negligently failed to safely carry the said Mary B. Crowder as it was its duty to do, but did so negligently and unskillfully conduct itself in that regard that the said Mary B. Crowder, while such passenger, and at or near Madison, a point on said road between said Decatur and said Huntsville, was thrown to the floor, and her hip dislocated," etc. The grounds of demurrer to this count were as follows: "(1) Said count fails to show with sufficient certainty wherein defendant was negligent in failing to safely carry said Mary B. Crowder to her destination. (2) Said count shows on its face that said Mary B. Crowder was at the time of said injuries, and still is, a married woman, the wife of the plaintiff, and as such entitled, under the laws of Alabama, to sue for and re-

Southern Ry. Co. v. Crowder

cover all damages that may have been sustained for the personal injuries complained of in said count, and that as to the other damages claimed in said count as special damages sustained by the plaintiff as husband, namely, the damage incurred by reason of the expense for medical attention, nursing, medicines, and hospital charges, the plaintiff's said wife was and is legally liable for the same, and not the plaintiff, and that as to the item for loss of services of the wife the plaintiff had no legal claim upon his said wife for such services under the laws of Alabama, and that, as to the item of damage arising from the loss of the comfort and companionship of his said wife, the said count shows on its face that said wife is still living with the plaintiff, and as a member of his family, and that the plaintiff has not sustained any loss by reason thereof." These demurrers having been overruled, defendant filed pleas of the general issue and contributory negligence. The evidence showed that the train on which Mrs. Crowder was being carried was an accommodation or mixed train, and consisted of a large number of freight cars, with a caboose attached at the rear, in which passengers were habitually carried. Mrs. Crowder boarded this train at Decatur, holding a first-class ticket for passage to Huntsville. She was given a seat by the conductor upon a chair at the rear end of the caboose, which chair she occupied until the train reached Madison, and there she was thrown by a jar or jerk of the train upon the floor of the car, and her right hip was seriously and permanently injured. The evidence was conflicting as to whether the jar or jerk was of unusual severity, and also upon the issue of contributory negligence. Upon the cross-examination of the conductor, W. A. McMahon, in answer to the question quoted in the opinion, he stated: "I cautioned Mrs. Crowder. Told her to hold on and look out for jars and jerks; could not handle them as nice as on a passenger train. Told her that at the tank at Decatur, when I put her in the chair back there." On the direct examination of J. H. McMahon, a brakeman, he testified in regard to the manner in which the train was stopped at Madison, and as to his putting on brakes to stop the train, and that the train was stopped without any unusual jar or jerk. On cross-examination he was asked, among others, the following questions: "(1) What is the difference in a long train and in a short train, with reference to stopping it? (2) If there is air on two-thirds of the cars, would you have to put up as many brakes, or as soon, as if you had air only on a part of it?" These questions were objected to on the ground that the witness was not an expert, and exceptions to the overruling of the objections were duly reserved. Other facts appear from the opinion. The court, in its general oral charge to the jury, stated, among other things: "(1) If it is a known fact that there are bumps and jerks on a freight train, and she assumes

Southern Ry. Co. v. Crowder

all the risks incident to that particular mode of travel, distinctly incident to it, that could not be prevented by the exercise of that high degree of care which the law charges the carrier with, she assumes this. (2) If she did not know of any danger, she would have a right to rely upon the defendant's servant in charge of the car, that the place he put her was as safe a spot as he had,—that it was an ordinarily safe place,—if you believe that the conductor did so place her." Defendant separately excepted to said portions of the general charge, as well as to the refusal of each of the following special written charges, viz.: "(5) If the jury believe the evidence, they must find for the defendant." "(9) There can be no recovery by the plaintiff of damages by reason of the alleged loss of his wife's services, resulting from the injury to her. (10) There can be no recovery of damages in this case by reason of the loss by plaintiff of his wife's society or of her companionship. (11) There can be no recovery in this case of damages occasioned to the plaintiff by loss of his wife's aid, assistance, or comfort. (12) There can be no recovery by the plaintiff of damages based on money expended by the plaintiff or liability incurred by him for medical attention, nursing, medicines, or hospital charges in and about endeavoring to cure the plaintiff's wife of her said injuries."

Smith & Weatherly, for appellant.

Nathan L. Miller and Lane & White, for appellee.

DOWDELL, J. This is a suit brought by the husband to recover damages resulting from an injury inflicted upon the wife through the alleged wrong or negligence of the defendant's agents or employees. The damages claimed are for the loss of the wife's services to the husband in their marital and domestic relations, and of her companionship, as well as for expenses incurred by the husband in the medical treatment and nursing of the wife on account of the injuries received. It is not questioned by counsel for appellant but that, apart from any modification of the principles of the common law by our statutes in regard to the rights of the husband growing out of the marriage relation, the husband could sue and recover damages for a wrong done to the wife, occasioning a loss to him of her companionship and services, and for any and all expenses incurred as a proximate result of such wrong. The contention of counsel, however, is that the common-law principles in this respect have been so far modified by our statutes (sections 2520 to 2537 of the Code of 1896, and especially sections 2521 and 2527) that the husband's legal right to the labor, the services, and the earnings of the wife has been taken from him, and that he can no longer maintain a suit of this character for the value of such labor, services, or earnings. So far as we know, or are informed by the briefs of counsel, this is the first time the question now presented for our consideration has ever been before this court. This

Southern Ry. Co. *v.* Crowder

question, however, has received consideration by the courts of some of the states having statutes similar to ours affecting the rights of married women. The decisions of these courts seem not to be altogether in harmony.

The New York statute relating to married women provided as follows: "A married woman may bargain, sell, assign and transfer her separate property and carry on any trade or business, and perform any labor or services on her sole and separate account, and the earnings of any married woman from her trade, business, labor or services, shall be sole and separate property and may be used by her in her own name." Laws 1860, c. 90. The city court of New York, in *London v. Cunningham*, 20 N. Y. Supp. 882, construing this statute, said: "The rule now prevailing here as to the measure of her damages as regards loss of her services is that she can recover in her action for the loss of her earning power, over and above her domestic services, which still belong to her husband, but which, of course, are not limited to those of domestic servant, but are such as are usually performed by the wife in the household of her husband, having regard to the surrounding of their home and to their condition in life, and such services would include attendance upon visiting friends as well as boarders in the household; and to all such services the husband is entitled, and in his action can recover for the loss of all such services which would appertain to his or her home, be it in the country, on a farm, in the city, in a palatial residence, or some small apartment in a crowded tenement house." "Of course, the rule under discussion only applies to the wife's services, for the husband can still recover in his action for the loss of his wife's society, and comfort of that society, and this for the future as well as the past, if occasioned by the injuries to the wife; and in the same action he can recover for the necessary expenses incurred by him by reason of such injuries to her." The Nebraska statute is as follows: "Any married woman may carry on a trade or business and perform any labor or services on her sole and separate account, and the earnings of any married woman from her trade, business, labor or services, shall be sole and separate property and may be used and invested by her in her own name." Comp. St. 1901, § 3662. In discussing this statute, the supreme court of that state said: "The services which are due to the husband from his wife, and for the loss of which he may recover, are such duties and services as reasonably devolve upon her by reason of the marriage relation." "The law presumed that a wife performs the duties and renders the services towards her family which grow out of the marriage relation, and that she will continue to do so." *Riley v. Lidtke*, 68 N. W. 357. Iowa has a similar statute, and the Nebraska court, in discussing the statute of its own state in reference to items of damages, said: "(1) The value of the loss of services and

Southern Ry. Co. v. Crowder

companionship of his wife, to the extent that such injuries have incapacitated her from performing all the duties of a wife that reasonably devolve upon her in the marriage relation. As to the first subdivision of the instructions, the argument is that as our married woman's act gives to the wife the right to conduct her own business and her own earnings, and emancipates her property and earnings from the husband's control, the husband can no longer recover for loss of services. It will be observed that the court, in these instructions, did not submit to the jury generally the determination of the value of the wife's services, but restricted the jury to a consideration of the extent to which her injuries had incapacitated her from 'performing all the duties of a wife that reasonably devolved upon her in the marriage relation.' To this extent the husband can recover, notwithstanding the married woman's act. As said in *Mewhirter v. Hatten*, 42 Iowa, 288, 20 Am. Rep. 618, on a precisely similar question: 'We feel very clear that the legislature did not intend by this section of the statute to release and discharge the wife from the common-law and Scriptural obligation and duty to be a helpmeet to her husband. If such a construction were to be placed upon the statute, then the wife would have a right of action against the husband for any domestic services or assistance rendered by her as wife. For her services in the care and nurture and training of his children, she could bring her action for compensation. She would be under no obligation to support and look after any of the affairs of the husband unless her husband paid her wages for so doing. Certainly such consequences were not intended by the legislature, and we cannot so hold, in the absence of positive and explicit legislation.' " *Railroad Co. v. Chollette*, 59 N. W. 921, 925. It was also said by the supreme court of Iowa, in the case above referred to, in construing the statute which contained the provision that the "wife may receive the wages of her personal labor and maintain an action therefor in her own name and hold the same in her own right" (Code, § 3162): "Wages of her personal labor as here used refer to cases where the wife is employed to some extent in performing labor and services for others than her husband, or where she is carrying on some outside business in her own behalf,—such, for instance, as dressmaking, or millinery business, or school-teaching. In a word, she is entitled to the wages for her personal labor or services performed for others, but her husband is entitled to her labor and assistance in the discharge of those duties and obligations which arise out of the marriage relation." In *Grant v. Green*, 41 Iowa, 88, which was an action by the wife against the administrator of her deceased husband, it was held that the wife could not recover for services rendered by her in taking care of her husband in his lifetime during a period of his insanity, and this notwithstanding she had been employed by the guardian of her insane husband to perform

Southern Ry. Co. *v.* Crowder

them. The ruling was put upon the doctrine that the services were such as the marriage relation imposed upon the wife, and which, under the law, she was bound to perform, in discharge of her marital obligations to the husband, without pecuniary compensation.

As opposed to these authorities, counsel for appellant cite the cases of *Harmon v. Railroad Co.*, 42 N. E. 505, 30 L. R. A. 658, 52 Am. St. Rep. 499, and *Jordan v. Railroad Co.*, 138 Mass. 425, wherein the supreme court of Massachusetts had under consideration statutes similar to ours. It is claimed by counsel that the effect of the decisions of that court is to hold that a married woman, as a result of this legislation, becomes, in view of the law, a distinct and independent person from her husband, not only in respect to her right to own property, but also in respect to her right to use her time for the purpose of owning money on her sole and separate account, and that such right is inconsistent with the right of the husband to demand or control her labor or time, and that therefore the wife, in her suit for personal injuries, could claim as an element of damage the loss of her services or loss of earning capacity. And from this it is further contended in argument by counsel that, in a suit brought by the wife for personal injuries to her, she might include in her claim for damages loss of earning capacity, and loss of capacity to give service, aid, and assistance to her husband, and also any medical bills or other expenses paid or incurred by her on account of her said injuries. As to the right of the husband to enforce and control the labor and services of the wife, that is a question not involved in the merits of this controversy. There is no inconsistency growing out of the statute conferring on the wife property rights, and the right to earnings arising from her labor and services, with her duties to her husband in the marital and domestic relation. There is no reason why both should not consist together in perfect harmony. In regard to the statement of counsel for appellant that the wife might include in her claim for damages loss of earning capacity, we see no reason why this should not be a legitimate claim, to the extent of her earning capacity in performing services for others than her husband or members of his family, since for such services she could contract for compensation. Nor can we see why expenses actually paid or incurred by her on account of the injuries received might not also become a legitimate claim in a suit by her. Of course, she could not recover such expenses if paid or incurred by the husband. Nor could she recover for loss of capacity to render service to the husband in their domestic relation, for the reason that such service is a duty growing out of their marriage relation, and for which she could not contract for or demand compensation. If the effect of the decision of the Massachusetts court be such as counsel contend for, it is opposed to the better reasoning employed in the decisions of other courts, and from which we have quoted.

Southern Ry. Co. v. Crowder

Our statute on this subject (Code, § 2521) reads as follows: "The earnings of the wife are her separate property; but she is not entitled to compensation for services rendered to or for her husband, or to or for the family." It will be observed that our statute is not as unrestricted as the statutes of New York and Nebraska are, in giving to the wife her "earnings," but, on the contrary, contains an express limitation that she shall not be entitled to any compensation for services rendered to or for her husband, or to or for the family, or, in other words, for any services performed by her in discharge of any duty or obligation growing out of the marriage relation. That it was not the intention of the legislature, in conferring by section 2521 upon the wife the right to her earnings, to absolve the wife from the duties and obligations imposed by the marriage vow in her marital and domestic relations, is placed beyond cavil by the limitation contained in the second clause of the statute. Section 2527 provides that, for all injuries to the person, the wife must sue alone. This in no wise takes from the husband his right of action for the loss and damage he has sustained as a proximate result of the injury done the wife. He may not sue for the injury itself, and this the appellee concedes. Our conclusion is that the statute does not affect the reciprocal duties of husband and wife, growing out of the marriage state, within their domestic relations, and that the husband has a marital right to the wife's services to himself and to the family, and for the loss of which, when caused by the wrongful act of another, he has his right of action in damages as against such wrongdoer. So, likewise, for the loss to him of the companionship of his wife, resulting from the wrong and injury to her. His relation as husband imposes upon him the duty of providing for and taking care of his wife, and any and all expenses paid or incurred by him on account of injuries received by her are recoverable as an element of damages sustained by him.

In ascertaining the amount of damages to which the husband may be entitled by reason of the injury inflicted on the wife, it is improper to take into consideration the amount of salary which the husband has lost while waiting upon and nursing his wife. The court, therefore, erred in this regard when it permitted the plaintiff, against the objection of the defendant, to show that on account of the injury to his wife, and his having to wait upon her, he lost a month's salary, of \$100. This could not enter into the estimate of damages, and was incompetent and irrelevant evidence, and, as such, calculated to prejudice the rights of the defendant before the jury.

The negligence of the defendant, as averred in the first count of the complaint, we think is stated with sufficient certainty and definiteness, and the demurrer interposed to the count on that ground was properly overruled.

It is matter of common knowledge that jerks and jars ordi-

Southern Ry. Co. v. Crowder

narly attend the handling and running of freight trains, and to a greater degree than regular passenger trains. One who becomes a passenger on a freight train does so with this knowledge, and assumes the risk of the usual and ordinary jars and jerks of such train. Matters of common knowledge are not questions for the determination of the jury, and instructions which submit such questions to the jury are erroneous. We think the answer to the question asked the witness McMahon, who was the conductor of the train. "Wasn't it usual for you to caution ladies about the roughness of the way, and the necessity for being careful when they took passage on that caboose?" was favorable to the defendant, and therefore no injury resulted to the defendant. The other questions to which objections were made were asked upon a cross-examination of the witness, and, we think, we are within the scope of legitimate cross-examination, and not objectionable as calling for an expert opinion.

We have sufficiently, for the purposes of another trial, considered the questions raised in the assignments of error on the charges of the court, and therefore deem it unnecessary to discuss them separately. For the errors indicated in what we have said above, the judgment of the lower court will be reversed, and the cause remanded.

On Application for Rehearing.

(Jan. 27, 1903.)

It is insisted by counsel for appellee that in what was said by us in reference to the ruling of the lower court in permitting the plaintiff, against the objection of the defendant, to show that on account of the injury to his wife, and his having to wait upon her, he lost a month's salary, of \$100, we declared the law upon a question which is not in the record. Counsel say that, upon an examination of the record, it appears that the exception arose upon a motion to exclude the statement of the witness J. M. Crowder, the plaintiff, "as to the loss of time of one month." The witness, in making his statement of the loss of a month's time, in the same connection stated that he was getting a salary of \$100 a month, and that he lost a month's salary, and we were led into stating the proposition as we did by the argument of counsel in brief. The action of the lower court in overruling the defendant's motion to exclude the witness' statement "as to his loss of time of one month" was erroneous. It is not the value of the time lost in attending and nursing his wife, but the value of his services while so attending and nursing, that constitutes an element of recoverable damages in such case. The value of time lost and the value of services rendered are entirely distinct. The complaint does not, in terms, claim for the value of lost time; and, if it had done so, it would have been in that respect defective and objectionable.

It is further urged that the lower court properly overruled

Chicago & A. R. Co. v. Flaherty

the motion to exclude the evidence, for the reason that no objection was made to the question asked the witness. It does not appear from the record that any question was asked the witness, eliciting the statement objected to. In fact, the record does not show that any question was asked at all, but, on the contrary, it appears that the witness, without any question having been asked him, proceeded to deliver his evidence in a narrative form, and in this manner the objectionable statement to which the motion to exclude was addressed was made. There is nothing by which a party can usually anticipate illegal testimony when the evidence is given in this manner, and for that reason the motion to exclude is the proper remedy.

Since the judgment is to be reversed, and the cause remanded for another trial, for the error in overruling the defendant's motion to exclude, it is unimportant to consider whether that which was pointed out as error in the oral charge was cured by other parts of the charge.

Application denied.

CHICAGO & A. R. CO. v. FLAHERTY.

(*Supreme Court of Illinois, April 24, 1903.*)

[66 N. E. Rep. 1083.]

Appeal—Review.

A judgment of the Appellate Court founded on a disputed question of fact will not be reviewed.

Negligence—Evidence—Directing Passenger to Board Moving Car.*

A passenger's evidence that a brakeman stationed at the car steps told her she would have time to buy a ticket, and that on her returning he told her to board the already moving train, is admissible in the passenger's action for injuries; it being shown that the conductor awaited the brakeman's signal before directing the train to start.

Appeal from Appellate Court, Third District.

Action by Nannie Flaherty against the Chicago & Alton Railroad Company. From a judgment of the Appellate Court affirming a judgment for plaintiff, defendant appeals. Affirmed.

Patton & Patton (William Brown, of counsel), for appellant.

David E. Keefe and Peebles & Peebles, for appellee.

CARTWRIGHT; J. In the evening of November 1, 1898, at Carlinville, the appellee, Nannie Flaherty, became a passenger on the appellant's railroad. Her destination was Miles, the fourth station south of Carlinville. She had no

*As to a carrier's duties in taking on and letting off passengers, see monograph appended to *Phillips v. St. Charles St. R. Co. (La.)*, 1 R. R. R. 902, 24 Am. & Eng. R. Cas., N. S., 902.

Chicago & A. R. Co. v. Flaherty

ticket, and there was a controversy between her and the conductor over the payment of 10 cents above the price of a ticket, which the conductor insisted she must pay. The altercation ended by her paying 41 cents fare to Plainview, the second station south of Carlinville. On the arrival of the train at Plainview, she got off, and hastened into the station to buy a ticket to Miles. The ticket agent was not in the office, and she came back to the door to see if he was on the platform, when she saw the brakeman give a signal with his lantern for the train to start. She hurried to the train, and, in attempting to get aboard, fell or was thrown down between the platform and the track, and was injured. She brought this suit to recover damages on account of her injuries, and obtained a judgment, which has been affirmed by the Appellate Court.

The argument for a reversal of the judgment of the Appellate Court is almost wholly upon the proposition that the plaintiff was not corroborated in her version of the affair, but was contradicted by the other witnesses who testified in the case, and that the clear preponderance of the evidence was in favor of the defendant. We do not review judgments of the Appellate Court in cases of this character upon controverted questions of fact, and all such questions have been conclusively settled by that judgment.

The only ruling of the trial court which is alleged to have been erroneous is the admission, over the objection of the defendant, of evidence as to a conversation of the plaintiff with the brakeman. The conductor testified that the cash fare to Plainview included the extra 10 cents, but plaintiff testified that she did not understand she was paying any extra fare to Plainview, and that the conductor told her she could get off there and get a ticket, and would have time to get one. Her testimony which was objected to was that when she left the coach, and was going down the steps, she told the brakeman she had orders from the conductor to get a ticket, and asked him if she would have time, to which he replied that she would, and that they would wait until she got the ticket. She also testified that when she came back she told the brakeman she must get on that train, and he told her to get on. The objection to this evidence is that the conductor is the agent of the railroad company in the charge, control, and management of the train, and that the office of brakeman does not confer either actual or apparent authority to govern the movements of the train or make agreements with passengers. The conductor was at the baggage car, not giving any attention to passengers, and the brakeman was stationed at the steps of the coach, where passengers got on and off the train. The brakeman testified that it was his duty, when he found everything in readiness to start, to give a signal to the conductor, and that the train would not start until he gave the signal. The train was started by the signal to the conductor

Central of Georgia Ry. Co. v. Motes

from the lantern of the brakeman, and the conductor then signaled the engineer to start. The evidence proved that the starting of the train was within the control of the brakeman, and that the time of starting was not only within the apparent, but also the actual, scope of his authority. The court did not err in admitting the evidence.

The judgment of the Appellate Court is affirmed. Judgment affirmed.

CENTRAL OF GEORGIA RY. CO. v. MOTES.

(*Supreme Court of Georgia, April 8, 1903.*)

[43 S. E. Rep. 990.]

Carriers of Passengers—Regulations—Reasonableness.

Whether a regulation adopted and sought to be enforced by a carrier of passengers is or is not reasonable is a question of law, and not one of fact for determination by a jury.

Same—Stations and Depots—Regulations against Sleeping.

In the absence of any duty devolving upon a railway company to provide at its stations a place wherein its patrons may sleep while awaiting the arrival or departure of trains, a regulation forbidding passengers from going to sleep in its waiting rooms, or lying down on the benches therein, is not, in a legal sense, unreasonable.

Same—Same—Same—Violation—Use of Force by Provoked Employee.*

A passenger who displays a persistent determination to disregard such a regulation, and by his wrongful conduct so exasperates a servant of the company as to unfit him from properly performing the duty he owes his master with respect to his treatment of its patrons, cannot justly complain that the company's servant lost his temper and resorted to unnecessary force in compelling an observance of the regulation on the part of the passenger.

(Syllabus by the Court.)

Error from City Court of Macon; W. D. Nottingham, Judge.

Action by Isaac Motes against the Central of Georgia Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

Hall & Wimberly, J. E. Hall, and R. D. Feagin, for plaintiff in error.

H. A. Mathews and Guerry & Hall, for defendant in error.

SIMMONS, C. J. An action sounding in tort was brought by Isaac Motes against the Central of Georgia Railway Company to recover damages for an assault alleged to have been committed upon him by an employee of the company.

On the trial of the case, the plaintiff was introduced as a witness in his own behalf, and testified substantially as follows: About the 5th of January, 1901, he purchased at Griffin a ticket entitling him to be carried over the line of the defendant's road from that point to Ft. Valley. He took pas-

*See monograph appended to Birmingham Ry. & Electric Co. v. Baird (Ala.), 22 Am. & Eng. R. Cas., N. S., 909.

Central of Georgia Ry. Co. v. Motes

sage upon an afternoon train which ran as far as Macon, an intervening station, and arrived there about 7 o'clock. He was asleep when the train "rolled into the depot, and * * * was not aroused until all the passengers were off," when "the conductor, or porter, or some official, came through and waked" him up. He then got off on the left-hand side of that train, and inquired of a man wearing the uniform of a porter what train he should take in order to reach his destination. Being directed to a train on the right-hand side of that he had left, he boarded the former; but, after it had proceeded some distance from the depot, he learned it was not "the right train to Ft. Valley," and thereupon "got off the train and walked back." On his return to the station he made inquiry at the ticket office concerning the train he should have taken, and was informed it had left, and he would be compelled to wait for the next train passing through Ft. Valley, which would not leave Macon until early in the morning of the following day. He then "proceeded to the waiting room," and, as he "was tired and sleepy from the fatigue of the day, * * * laid down across the benches and went to sleep." Shortly afterwards, the official in charge of the waiting room came and waked the plaintiff, telling him "that was not a hotel; that the benches were made to sit on." As soon as this official went out of the room, the plaintiff "laid back down in a reclining position," not "in the same position" he had before assumed, but in one which admitted of his resting upon his elbow and allowing his feet to hang off the seat. "It was not but a short while before the" official just mentioned came back into the room, pulled the plaintiff up, and told him he would send him to a hotel; that he "could not sleep there." In reply the plaintiff said he "did not care to go to a hotel." This official again left, whereupon the plaintiff "slipped back on the seat, where [he] could lay [his] head on the back of the seat." He "did not lay down that time," but put his "head on the back of the seat" and closed his eyes. "In a few minutes [he] was disturbed again by the same" official, who "pulled [him] out of [his] seat and jerked [him] around a little." Plaintiff had his coat buttoned up. The official pulled it open, "jerking off some buttons," and threatened to carry plaintiff to the "courthouse" and lock him up. After shaking him, and while still having hold of him, the official demanded that the plaintiff show his ticket, and compelled him to exhibit it before he was turned loose. The official "did not make any apology for his conduct," when shown plaintiff's ticket, but remarked that he "didn't have any business there anyway," as he "should have gone on the train" which he had missed. Plaintiff was not further molested in any way, and left Macon on the morning train for Ft. Valley. His coat was not injured, save that the top button was torn off. "The other buttons came unfastened," as the company's official took

Central of Georgia Ry. Co. v. Motes

hold of the plaintiff's coat where it came together at the collar. He "was not drinking that night," but was merely drowsy and sleepy. He was pulled up out of his seat the last time he was disturbed; "was not to say sound asleep at the time, [but] was in a dozing manner." Was pulled to his feet, though not carried off further than a few feet. The benches in the waiting room were placed back to back, and were provided with small arms, so arranged as to divide the benches into seats. "The sitting-down places were entirely separated from each other all the way across," and the seats were "large enough for a person to sit on."

During the course of the plaintiff's examination while on the witness stand, he stated that he did not remember having made any remarks to the official in charge when the latter first aroused him from his slumbers and told him he could not sleep in that room, as it was not a hotel, and the benches were made to sit on; though, the witness said, he "might have made some remark." He admitted he paid no regard to what this official said as to how he should conduct himself, and immediately lay "down in a reclining position to rest, after he went out, [and,] as a matter of fact," did again go to sleep. Upon being again awakened and told he would be sent to a hotel, he replied he "didn't care to go to a hotel; that [he] would spend the night there." The railroad official doubtless understood him to mean by this remark that he did not intend to observe any regulation of the company with respect to the right of passengers to regard its waiting room as a lodging house, for it affirmatively appears from the testimony of another witness, whom the plaintiff himself introduced, that in point of fact he did make an offensive reply to the company's official when first approached by him and told he must not sleep in the waiting room. In this connection, this witness testified: "I just noticed the officer shake the young man awake and tell him that he must not sleep in the waiting room; that, if he wanted to sleep, he had better go to the hotel. The young man replied that he would sleep if he felt like it." According to the account given by this witness, "the officer went out of the room and returned in * * * about twenty or thirty minutes, and walked to where the young man was sitting, and jerked him out of his seat and tore the buttons from his coat," taking hold of him rudely and using him "pretty rough." The witness further undertook to assert that the plaintiff had not laid down on the benches at any time previously, and was sitting quietly in his seat asleep when thus rudely aroused—"leaning on his hand, sitting in the seat." Witness "saw the officer approach the young man twice" only. The second time, "the officer jerked the young man from his seat to the floor, or to his feet, and said that he had told him not to sleep in there, and that he would see he did not do so." Witness was himself "asleep part of the time that night in the waiting room, and was not

Central of Georgia Ry. Co. v. Motes

disturbed by the officer at all"; but neither he nor any one else present was, he said "stretched on the benches asleep," and the "young man never laid down." Not only as to this last statement, but in other respects, the testimony of this witness differed essentially from what the plaintiff admitted was the truth with regard to what actually occurred.

The only other witness who testified on the trial was the company's official who had charge of its waiting rooms on the occasion under investigation. He explained that there were "three waiting rooms at the depot: A colored waiting room; a general waiting room; and a private waiting room for ladies," which was a small room opening into the general waiting room. Ladies usually sat in this small room when unaccompanied by gentlemen, though the general waiting room was provided for the accommodation of both sexes. While there were "no printed regulations for the government of the waiting rooms at the Union Depot," there were verbal ones with regard to lying down on the benches, and as to sleeping in the general waiting room; and the witness had been a number of times instructed not to permit a violation of these regulations. It was his duty to preserve order in and about the depot, and his "jurisdiction embraced the waiting room" set apart for ladies and gentlemen, to which the plaintiff went. He was first seen by the witness somewhere between 8 and 9 o'clock, and was then in this waiting room, sitting by the stove with several others. "The next time [witness] went in there, he was lying down on the seat. He had moved down to the end of the seat then, and had his head on" one of the arms, and was "stretched out full length on the bench." Witness "went to him and tried to get up then, and told him to sit up, but he didn't do it. He just let his foot down off the seat and lay there." A train was backing into the car shed at the time, and witness had to leave to attend to other duties. When he returned to the waiting room, plaintiff was still lying there, and witness "asked him again to get up and sit up," saying "that was not any place to sleep; that if he wanted to sleep he must go and get a room." Plaintiff said he would, if witness would pay for it; but this the latter declined to do, and "insisted on his getting up and sitting up, and he would not do it. He would not make any move to do it, and [witness] caught hold of his coat right there, in order to pull him in a sitting position, not to pull him off the seat. A button broke off. He got up then and picked the button off the floor and stood up in the floor, and then was the time [witness] asked for his ticket, and he said he had it." Witness asked to see it, but plaintiff replied he "never had any business to see it until train time," and that "when he [plaintiff] started through the gate, he would let" witness see it. Witness told him he would have to show his ticket or get out; "that he would not stay there unless he did let [witness] see it. He finally offered it,"

Central of Georgia Ry. Co. v. Motes

though he held on to one end of it, and witness "saw enough to see where it was to and from. Nothing further was said, save that witness "told him he had no business there; that his train was gone, and if he came from Griffin he ought to have gone on the Albany train right on to Ft. Valley." Witness approached the plaintiff only twice. "He was lying full length on the bench both times. * * * He was lying with his body over the arm the second time, with his head on the arm of the seat, and he was occupying two seats then." Witness asked for his ticket in order to ascertain whether or not he was a passenger, whether "he was going anywhere or not," and whether "he had any right to the building or not. Passengers are not allowed to lie across benches; it does not matter how many tickets they have." Witness "did not see any one else in the waiting room lying across the benches asleep. There were cards hung on the back of each train in that shed at that time for the guidance of the people, showing what train it was, and where it went to. That was true in every instance at that time." Plaintiff "explained how he got left."

1. The trial judge refused to give in charge to the jury the following written request: "If you believe from the evidence that the plaintiff, Isaac Motes, after being informed by the officer of the defendant company who was in charge of the white waiting room that he could not sleep across the benches in such waiting room, or could not lie across said benches for any purpose, and if you believe from the evidence that Motes persisted in lying across said benches, after having been informed by the officer in charge that he had no right to do so, then I charge you that the officer in charge had the right to use such force towards Motes as was necessary to enforce the regulation." As will be noted, this request to charge was based upon the assumption that, as matter of law, the regulations adopted by the company with respect to lying across benches and sleeping in its waiting room were reasonable. His honor did instruct the jury in general terms that the "defendant's agent was authorized in law to use such force as was necessary in enforcing reasonable regulations of the company," and further told the jury that it was for them to determine whether or not, in point of fact, the particular regulations adopted by the defendant company were, under all the circumstances, reasonable and proper. Apparently the jury found they were not. The question is therefore presented whether it was or was not within the province of the jury to determine this all-important matter. We think not. "A railroad company has an implied authority (which is necessarily almost absolute) to make and enforce all reasonable rules and regulations for the control of its trains and the persons thereon, of persons using its stations and grounds, and of those transacting business with it, in order to provide for the safety of its passengers and employees, and to protect itself

Central of Georgia Ry. Co. v. Motes

from imposition and wrong.” 1 Elliott on Railroads, § 199. “To this end,” carriers of passengers “may regulate the purchase of tickets, the time and manner of procuring and paying for the same, and the time and manner of surrendering them; the manner and time of entering and leaving the cars; and the conduct of the passengers while upon the cars or at stations waiting for trains, as that they shall not be boisterous or disorderly. * * * Rules and regulations in regard to separate cars for ladies and their escorts” have been upheld as reasonable, as have also rules “prohibiting disorderly conduct on the cars.” And it is the right of common carriers to “exclude from their carriages and premises such persons as refuse to comply with their reasonable regulations.” Id. § 200. “The reasonableness of such regulations and the manner of their enforcement in a given case has been held by some of the courts to be a question of fact for the jury. But it would seem that this must be a question of law for the court to decide, if any fixed and permanent regulations are to be established, and the better authority holds it to be such; since one jury in a given case might pronounce the rule reasonable, while another jury in another case might decide the same rule to be unreasonable. * * * There are doubtless many cases in which the reasonableness of the rule depends, in the particular instance, upon disputed facts or circumstances, and, where this is true, it may perhaps be called a mixed question of law and fact; but, when the facts are undisputed, we think it is clear, both upon principle and according to the weight of authority, that the question is one of law for the court.” Id. § 202. Says no less an authority than Judge Thompson: “Whether a certain rule of a railway corporation be reasonable, and therefore valid, is a question of law for the court: the general rule being that the reasonableness of the by-laws, rules, and regulations of corporations, whether private or municipal, is to be decided as a question of law, and that such a by-law, rule, or regulation, if unreasonable, is to be held void as matter of law; and it is improper to submit the question of the reasonableness of such a by-law, ordinance, or regulation to the decision of a jury.” 1 Thomp. on Trials, § 1057. This subject came under discussion in the case of Southern Ry. Co. v. Watson, 110 Ga. 682, 690, 36 S. E. 209, wherein the question arose as to whether or not a carrier of passengers could lawfully undertake to limit the time in which a railroad ticket should be used. In this connection, Mr. Justice Little, who delivered the opinion of the court, said: “All the authorities which support the doctrine that a railroad company may by rules and regulations limit the time in which a ticket can be used for passage concur in the view that such regulations must be reasonable, and whether or not a regulation of this character is or is not reasonable is a question to be determined by the court. On this subject, the rule, as we understand it, is that, where the facts

are not disputed, the reasonableness of a regulation of a common carrier affecting the transportation of passengers is one of law for the court, and not of fact for the jury." See, also, the cases cited on page 690, 110 Ga., and page 213, 36 S. E.

2. We shall not at this time undertake to do more than determine whether or not, as regards a waiting room in a city such as Macon, where weary travelers may, if they wish, procure suitable accommodations for rest and comfort, regulations forbidding the use by passengers of benches as beds, or any other attempted transformation of a railroad waiting room into a lodging house, tend to deprive passengers of inalienable rights, or are for any other reason to be regarded as despotic and unreasonable. It is pertinent here to remark that there was no evidence introduced on the trial touching any rule promulgated by the railroad commission of this state with respect to the duty of a common carrier to furnish lodgings to such of its patrons as find it convenient to present themselves at the carrier's depot during the night, there to remain until the scheduled departure several hours later of a morning train. Nor have we been cited to any common-law or statutory rule which imposes upon a railway company any such duty towards such patrons, or to one holding a ticket, who, through his own fault or misfortune, has missed an evening train. Accordingly, we shall endeavor to decide on principle whether such a duty does or does not, as a general thing, exist.

It seems reasonable to assert that a railway company could not be considered unreasonable if it adopted a regulation whereby a passenger was not admitted to its waiting room until an hour or so before the departure, on schedule time, of a train the passenger desired to take. Nor would it appear more unreasonable for the carrier to actually keep its waiting room open all night for the accommodation of its patrons, permitting them to enter it at any time they chose, on condition that they would not abuse the privilege thus accorded them by undertaking to wrest from the carrier a night's sleep to which they were not entitled. Many good reasons might be suggested why the carrier would be unwilling to extend an unqualified invitation to enter at will and stay as long as desirable. For instance, passengers expecting to take a particular train might, if permitted to indulge in inopportune sleep, miss the train, and be left complaining on the carrier's hands, instead of making a timely and orderly departure and giving place to other passengers entitled to enter its waiting room and partake of the accommodations it afforded. Again, the carrier could have a laudable ambition to so conduct its waiting room that passengers of culture and refinement might be spared the disgust of witnessing the uncouth and unseemly behavior of a different class of travelers, whose sense of decency fails to suggest to them the impropriety of

Central of Georgia Ry. Co. v. Motes

sprawling over or upon benches or seats designed for a purpose other than that of affording an opportunity to retire for the night in a grotesque, if not offensive, attitude of repose. The reasonableness of a regulation adopted by a carrier of passengers with respect to the use to be made of its premises is not to be arbitrarily determined by applying the test whether or not such regulation would be reasonable if adopted by a carrier of live stock. The circumstances of time and place are to be given due consideration. On the Western frontier, years ago, the reasonableness of attempting to regulate the "shooting out" of station lights by waiting passengers might have been seriously questioned by at least some members of the traveling public. To-day there is doubtless a growing sentiment in all parts of the country against converting into a smoking apartment a general waiting room provided for the accommodation of both sexes, as well as against treating with contempt the invitation held out by the station house "sand box" or cuspidor, and other minor infractions of the laws of etiquette which obtain in polite society. The evolution which has taken place along this line cannot properly be ignored by the courts, for carriers of passengers are to be encouraged, rather than disheartened, when they manifest a disposition to improve conditions which have become almost intolerable. To furnish adequate and comfortable accommodations to the traveling public is an exacting and serious business, not mere vain and expensive trifling. A prospective traveler who purchases a railroad ticket with a view to going on a journey does not thereby acquire a right to demand of the carrier that he be allowed to enter its waiting room eight hours or so before the train he expects to take is due, and there go to sleep as a matter of course. To miss his train will not change his status from a waiting passenger into a guest entitled to demand a place wherein to sleep until the next train bound for his destination arrives, or transform the carrier into an innkeeper or proprietor of a lodging house. Indeed, he would stand upon no better footing than would a patron of a public eating house who, after missing his supper through his own tardiness, might, simply, because he was the holder of a meal ticket, unreasonably claim the privilege of occupying a chair at table in the room where meals were served, and there passing his time in sleep until the arrival of the breakfast hour. Accordingly, we hold, without hesitation, that a railway company may with propriety insist that such of its patrons as contemplate taking a morning train shall, if they desire to refresh themselves by slumber during the intervening night, find quarters other than its waiting rooms.

3. According to the version given by the plaintiff himself touching what occurred prior to the time he was assaulted by the station agent, a finding against the defendant company was wholly unauthorized. Notwithstanding the plaintiff was expressly notified of the above-mentioned regulations of the

Central of Georgia Ry. Co. v. Motes

company governing its waiting room, he manifested a persistent determination to pay no regard to the same, and displayed a disposition to irritate and move to anger the official whose duty it was to enforce them. After being twice told by that official that passengers were not permitted to sleep in the waiting room, the plaintiff confesses he waited until the official again left the room, and then "slipped back on the seat," where he could lay his head on the back of it, closed his eyes, and dropped off into slumber. While he says he "did not lay down that time," it is evident that he knew the official would protest, if present, against his thus assuming an undignified and sprawling attitude, which enabled him to use the back of the seat as a pillow, and resume his nap at the point where it had been interrupted. He did not undertake to assume this position until the officer again left the room, nor in good faith try to observe the rule against using the benches for a purpose other than that for which they were provided. From the beginning to the end of his altercation with this official, the plaintiff spoke and acted in a manner well calculated to bring down upon himself the harsh treatment he finally suffered at the hands of the company's agent. Should it, in good conscience, be held responsible therefor? The reply to this inquiry is to be found in the report of the case of *Peavy v. Georgia R. Co.*, 81 Ga. 485, 8 S. E. 70, 12 Am. St. Rep. 334, wherein it was pertinently remarked that: "It is unjust to a master wrongfully to unfit his servant for exercising the care and prudence which are essential in guarding the master's interest and performing the servant's duty." The doctrine laid down in that case was subsequently recognized and applied in *City Electric Ry. Co. v. Shropshire*, 101 Ga. 33, 28 S. E. 508, and in the cases cited on page 35, 101 Ga., and page 508, 28 S. E. In *Georgia R. Co. v. Hopkins*, 108 Ga. 324, 33 S. E. 965, 75 Am. St. Rep. 39, the plaintiff sought to recover damages because of an assault which the company's night watchman committed upon him while he was at a station waiting for a train; but, it appearing that the plaintiff had himself been guilty of grossly improper conduct, and had exasperated the company's agent by the use of offensive and insulting language to and of him, this court held the company was not liable for the consequences of such assault, even though the agent may not have been fully excusable, and the battery inflicted was entirely disproportionate to the insult given. In the present case no physical injury was inflicted upon the plaintiff. His feelings were hurt; that is all. His sole grievance is that the company's official used unnecessary force in undertaking to discharge his duties. By persistent disregard of the company's regulations, it is clear that the plaintiff forfeited his right to longer remain in its waiting room, and might very properly have been ejected therefrom. Being himself in the wrong, he is not in a position to justly complain that, instead of being forcibly ejected from the

Danville Ry. & Elec. Co. v. Hodnett

room, he was wrongfully treated with unnecessary harshness by the official in charge, and then permitted to remain therein, since the plaintiff by his own misconduct so exasperated that official as to unfit him for performing in an irreproachable and conservative manner the duties assigned to him by his master. This being the view we take of the case, we shall not specifically deal with other points made in the motion for a new trial, touching the propriety of charging the jury as to the law with regard to the recovery of punitive damages, etc. In our opinion, the plaintiff was entitled to no damages at all.

Judgment reversed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

DANVILLE RY. & ELECTRIC CO. v. HODNETT.

(Supreme Court of Appeals of Virginia, March 12, 1903.)

[43 S. E. Rep. 606.]

Street Railways—Care Required after Discovery of Peril of Person on Track *

The rule that a traveler should give the right of way to a street car does not relieve the railway company from exercising due care to prevent a collision, and when persons in charge of the car know, or by the exercise of reasonable care should know, of the inability of a traveler to prevent a collision, it is their duty to exercise due care to prevent the car from running against him.

Same—Frightening Horses.

Where a motorman discovers that a horse is frightened by the approach of his car, it is his duty, if his car is advancing at a high rate of speed, to slacken it, or, if being run only at a moderate rate, to have it under control, so as to readily stop it, if the latter act appear necessary from the subsequent action of the horse.

Same—Same—Liability for Injury to Rider.†

A street car company is liable if the rider of a horse was thrown from the horse, not by the contact of the horse with the car, but by the fright of the horse, if the injuries sustained were caused by the negligence of the servants of the railway company in running the car against the horse.

Same—Same—Proximate Cause.

Whether or not it was negligence for a motorman not to stop his car before striking a horse evidently frightened by the approach of the car, and whether that negligence was the proximate cause of the injury to the rider, were questions for the jury.

Error to Corporation Court of Danville.

Action by R. T. Hodnett against the Danville Railway & Electric Company. Judgment for plaintiff. Defendant brings error. Affirmed.

*Duties and liabilities of railroad company after discovering person in perilous situation upon its tracks, see *Cottrell v. Southern Ry. Co.* (Miss.), 2 R. R. R. 641, 25 Am. & Eng. R. Cas., N. S., 641.

†As to the care required of those in charge of street cars to avoid collisions with persons, animals, or vehicles, see note appended to *Robinson v. Louisville Ry. Co.* (C. C. A.), 1 R. R. R. 838, 24 Am. & Eng. R. Cas., N. S., 838.

Danville Ry. & Elec. Co. v. Hodnett

Berkeley & Harrison, for plaintiff in error.

Peatross & Harris and H. C. Cabell, for defendant in error.

CARDWELL, J. R. T. Hodnett sued the Danville Railway & Electric Company in the corporation court of the city of Danville, and recovered a judgment for damages to the amount of \$3,000 for injuries alleged to have been sustained by him under the following circumstances:

On January 19, 1901, Hodnett, along with a neighbor of his (W. C. Witcher), rode on horseback into Danville, passing a car of the defendant company standing at the terminus of its line on North Main street; Hodnett riding next to the railway track, and Witcher to his right; the space between the track and the street curbing being about 14 feet wide. After Hodnett and Witcher had gotten a short distance past the car mentioned, it started on its return along Main street, and when it approached Hodnett's horse, the horse began to show fright, by shying, prancing, and endeavoring to run; Hodnett in the meantime endeavoring to hold, manage, and quiet it and to keep it away from the railway track; all of this being in full view of the motorman operating the car at a distance from the horse at no time after he became frightened and unmanageable greater than 30 yards. As the car approached nearer the horse, he became more frightened, unmanageable, and beyond the control of Hodnett, shyed to within a few feet of the car, then went forward, and came back upon the track, according to plaintiff's witnesses, 25 or 30 yards in front of the car, and, according to the witnesses of the defendant company, only about 8 feet. The car was running at a speed of at least 6 miles an hour, and ran upon and against the horse, causing him to lunge and bound forward, whereby Hodnett became unseated, and fell upon the curbing of the street, on the opposite side of the railway track, about 150 feet from where the collision of the car with the horse occurred, receiving the serious bodily injuries of which he complains.

We are asked to review and reverse this judgment, first, because of misdirection of the jury by the giving and refusal of certain instructions; and, second, because the verdict is contrary to the law and the evidence.

The court, at the instance of the defendant in error here (plaintiff in court below), gave to the jury the following instruction:

"The court instructs the jury that if they believe from the evidence in this cause that the horse of the plaintiff, while being ridden by him along North Main street, in the city of Danville, along and over which the cars of the defendant company were propelled and operated by electric power, became frightened by one of the cars of the defendant company approaching from the rear; that as the result of such fright the horse of the plaintiff became unmanageable, and passed from under the control of the said plaintiff despite his

Danville Ry. & Elec. Co. v. Hodnett

best efforts to manage and control it, and carried the plaintiff upon the part of said street over and along which the track of the defendant company extended, and in front of one of the moving cars of said defendant, and that the servants of the defendant company in charge of said car saw, or by the exercise of ordinary care could have seen, the position and situation of the plaintiff in time to have stopped the movement of its car, but failed to do so, and ran said car in and upon the horse upon which the plaintiff was riding, thereby causing said plaintiff to be thrown from said horse, and to receive injury or injuries complained of in this action—that then they must find for the plaintiff, and fix his damages at such a sum as to them may seem just, under all the evidence in the cause, not exceeding the sum of \$10,000 claimed in the declaration, unless they further believe from the evidence in the case that, notwithstanding such failure upon the part of the defendant company to stop said car, the plaintiff could, by the exercise of ordinary care on his part, have avoided the injury to himself, and failed to do so.”

It is contended that this instruction lays down, as a general rule of law, that street cars are required to come to a stop when the servants of the company operating a car see a vehicle or horse upon the track ahead of the car, and the horse shows fright at the approach or noise of the car.

We do not think that the instruction admits of this interpretation. Nor is it necessary to decide in this case whether or not street car companies have a right on the space occupied by their tracks superior to the right of other travelers on the street between crossings. They are not required to stop their cars upon the discovery of the fright of a horse on the street, occasioned by the usual and ordinary noises of the car, and are only required to keep the car under control, so that it can prevent damages when occasion arises; and, while it is a recognized fact that travelers should give the right of way to the street car, it does not relieve the company from exercising due care to prevent a collision. It cannot wantonly, maliciously, recklessly, or negligently inflict injury upon a traveler on the street by running its car upon him, when the servants of the company in charge of the car knew, or by the exercise of reasonable care and caution should have known, of his inability to prevent a collision with the car. Booth on Street Railways, § 305; Joyce on Elec. Law, § 597.

Whether the company in such a case has been guilty of wanton, malicious, reckless, or negligent conduct is a question for the jury, under proper instructions from the court.

“Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or the doing what such a person under existing circumstances would not have done. The duty is dictated and measured by the exigencies of the occasion.” Balt. & Po. R. Co. v. Jones, 95 U. S. 439, 24 L. Ed. 506.

Danville Ry. & Elec. Co. v. Hodnett

In *Welsh v. The Jackson County Horse R. Co.*, 81 Mo. 466, a child on the street was run over by a horse car and killed; and the appellate court approved an instruction to the jury which told them that "if, by the exercise of ordinary care and prudence, the driver might have seen the child and stopped the car in time to have avoided the killing, or if, by the exercise of ordinary care and prudence under the circumstances, the driver might have avoided driving over the child, plaintiff must recover."

Unquestionably, greater caution and prudence are required of a street car company to avoid an injury to a small child on the street than to an adult, for the reason that the servants of the company operating the car may reasonably presume that a person of sufficient size and age, apparently in the possession of all his powers and faculties, will get out of the way of the approaching car; but when those in charge of the car knew, or by the exercise of reasonable care and prudence should know, that a person on the track, or about to get on the track, in front of the car, is in such a situation or condition that he is unable to avoid a collision with the car if it continues its course, then, both upon reason and authority, it becomes the duty of those operating the car not only to have the car under control, but, if need be, to stop it, in order to prevent injury to the person so situated.

Says the opinion in *Cooke v. Balt. Trac. Co.*, 80 Md. 554, 31 Atl. 328: "Negligence is essentially relative and comparative, and not absolute. It is not even an object of simple apprehension, apart from the circumstances out of which it grows. As these circumstances necessarily vary in their relations to each other, under different surroundings they inevitably change their original signification and import. Hence it is intrinsically true that those things which would not under one condition constitute negligence, would, on the other hand, under a different, though not necessarily an opposite, condition, most unequivocally indicate its existence. Thus an act which would have been neutral or indifferent when street cars were drawn by horses at a comparatively low rate of speed, and could not consequently be readily brought to a stop as occasion required, would become culpable negligence since the change of motive power and the great acceleration of speed incident thereto under the rapid transit system. The existence of negligence is therefore to be sought for in the facts and surroundings of each particular case. But there will generally be found standing prominently out in many instances of this character a disregard of the safety of others, a want of caution to avoid injury where the duty to use that caution is incumbent, and a reckless or heedless use of dangerous agencies in localities where the peril from their use is obvious. When these conditions, or any of them, are presented, and an injury is inflicted in consequence upon another,

Danville Ry. & Elec. Co. v. Hodnett

a case of actionable negligence has been made out, provided the plaintiff is himself free from contributing blame."

In that case the injury was to an occupant of a buggy entering upon a street into which a cable car swung at full speed and without headlight around a curve from an intersecting street, and collided with the buggy. Discussing the negligence of the defendant company, and characterizing it as "gross and flagrant," the opinion proceeds:

"The gripman had ample time to check the speed of his car, and, if he saw that the plaintiff was driving to a place of peril, he was bound to stop and avoid a collision otherwise inevitable. If he did not see the plaintiff, he was equally negligent in not stopping before sweeping around the curve, because a proper regard for the safety of persons who might be rightfully on the east side of Gilmore street, above Fayette, and who would therefore be beyond the reach of his vision, by reason of the intervening buildings along the north side of Fayette street, imperatively required him to stop before venturing around the curve, and to ascertain that the track beyond or north of the corner was clear."

There, as will be readily observed, the court not only held that it was the duty of the gripman to have his car under control, but, upon seeing the plaintiff drive to a place of peril, to stop the car in order to prevent it from coming in contact with plaintiff's buggy.

Joyce on Elec. Law, § 597, discussing the duties of a motorman in charge of a street car when he discovers that a horse is being frightened by the approach of the car, says:

"While a motorman need not necessarily stop his car upon the first indication of a horse being frightened by the approach of his car, it would seem that such fact would be construed as sufficient notice to him to exercise reasonable care—that is, to act as a reasonably prudent man would under the same circumstances, and therefore, if his car is advancing at a high rate of speed, to slacken its speed, or, if being run only at a moderate rate, to have it under control, so that he may readily stop it if the latter act appear necessary from the subsequent action of the horse. This duty he owes not merely to the person or persons in a vehicle, but also to the traveling public, who may suffer injury in case the horse becomes unmanageable. He should not wait until the horse is beyond the driver's control, for then any action on his part would probably avail little, but he should be required to act at the point of time in the occurrences when a reasonably prudent man might infer that the horse would become unmanageable and would act."

The learned counsel for plaintiff in error in the case at bar cite, among others, as supporting the objection urged to the instruction under consideration, the case of *Marion City Ry. Co. v. Buboise* (Ind. App.) 55 N. E. 266, and *Doster v. Charlotte St. Ry. Co.* (N. C.) 23 S. E. 449, 34 L. R. A. 481.

Danville Ry. & Elec. Co. v. Hodnett

In the first-named case the action was for injuries to the plaintiff's wife, resulting from being thrown out of a buggy by reason of the fright of the horse drawing the buggy at the approach of the car from behind just as the buggy entered upon a covered bridge, and the Appellate Court of Indiana held the defendant company not liable; the decision being put upon the ground that the servants of the defendant company discharged every duty imposed upon them by the circumstances attending the accident to the plaintiff's wife, but the fact that the car was brought to a stop before coming in contact with the buggy is emphasized. The opinion says: "It appears by the special findings that the motive power had been turned off at a considerable distance from the bridge and the appellee. Whether the motive power had been turned off because of a descent in the railway, or because of the fright of the horse, does not appear. But it does appear that, as soon as those operating the car saw the horse's fright, an effort was made to stop the car; that the brake was applied, and the car was stopped 84 feet from the place where the appellee's wife fell from the buggy, and about 90 or 100 feet from the bridge, where the car was upon the ascending grade. It affirmatively appears that there was no wanton or reckless conduct on the part of the appellant's servant, but, on the contrary, there was an effort to prevent the injury. There was no contact of the car with the horse or buggy. The horse did not run down the embankment, and thereupon injure appellee's wife, but she fell out upon the road at a considerable distance from the car."

In *Doster v. Charlotte St. Ry. Co.*, supra, the decision is that "an electric street railway company is not liable, in the absence of a collision with its car, on account of its failure to stop its car, for injuries caused by a horse driven on the street becoming frightened, no unnecessary noise having been made for the purpose of frightening the animal"; but there is nothing in the opinion opposing the doctrine that where the traveler on the street is imperiled by his horse being frightened by an approaching car, and his imperiled condition known, or by the exercise of ordinary care could have been known, to the motorman in charge of the car in time to have stopped it before coming in contact with the traveler or his horse, it is negligence not to stop the car, and if injury result therefrom the injured person may recover of the street car company damages for the injury, provided he is himself free from contributory blame. On the contrary, the opinion plainly sanctions that doctrine.

Instruction No. 1 given for the defendant in error is based upon the evidence as to the situation in which the parties were at the moment of the accident, and correctly expounds the law applicable to the facts which the evidence tends to prove.

The refusal to give instruction No. 5 asked by plaintiff in error constitutes its next assignment of error.

Danville Ry. & Elec. Co. v. Hodnett

By the four instructions already given for plaintiff in error, its side of the case was as fully and fairly submitted to the jury as it could, upon the evidence, reasonably have asked. Instruction No. 5 proceeds upon the theory that because defendant in error was not knocked off the horse by the contact of the car with it, but fell or was thrown from the horse by the fright which it had before and after it was struck by the car, the plaintiff in error was not liable for the injuries resulting. In other words, the proposition contained in the instruction is that, to entitle him to recover, defendant in error had to be struck by the car, and the injuries to him inflicted by actual collision with the car, or by being knocked off his horse at the point of the collision.

Clearly, if the injuries he sustained were caused by the negligence of plaintiff in error's servants running the car against his horse, he was as much entitled to recover for the injuries sustained in the manner and at the point they were as if they had been inflicted at the point of the collision.

"The proximate cause is the efficient cause—the one that necessarily sets the other causes in operation." *Ins. Co. v. Boon*, 95 U. S. 117, 24 L. Ed. 395. Manifestly, therefore, it was not error to refuse an instruction which was calculated, as was instruction No. 5, to lead the jury to the conclusion that, because defendant in error was not actually struck or knocked off his horse by the car as the result of the collision, he could not recover for the injuries he sustained.

What we have already said as to instruction No. 5 applies as well to instruction No. 6. This instruction was well calculated to mislead the jury to the conclusion that because the horse of defendant in error was not knocked down, nor he knocked off the horse, by the car, but fell or was thrown from the saddle by his inability to keep his seat, or by the horse coming in collision with a tree after the car had stopped, plaintiff in error was not liable for the injuries resulting. The instruction was rightly refused.

The statement of the case already made renders it unnecessary, we think, to review the evidence in detail in considering the remaining assignment of error, which is to the refusal of the court below to set aside the verdict and grant a new trial. Plaintiff in error lays much stress upon the evidence as to the control which the motorman had over the car, as where the car stopped after the collision with the horse. Upon these questions the evidence is conflicting, but, if it be conceded that the car stopped within its length (30 feet) after the collision, still the question was whether or not it was negligence, under all the circumstances proven, not to stop the car before striking the horse, and whether that negligence was the proximate cause of the injuries to plaintiff, and these were questions for the jury. There was no attempt to prove contributory negligence on the part of defendant in error; and if, as plaintiff in error contends, the motorman had his

Hamburg-Bremen Fire Ins. Co. v. Atlantic C. L. R. Co

car under such control as to enable him to stop it immediately, it was all the more reckless in him not to bring the car to a stop, when he saw the situation which the evidence shows defendant in error to have been in when the car was run against his horse, and that a collision with the horse could only be avoided by bringing the car to a stop.

According to the motorman's own statement upon cross-examination as a witness for plaintiff in error, he saw that the horse was beyond the control of its rider; that it could not be kept off the track, or gotten to go forward out of the way of the car; and that the car could have been easily stopped before striking the horse.

We are of opinion that the evidence fully sustained the verdict of the jury, and that the judgment of the corporation court must be affirmed.

**HAMBURG-BREMEN FIRE INS. CO. v. ATLANTIC COAST
LINE R. CO.**

(Supreme Court of North Carolina, March 10, 1903.)

[43 S. E. Rep. 548.]

Fires Set by Locomotives—Combustibles on Railroad Platform.*

A railroad is liable for the destruction of a building by fire communicated by sparks from a passing engine to bales of cotton, which the company had permitted to stand on its platform until the bagging came off, and the lint bulged out so as to be easily ignited, and from such cotton to the building.

Same—Subrogation of Insurer—Statutes.

Code, § 177, provides that all actions must be prosecuted in the name of the real party in interest, but "this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract": *held*, that if the exception in the section operated to prevent a fire insurance company, on paying a loss, from suing the one whose negligence caused the loss, it was repealed by Laws 1899, c. 54, § 43, which provides that the insurance company should be subrogated, to the extent of the payment by it, to all right of recovery by assured.

Same—Same—Same.

Though Laws 1899, c. 54, § 43, provides for an assignment by assured to the fire insurance company of his right of action against the one whose negligence caused the loss, the company, on paying the loss, may maintain the action, though no assignment has been made.

Appeal from superior court, Edgecombe county; Winston, Judge.

Action by the Hamburg-Bremen Fire Insurance Company against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

John L. Bridgers and Geo. B. Elliott, for appellant.

G. M. T. Fountain, for appellee.

CLARK, C. J. The complaint alleges that "the defendant

*Negligence of railroads in allowing combustibles to accumulate on right of way, see foot-note appended to *Livermon v. Roanoke & T. R. Co. (N. Car.)*, 5 R. R. R. 506, 28 Am. & Eng. R. Cas., N. S., 506.

Hamburg-Bremen Fire Ins. Co. v. Atlantic C. L. R. Co

negligently allowed and permitted inflammable material to be and remain on its right of way, and the same so remaining on its said right of way on the night of 4th February, 1901, said inflammable material was set on fire by sparks falling from one of its engines passing over its said right of way, or otherwise, between the hour of ten o'clock p. m. and the hour of four o'clock a. m. of the said night preceding the 5th February, 1901, and the said fire, so started, spread to the property of the said Hearne Bros. & Co., and the same was burned and destroyed, to the value of \$750, which the plaintiff had to pay, under its insurance policy as aforesaid, to their great damage, to wit, the sum of \$742.50, aforesaid." The judge sets out in the judgment the following findings of fact: "It being admitted by the defendant that the facts alleged in the complaint are true, reserving the question of liability arising upon these facts to be hereafter determined, except the negligent burning, and it being further agreed that his honor should submit to the jury the following issues: First. Did the defendant negligently set fire to and burn the property described in the complaint, as alleged therein? Second. If so, what damage has the plaintiff sustained thereby?—and it being further agreed that, upon the jury finding the first issue 'Yes,' his honor should answer the second issue, '\$742.50,' with interest from 5th March, 1901, until paid, and the jury having found the first issue 'Yes,' judgment was accordingly entered in favor of the plaintiff for said amount." It was in evidence that the defendant allowed cotton bales, three rows deep, standing on end, to remain several weeks on its open platform, close to the track; said cotton being "in bad condition; heads off, bagging off, naked lint standing right up on 5 or 6, or probably 10, bales of it; 23 bales in lot on that end, 3 bales deep in rows; cotton in ten feet of west edge of platform." The defendant's train passed about 20 minutes before the alarm of fire, wind blowing from northwest. Trains passed on west side of warehouse, the cotton on platform caught, and then the warehouse, whence flames were communicated to Hearne Bros. & Co.'s property, 50 feet west of the defendant's warehouse. The jury found that the fire was caused by the negligence of the defendant as alleged in the complaint, as above set forth. This was a question of fact, and, on examining the instructions given and refused, we find no error of which the defendant could complain.

The thirteenth instruction requested by the defendant contained the following admission: "If you believe the evidence, the firing of the cotton led to the burning of Hearne's property. If the cotton had not been on the platform, the fire would not have occurred. So the question arises, was the defendant negligent because the cotton was there, in the condition it was in?" There being no objection to the evidence, but only to the charge, this practically narrows the controversy down to the question whether if the fire was caused by

sparks from the engine, or cinders, creating a flame which reached the cotton in this exposed or dilapidated condition, was the defendant liable therefor? On this point, we think the judge charged correctly, to wit: "If the defendant company permitted baled cotton to remain on its platform, no matter to whom it belonged, and no matter whether put there for shipment or not, until the bagging came off, and the lint bulged out so as to be easily ignited, and a spark from its passing engine caught such cotton and set it on fire, and the fire finally communicated to the factory, and the factory burned, then the company was negligent, and you will answer the issue, 'Yes.' "

The court gave the defendant's prayers for instructions Nos. 2, 5, 6, 9, 12, and 15, which were carefully drawn, and fully protected its rights; also prayers 7 and 8 were given, with slight modifications, properly inserted; and the other prayers were properly refused, in form as asked, except as given in the charge. The rejected prayers were requests to charge, substantially, that the defendant was not liable if the fire was caused by sparks, or otherwise, from its engine, communicating flame through the medium of cotton on the defendant's platform, in the bad condition stated, and were properly refused. *Black v. Railroad*, 115 N. C. 667, 20 S. E. 713, 909; *Blue v. Railroad*, 117 N. C. 644, 23 S. E. 275; *Moore v. R. Co.*, 124 N. C. 388, 32 S. E. 710. Prayer No. 3 given at the request of the plaintiff was: "If you find that defendant permitted cotton to remain on its platform, near its railroad track, with the bagging off the upper end of the bales, with the lint bulged out, and exposed to fire from its engines passing over its said road, as described by the witnesses, this was negligence; and if you are further satisfied that the cotton caught fire from sparks from one of defendant's engines, and Hearne's factory was thereby burned, as the direct result of such cotton catching on fire, then I charge you to answer the first issue 'Yes.' " And prayer 15 given at request of defendant was: "The court instructs the jury that the burden is on the plaintiff to prove affirmatively that the fire was set by sparks from the defendant's engine. They are not at liberty to guess as to the origin. To justify a finding that the fire did start from the engine, the facts must be such as to support this theory; that is to say, if from the evidence it appears that the fire may have started in some other way than from the engine, the jury is not justified in assuming that the engine set the fire, but the jury must be satisfied by the greater weight of the evidence that the fire originated from a spark from the passing engine."

The court, in its charge, further instructed the jury, among other things: "The burden of proof is on plaintiff to show by the greater weight of the evidence that a spark from the engine set fire to the cotton, and that, as a natural result, the house was burned, and that the company could have foreseen

Hamburg-Bremen Fire Ins. Co. v. Atlantic C. L. R. Co

that the cotton, in the condition it was in, was likely to catch fire from passing trains. If it so appears, the company was negligent, and you will answer 'Yes'; otherwise you will answer 'No.' Proximate cause is the direct cause which produces a result, without any other cause supervening and bringing about the result. The defendant admits the insurance and the burning, and the payment by the plaintiff to Hearne, but says it was in no way responsible for the fire, and that the fire was not the result of any act of negligence on the part of the defendant or its agents, and for that reason they are not responsible. The special negligence complained of by the plaintiff is alleged to be that the company permitted baled cotton, highly inflammable, to remain for some weeks on its platform, near the passing trains; that the cotton had got in bad condition, bagging off the ends, and the lint cotton bulged out, and standing up, so as to be easily fired; that this was left so, and that the trains were constantly passing; that on the night in question a train passed near the spot; that in some minutes fire broke out; that it was discovered in this cotton; that it communicated to the warehouse, and thence to the Hearne factory; and, as indicating that the engine set it on fire, it is contended that the wind was blowing from the engine over the cotton and onto the factory from a northwest direction, and that the sparks from the engine set it on fire, and it was carried by the wind to this factory. The defendant denies that the fire occurred in that way." The court thereupon gave very fully the defendant's contentions, and added: "It is the duty of a railroad company to keep its right of way free from such inflammable material, as is likely to catch fire from the running of its train, and communicate it to adjacent property. If defendant permitted baled lint cotton to remain on its platform, no matter to whom it belonged, and no matter whether put there for shipment or not, until the bagging came off the end, and the lint bulged out so as to be easily ignited, and a spark from its passing engine caught such cotton and set it on fire, and the fire finally communicated to the factory, and the factory was burned, then the company was negligent, and you will answer the issue 'Yes'; but no matter how negligent the company may have been in having cotton on its right of way, and no matter what condition that cotton was in, if the spark that caused the fire did not come from defendant's engine, there can be no recovery, and you will answer the issue 'No.' If some one, in passing, dropped a cigar there, and that caused the fire, there can be no recovery. If the sparks came from the factory smokestack, then there can be no recovery. In no event is the company liable unless a spark from its engine set the cotton on fire." We think the sole issue of fact was intelligently and correctly submitted to the jury by his honor.

It was further contended that the plaintiff could not recover, but that Hearne Bros. & Co. were the proper parties

Brunswick & W. R. Co. v. Griffin

plaintiff. It will be seen, by the averments in the complaint and the admissions in the answer, that they have no interest in this action, and that the plaintiff is the sole party in interest for the recovery of the \$742.50 sued for, and therefore, under our Code system, the only party authorized to bring this action. It is insisted, however, that section 177 of the Code expressly provides that "every action must be prosecuted in the name of the real party in interest but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract." If this exception applied to a case of this kind, it has been repealed, so far as actions of this nature are concerned, by the following provision in section 43, c. 54, Laws 1899, (at page 168): That if the insurance "company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom": and it is further provided that the insured shall make an assignment to the company on receiving such payment. Whether the insured here made an actual assignment, or not, is immaterial, as the subrogation was complete upon the payment, and the sole right of recovery thereupon passed to the company. The actual assignment would only be evidence of the fact. This statute repeals any nonassignability which may have been imposed by the exception 177 of the Code, and this cause of action comes under the general provision that all actions "must be prosecuted in the name of the real party in interest."

After careful examination of the exceptions, we find no error.

BRUNSWICK & W. R. CO. v. GRIFFIN.

(*Supreme Court of Georgia, Feb. 11, 1903.*)

[43 S. E. Rep. 404.]

Railroads—Presumption of Negligence—Evidence.*

The evidence, though conflicting on some of the material issues in the case, was sufficient to authorize a finding that the presumption of negligence which arose against the defendant by proof that the death of the deceased was caused by the running of a locomotive of the company was not rebutted.

(Syllabus by the Court.)

Error from superior court, Ware county; Jos. W. Bennett, Judge.

Action by W. G. Griffin against the Brunswick & Western Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

*As to whether a presumption of negligence arises from the fact that a person is killed by a train, see *St. Louis, etc., Ry. Co. v. Townsend* (Ark.), 22 Am. & Eng. R. Cas., N. S., 123.

Commonwealth v. Chesapeake & O. Ry. Co

W. E. Kay, C. P. Goodyear, and S. W. Hitch, for plaintiff in error.

Atkinson & Dunwoody, L. A. Wilson, and J. C. McDonald, for defendant in error.

COBB, J. When this case was here before, it was held that the evidence was sufficient to raise a presumption of negligence against the company, and a judgment granting a nonsuit was reversed. 113 Ga. 642, 38 S. E. 968. The evidence in behalf of the plaintiff was substantially the same as that on the former trial, and the evidence relied on by the defendant to rebut this presumption of negligence was not of such a character as to require a finding that there was no negligence.

Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

COMMONWEALTH v. CHESAPEAKE & O. Ry. Co. (three cases).

(Court of Appeals of Kentucky, March 5, 1903.)

[72 S. W. Rep. 361.]

Carriers—Discrimination—Indictment.

An indictment against a carrier for discrimination, in violation of Const. § 215, providing that carriers shall haul freight of the same class for all persons between the same points, and on the same conditions, in the same manner and for the same charges, is bad, it charging the hauling of freight of the same class between the same points for different persons for different charges "and on different conditions."

Appeal from circuit court, Johnson county.

"Not to be officially reported."

Demurrers to indictments against the Chesapeake & Ohio Railway Company were sustained, and the commonwealth appeals. Affirmed.

Clifton J. Pratt and M. R. Todd, for the Commonwealth.
Wadsworth & Cochran, for appellee.

O'REAR, J. Appellee, a common carrier, was indicted in these three cases for a violation of section 215 of the Constitution of this state. In the descriptive part of the indictment there is the same omission discussed in other cases this day decided from the same court against this appellee. 72 S. W. 360, and *ubi supra*. But these three indictments contain this curious variation from the others discussed: "The accusative part of the indictment charges appellee with the offence of unlawfully, willfully, and knowingly hauling freight of same class from and to same points for different persons for different charges, and on different conditions."

The judgment of the circuit court sustaining a demurrer to the indictment and dismissing it because it fails to charge a public offense is affirmed.

COMMONWEALTH v. CHESAPEAKE & O. Ry. Co.

(Court of Appeals of Kentucky, March 5, 1903.)

[72 S. W. Rep. 758.]

Carriers—Discrimination—Indictment.

Under Cr. Code, § 124, requiring an indictment to be certain, not only as to the party and offense charged and the county where committed, but also as to the particular circumstances if they be necessary to constitute a complete offense, an indictment for violation of Const. § 215, prohibiting discrimination in freight rates by railroads, which fails to allege that the discriminative rates were charged for services to the different persons "upon the same conditions," is fatally defective.

Appeal from circuit court, Johnson county.

"Not to be officially reported."

An indictment against the Chesapeake & Ohio Railway Company was dismissed, and the commonwealth appeals. Affirmed.

Clifton J. Pratt and M. R. Todd, for the Commonwealth.
Wadsworth & Cochran, for appellee.

O'REAR, J. Appellee, a common carrier operating a railroad between Catlettsburg, Ky., and White House, Ky., and other points, was indicted by the grand jury of Johnson county for unlawful discrimination between shippers of freight of the same class from and to the same points and on same conditions. The indictment was for a violation of section 215 of the State Constitution. While the indictment charges the offense, it fails to describe the circumstances constituting the offense. The descriptive part of the indictment is as follows: "The said defendant Chesapeake & Ohio Railway Company, on the 1st day of October, 1898, in the county and circuit aforesaid, did unlawfully, wilfully and knowingly charge, collect, receive from John R. Mollett, \$1.40 per barrel of sorghum, for hauling sorghum for him from White House, Johnson County, Ky., to Cincinnati, Ohio, while at the same time said deft. charged, collected and received from John Ward \$1.00 per barrel of sorghum for hauling sorghum for him from said White House, Ky., to said Cincinnati, Ohio. The said freight hauled by defendant for said Mollett and Ward as aforesaid was of same class and hauled for them by defendant from and to same points and as a common carrier, as aforesaid. Against the peace," etc. The omission of the words from this part of the indictment, viz., "upon the same conditions," is a fatal one. See case this day decided, *Com. v. C. & O. Ry. Co.*, 72 S. W. 360; also *L. & N. R. R. Co. v. Com. (Ky.)* 57 S. W. 508. It is argued for the commonwealth that as the words are in the accusative part of the indictment it is unnecessary to repeat them in the descriptive part. Section 124, Cr. Code, is: "The indictment must be direct and certain as regards: (1) The party charged. (2) The offense

Commonwealth v. Chesapeake & O. Ry. Co

charged. (3) The county in which the offence was committed. (4) The particular circumstances of the offense charged, if they be necessary to constitute a complete offense.

The offense for which appellee was indicted in this case is known as a "statutory offense," and in the charging part of the indictment it is sufficient to follow the language of the statute near enough that the accused may certainly be put upon notice of the crime for which he is called upon to answer. When that is done, however perfectly done, it does not dispense with a good description also of the facts upon which the pleader relies as constituting the offense. The Code is equally imperative as to each of these requirements. The indictment must fully satisfy each. Touching this subject, this court, in *White v. Commonwealth*, 9 Bush, 180, said: "There is, perhaps, no principle in criminal pleading better established and supported by the common law authorities than that it is not only necessary that the nature and degree of the offense should be specified on the face of the indictment, but that the particular facts and circumstances which render the defendant guilty must be also alleged, it being a general rule that all indictments ought to charge a man with a particular offense by properly specifying the facts constituting it, to enable him to prepare for his defense, and for other important reasons." See, also, *Ward v. Commonwealth*, 14 Bush, 233, and *Brooks v. Com.*; 98 Ky. 143, 32 S. W. 403.

The court is of opinion that this indictment was fatally defective in omitting an averment, the existence of which in this case was essential to constitute any offense against appellee under the charge laid in the indictment. The judgment is affirmed.

COMMONWEALTH v. CHESAPEAKE & O. Ry. Co.

(Court of Appeals of Kentucky, March 5, 1903.)

[72 S. W. Rep. 361.]

Carriers—Long and Short Haul—Joint Traffic Rate.

A joint traffic arrangement, by which connecting carriers haul from a point on one road to a point on the other road for less than the first carrier charges from the same point on its road to its terminus, between the points, is not in violation of Ky. St. § 820, making an offense for a carrier to charge more for hauling for a shorter than for a longer distance "over the same line" in the same direction, the shorter being included in the longer distance.

Appeal from circuit court, Johnson county.

"To be officially reported."

Demurrer to an indictment against the Chesapeake & Ohio Railway Company was sustained, and the commonwealth appeals. Affirmed.

Clifton J. Pratt and M. R. Todd, for the Commonwealth.
Wadsworth & Cochran, for appellee.

Commonwealth v. Chesapeake & O. Ry. Co

O'REAR, J. Appellee was indicted by the grand jury of Johnson county for a violation of the "long and short haul statute" (section 820, Ky. St.). That offense is thus described in the indictment: "The said defendant * * * did unlawfully charge and receive from James N. Meek 24 cents per barrel on flour as railroad charges for transporting flour from Catlettsburg, Boyd county, Kentucky, to White House, Johnson county, Kentucky, and at the same time charge, collect and receive from Frank Preston fifteen cents per barrel on flour (being same class and kind of property delivered to said Meek at 24 cents per barrel for the railroad haul aforesaid) as railroad charges for transporting flour from Catlettsburg, Boyd county, Kentucky, to Paintsville, Johnson county, Kentucky, which last-mentioned haul is a longer distance than first-mentioned haul, and in same direction, and the first-mentioned haul from Catlettsburg, Boyd county, Kentucky, to White House, Johnson county, Kentucky, is included in the said longer haul from Catlettsburg, Boyd county, Kentucky, to Paintsville, Johnson county, Ky. Said property was transported and delivered to said James N. Meek and said Frank Preston under substantially same or similar circumstances and conditions; and which railway company operates and did at said time operate a line of railway in the state of Kentucky, which line runs into Johnson county, Kentucky, as aforesaid, at said time not having been authorized by the railroad commission of this commonwealth to charge less for a longer than for a shorter distance for the transportation of flour." It is not averred, nor do we understand it to be a fact, that appellee then operated a line of railroad from Catlettsburg, Ky., to Paintsville, Ky., but that its southern terminus of that line then was at White House, some 10 or 12 miles north of Paintsville, on the Big Sandy river, a stream navigable by steamboats. The statute under which this indictment was returned is (in part): "If any person owning or operating a railroad in this state, or any common carrier, shall charge or receive any greater compensation in the aggregate for the transportation of passengers or property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance, over the same line in the same direction, the shorter being included within the longer distance, such person shall, for each offense, be guilty of a misdemeanor, and fines," etc. It is to be noticed that to constitute the offense prescribed by the statute the carrier must have carried (1) property of like kind; (2) under similar circumstances and conditions; (3) must have charged more for the shorter than the longer distance; (4) the carrying must have been over the same line, (5) in the same direction, and (6) the shorter must have been included within the longer distance. If any one of these conditions is lacking, no offense against this statute is committed. The indictment

Commonwealth v. Chesapeake & O. Ry. Co

fails to say that the two shipments were over the same line. Doubtless the reason of the failure was because it could not have been truthfully alleged. The railroad company, by joint traffic arrangement with another common carrier, a steamboatman—for example, Frank Preston—might have agreed to carry flour from Catlettsburg, Ky., to Paintsville, Ky., using the railway to White House and steamboats to Paintsville, at a rate different and less than was charged by the railway alone for shipping flour from Catlettsburg to White House, and no further. Is that a violation of the statute? Among the earliest efforts to regulate this question of “long and short haul” discriminations by legislation was the interstate commerce act of February 4, 1887. Since then many states have applied its provisions, so far as applicable, to similar transactions within the several states. Congress could have legislated only with regard to traffic and shipments between the states. It could not, and did not, attempt to regulate shipments of freight beginning and ending in the same state. To supplement, and to make this provision effective as a comprehensive scheme, most or all of the state legislatures have adopted substantially, if not literally, the provisions of the federal act on this subject. The interstate commerce act contained this clause: “That it shall be unlawful for any common carrier, subject to the provisions of this act, to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction; the shorter being included within the longer distance.” Act Feb. 4, 1887, c. 104, § 4, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3156]. Whether a joint traffic rate adopted by two carriers, by which they agreed to carry a certain class of freight over their two lines for less than either charged for the same class of freight over a part of its own line, the shorter being included in the longer distance, was a violation of the section just quoted, came on to be considered for the first time, so far as we know, in the case of *Chicago & N. W. Ry. Co. v. Osborne*, 3 C. C. A. 347, 52 Fed. 912, before Mr. Justice Brewer and Judges Caldwell and Sanborn, sitting as the Circuit Court of Appeals for the Eighth Circuit, October 17, 1892. Mr. Justice Brewer delivered the opinion of the court. In the course of the opinion the learned Justice said: “Where two companies owning connecting lines of road unite in a joint through tariff, they form for the connected roads practically a new and independent line. Neither company is bound to adjust its own local tariff to suit the other, nor compellable to make a joint tariff with it. It may insist upon charging its local rates for all transportation over its lines. If, therefore, the two companies by agreement make a joint tariff over their lines, or any parts of their lines, such joint tariff is not the

Commonwealth v. Chesapeake & O. Ry. Co

basis by which the unreasonableness of the local tariff of either line is determined." And again (page 350, 3 C. C. A., and page 916, 52 Fed.): "The use of the word 'line' is significant. Two carriers may use the same road, but each has its separate line. The defendant may lease trackage rights to any other railroad company, but the joint use of the same track does not create the 'same line', so as to compel either company to graduate its tariff by that of the other." Our statute on this subject, which follows the federal act so closely as to be almost a literal copy, was enacted April 5, 1893. It must be presumed that the language of the federal act was adopted by the Legislature with knowledge of the construction put upon it by the federal courts, and that, therefore, a similar meaning was to be ascribed to the same language under substantially the same circumstances. The common carriers, in fixing their traffic rates under the law, may well have relied on the fact that the same language, used in connection with this same subject, and under circumstances so nearly alike, would be construed uniformly by all courts, as it ought to be. *Parsons v. C. & N. W. Ry. Co.*, 11 C. C. A. 489, 63 Fed. 903, followed *Chicago N. W. Ry. Co. v. Osborne*, supra. Its facts grew out of the same tariff rates and arrangement discussed and decided in *Osborne's Case*. The *Parsons Case* was carried to the Supreme Court, and was there affirmed. *Parsons v. Chi. & N. W. Ry. Co.*, 167 U. S. 447, 17 Sup. Ct. 887, 42 L. Ed. 231. The opinion of the court was delivered by Mr. Justice Brewer, the *Case of Osborne*, supra, being cited and expressly approved. In the case at bar appellee could not have delivered the goods at Paintsville, Ky., by shipping over its railroad line alone, for the reason that its railroad line did not reach to Paintsville by some 10 or 12 miles. It was necessary that some other line, by some other carrier, and under some joint traffic arrangement, should be employed, else appellee could not in fact have delivered the goods as charged. This brings us right up to the question whether the words omitted from the indictment, and used in the statute, viz., "over the same line," are essential to constitute the offense denounced by the statute, and whether a traffic arrangement between two carriers owning or operating different lines, so that the freight in question passes in part over each, is included in the expression "over the same line," when used to regulate one of the carriers' traffic over its own line. We hold that the omitted words are essential to make a good indictment, and that, where the freight passes over two or more lines of different carriers, it is not embraced by the terms of the statute when regarded in connection with other carriers' shipments locally over its own line alone.

The judgment of the circuit court sustaining the demurrer to the indictment and dismissing it is affirmed.

CHARLES F. CHAMPION, Appt., v. JOHN C. AMES, United States Marshal.

(Argued February 27, 28, 1901. Ordered for reargument April 29, 1901. Reargued October 16, 17, 1901. Ordered for reargument before full bench November 10, 1902. Reargued December 15, 16, 1902. Decided February 23, 1903.)

[23 Sup. Ct. Rep. 321.]

Interstate Commerce—Regulation by Congress—Prohibition of Traffic in Lottery Tickets.

The carriage of lottery tickets from one state to another by an express company engaged in carrying freight and packages from state to state is interstate commerce, which Congress, under its power to regulate, may prohibit by making it an offense against the United States to cause such tickets so to be carried.

Appeal from the Circuit Court of the United States for the Northern District of Illinois to review an order dismissing a writ of habeas corpus to inquire into a detention under a warrant charging a conspiracy to cause lottery tickets to be carried from one state to another. Affirmed.

The facts are stated in the opinion.

Messrs. Moritz Rosenthal, William D. Guthrie, and Joseph B. David for appellant on original argument.

Mr. William D. Guthrie for appellant on rearguments.

Assistant Attorney General Beck for appellee.

MR. JUSTICE HARLAN delivered the opinion of the court:

The general question arising upon this appeal involves the constitutionality of the 1st section of the act of Congress of March 2d, 1895, chap. 191, entitled "An Act for the Suppression of Lottery Traffic through National and Interstate Commerce and the Postal Service, Subject to the Jurisdiction and Laws of the United States." 28 Stat. at L. 963, U. S. Comp. Stat. 1901, p. 3178.

The appeal was from an order of the circuit court of the United States for the northern district of Illinois dismissing a writ of habeas corpus sued out by the appellant Champion, who in his application complained that he was restrained of his liberty by the Marshal of the United States in violation of the Constitution and laws of the United States.

It appears that the accused was under indictment in the district court of the United States for the northern district of Texas for a conspiracy under § 5440 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3676), providing that "if two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not more than two years."

He was arrested at Chicago under a warrant based upon a

Champion v. Ames

complaint in writing, under oath, charging him with conspiring with others, at Dallas, in the northern district of Texas, to commit the offense denounced in the above act of 1895; and the object of the arrest was to compel his appearance in the Federal court in Texas to answer the indictment against him.

The 1st section of the act of 1895, upon which the indictment was based, is as follows: "§ 1. That any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, or deposited in or carried by the mails of the United States, or carried from one state to another in the United States, any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, to be brought into the United States, or deposited in or carried by the mails of the United States, or transferred from one state to another in the same, shall be punishable in [for] the first offense by imprisonment for not more than two years, or by a fine of not more than \$1,000, or both, and in the second and after offenses by such imprisonment only." 28 Stat. at L. 963, U. S. Comp. Stat. 1901, p. 3178.

The indictment charged, in its first count, that on or about the 1st day of February A. D. 1899, in Dallas county, Texas, "C. F. Champion, alias W. W. Ogden, W. F. Champion, and Charles B. Park did then and there unlawfully, knowingly, and feloniously conspire together to commit an offense against the United States, to wit, for the purpose of disposing of the same, to cause to be carried from one state to another in the United States, to wit, from Dallas, in the state of Texas, to Fresno, in the state of California, certain papers, certificates, and instruments purporting to be and representing tickets, as they then and there well knew, chances, shares, and interests in and dependent upon the event of a lottery, offering prizes dependent upon lot and chance, that is to say, caused to be carried, as aforesaid, for the purpose of disposing of the same, papers, certificates, or instruments purporting to be tickets to represent the chances, shares, and interests in the prizes which by lot and chance might be awarded to persons, to these grand jurors unknown, who might purchase said papers, certificates, and instruments representing and purporting to be tickets, as aforesaid, with the numbers thereon shown and indicated and printed, which by lot and chance should, on a certain day, draw a prize or prizes at the purported lottery or chance company, to wit, at the purported monthly drawing of the so-called Pan-American Lottery Company, which purported to draw monthly at Asuncion, Paraguay, which said Pan-American Lottery Company purported to be an enterprise

Champion v. Ames

offering prizes dependent upon lot and chance, the specific method of such drawing being unknown to the grand jurors, but which said papers, certificates, and instruments purporting to be and representing tickets upon their face purporting to be entitled to participation in the drawing for a certain capital prize amounting to the sum of \$32,000, and which said drawings for said capital prize, or the part or parts thereof allotted or to be allotted in conformity with the scheme of lot and chance, were to take place monthly, the manner and form of which is to the grand jurors unknown, but that said drawing and lot and chance by which said prize or prizes were to be drawn was purported to be under the supervision and direction of Enrigue Montes de Leon, manager, and Bernardo Lopez, intervener, and which said papers, certificates, and instruments purporting to be tickets of the said Pan-American Lottery Company were so divided as to be called whole, half, quarter, and eighth tickets, the whole tickets to be sold for the sum of \$2, the half tickets for the sum of \$1, the quarter tickets for the sum of 50 cents and the eighth tickets for the sum of 25 cents."

The indictment further charged that "in pursuance to said conspiracy, and to effect the object thereof, to wit, for the purpose of causing to be carried from one state to another in the United States, to wit, from the state of Texas to the state of California aforesaid, for the purpose of disposing of the same, papers, certificates, and instruments purporting to be and representing tickets, chances, and shares and interests in and dependent upon lot and chance, as aforesaid, as they then and there well knew, said W. F. Champion and Charles B. Park did then and there, to wit, on or about the day last aforesaid, in the year 1899, in the county aforesaid, in the Dallas division of the northern district of Texas aforesaid, unlawfully, knowingly, and feloniously, for the purpose of being carried from one state to another in the United States, to wit, from Dallas, in the state of Texas, to Fresno, in the state of California, for the purpose of disposing of the same, deposit and cause to be deposited and shipped and carried with and by the Wells-Fargo Express Company, a corporation engaged in carrying freight and packages from station to station along and over lines of railway, and from Dallas, Texas, to Fresno, California, for hire, one certain box or package containing, among other things, two whole tickets or papers or certificates of said purported Pan-American Lottery Company, one of which said whole tickets is hereto annexed by the grand jury to this indictment and made a part hereof."

It thus appears that the carrying in this case was by an incorporated express company, engaged in transporting freight and packages from one state to another."

The commissioner who issued the warrant of arrest, having found that there was probable cause to believe that Champion was guilty of the offense charged, ordered that he give bond

Champion v. Ames

for his appearance for trial in the district court of the United States for the northern district of Texas, or in default thereof to be committed to jail. Having declined to give the required bond the accused was taken into custody. Rev. Stat. § 1014 (U. S. Comp. Stat. 1901, p. 716). Thereupon he sued out the present writ of habeas corpus upon the theory that the act of 1895, under which it was proposed to try him, was void, under the Constitution of the United States.

The appellant insists that the carrying of lottery tickets from one state to another state by an express company engaged in carrying freight and packages from state to state, although such tickets may be contained in a box or package, does not constitute, and cannot by any act of Congress be legally made to constitute, commerce among the states within the meaning of the clause of the Constitution of the United States providing that Congress shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes;" consequently, that Congress cannot make it an offense to cause such tickets to be carried from one state to another.

The government insists that express companies, when engaged, for hire, in the business of transportation from one state to another, are instrumentalities of commerce among the states; that the carrying of lottery tickets from one state to another is commerce which Congress may regulate; and that as a means of executing the power to regulate interstate commerce Congress may make it an offense against the United States to cause lottery tickets to be carried from one state to another.

The questions presented by these opposing contentions are of great moment, and are entitled to receive, as they have received, the most careful consideration.

What is the import of the word "commerce" as used in the Constitution? It is not defined by that instrument. Undoubtedly, the carrying from one state to another by independent carriers of things or commodities that are ordinary subjects of traffic, and which have in themselves a recognized value in money, constitutes interstate commerce. But does not commerce among the several states include something more? Does not the carrying from one state to another, by independent carriers, of lottery tickets that entitle the holder to the payment of a certain amount of money therein specified also constitute commerce among the states?

It is contended by the parties that these questions are answered in the former decisions of this court, the government insisting that the principles heretofore announced support its position, while the contrary is confidently asserted by the appellant. This makes it necessary to ascertain the import of such decisions. Upon that inquiry we now enter, premising that some propositions were advanced in argument that need not be considered. In the examination of former judgments

Champion v. Ames

it will be best to look at them somewhat in the order in which they were rendered. When prior adjudications have been thus collated the particular grounds upon which the judgment in the present case must necessarily rest can be readily determined. We may here remark that some of the cases referred to may not bear directly upon the questions necessary to be decided, but attention will be directed to them as throwing light upon the general inquiry as to the meaning and scope of the commerce clause of the Constitution.

The leading case under the commerce clause of the Constitution is *Gibbons v. Ogden*, 9 Wheat. 1, 189, 194, 6 L. Ed. 23, 68, 69. Referring to that clause, Chief Justice Marshall said: "The subject to be regulated is commerce; and our Constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. . . . It has been truly said that commerce, as the word is used in the Constitution, is a unit, every part of which is indicated by the term. If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain, intelligible cause which alters it. The subject to which the power is next applied is to commerce 'among the several states.' The word 'among' means intermingled with. A thing which is among others is intermingled with them. Commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior. It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary. Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more states than one. . . . The genius and character of the whole government seem to be that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. . . ."

Champion v. Ames

Again: "We are now arrived at the inquiry,—What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specific objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States."

Mr. Justice Johnson, in the same case, expressed his entire approbation of the judgment rendered by the court, but delivered a separate opinion indicating the precise grounds upon which his conclusion rested. Referring to the grant of power over commerce, he said: "My opinion is founded on the application of the words of the grant to the subject of it. The 'power to regulate commerce' here meant to be granted was that power to regulate commerce which previously existed in the states. But what was that power? The states were, unquestionably, supreme; and each possessed that power over commerce which is acknowledged to reside in every sovereign state. . . . The law of nations, regarding man as a social animal, pronounces all commerce legitimate in a state of peace, until prohibited by positive law. The power of a sovereign state over commerce, therefore, amounts to nothing more than a power to limit and restrain it at pleasure. And since the power to prescribe the limits to its freedom necessarily implies the power to determine what shall remain unrestrained, it follows that the power must be exclusive; it can reside but in one potentate; and hence the grant of this power carries with it the whole subject, leaving nothing for the state to act upon."

The principles announced in *Gibbons v. Ogden* were reaffirmed in *Brown v. Maryland*, 12 Wheat. 419, 446, 6 L. Ed. 678, 688. After expressing doubt whether any of the evils proceeding from the feebleness of the Federal government contributed more to the establishing of the present constitutional system than the deep and general conviction that commerce ought to be regulated by Congress, Chief Justice Marshall, speaking for the court, said: "It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the states." Considering the question as to the just extent of the power to regulate commerce with foreign nations and among the several states, the court reaffirmed the doctrine that the power was "complete in itself,

Champion v. Ames

and to acknowledge no limitations other than are prescribed by the Constitution. . . . Commerce is intercourse; one of its most ordinary ingredients is traffic."

In the *Passenger Cases*, 7 How. 283, 12 L. Ed. 702, the court adjudged certain statutes of New York and Massachusetts, imposing taxes upon alien passengers arriving in the ports of those states, to be in violation of the Constitution and laws of the United States. In the separate opinions delivered by the justices there will not be found any expression of doubt as to the doctrines announced in *Gibbons v. Ogden*. Mr. Justice McLean said: "Commerce is defined to be 'an exchange of commodities.' But this definition does not convey the full meaning of the term. It includes 'navigation and intercourse.' That the transportation of passengers is a part of commerce is not now an open question." Mr. Justice Grier said: "Commerce, as defined by this court, means something more than traffic,—it is intercourse; and the power committed to Congress to regulate commerce is exercised by prescribing rules for carrying on that intercourse." The same views were expressed by Mr. Justice Wayne, in his separate opinion. He regarded the question then before the court as covered by the decision in *Gibbons v. Ogden*, and in respect to that case he said: "It [the case] will always be a high and honorable proof of the eminence of the American bar of that day, and of the talents and distinguished ability of the judges who were then in the places which we now occupy." Mr. Justice Catron and Mr. Justice McKinley announced substantially the same views.

In *Almy v. California*, 24 How. 169, 16 L. Ed. 644, a statute of California imposing a stamp duty upon bills of lading for gold or silver transported from that state to any port or place out of the state was held to be a tax on exports, in violation of the provision of the Constitution declaring that "no tax or duty shall be laid on articles exported from any state." But in *Woodruff v. Parham*, 8 Wall. 123, 138, 19 L. Ed. 382, 386, this court, referring to the *Almy Case*, said it was well decided upon a ground not mentioned in the opinion of the court, namely, that, although the tax there in question was only on bills of lading, "such a tax was a regulation of commerce, a tax imposed upon the transportation of goods from one state to another, over the high seas, in conflict with that freedom of transit of goods and persons between one state and another, which is within the rule laid down in *Crandall v. Nevada* [6 Wall. 35, 18 L. Ed. 744], and with the authority of Congress to regulate commerce among the states."

In *Henderson v. New York*, 92 U. S. 259, 270, sub nom. *Henderson v. Wickham*, 23 L. Ed. 543, 548, which involved the constitutional validity of a statute of New York relating to vessels bringing passengers to that port, this court, speaking by Mr. Justice Miller, said: "As already indicated, the provisions of the Constitution of the United States, on which

Champion v. Ames

the principal reliance is placed to make void the statute of New York, is that which gives to Congress the power 'to regulate commerce with foreign nations.' As was said in *United States v. Holliday*, 3 Wall. 417, 18 L. Ed. 185, 'commerce with foreign nations means commerce between citizens of the United States and citizens or subjects of foreign governments.' It means trade, and it means intercourse. It means commercial intercourse between nations, and parts of nations, in all its branches. It includes navigation, as the principal means by which foreign intercourse is effected. To regulate this trade and intercourse is to prescribe the rules by which it shall be conducted. 'The mind,' says the great Chief Justice, 'can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of one nation into the ports of another;' and he might have added, with equal force, which prescribed no terms for the admission of their cargo or their passengers. *Gibbons v. Ogden*, 9 Wheat. 190, 6 L. Ed. 68."

The question of the scope of the commerce clause was again considered in *Pensacola Teleg. Co. v. Western U. Teleg. Co.*, 96 U. S. 1, 9, 12, 24 L. Ed. 708, 710, 712, involving the validity of a statute of Florida, which assumed to confer upon a local telegraph company the exclusive right to establish and maintain lines of electric telegraph in certain counties of Florida. This court held the act to be unconstitutional. Chief Justice Waite, delivering its judgment, said: "Since the case of *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23, it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. Postoffices and post roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the national government. The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation it is not only the right, but the duty, of Congress to see to it that intercourse among the states and the transmission of intelligence are not obstructed or unnecessarily encumbered by state leg-

Champion v. Ames

isolation. The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business, and become one of the necessities of commerce. It is indispensable as a means of intercommunication, but especially is it so in commercial transactions." In his dissenting opinion in that case Mr. Justice Field speaks of the importance of the telegraph "as a means of intercourse," and of its constant use in commercial transactions.

In *Mobile County v. Kimball*, 102 U. S. 691, 26 L. Ed. 238, Mr. Justice Field, delivering the judgment of the court, said: "Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities." This principle was expressly reaffirmed in *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 203, 29 L. Ed. 158, 161, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826.

Applying the doctrine announced in *Pennsylvania Teleg. Co. v. Western U. Teleg. Co.*, it was held in *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 26 L. Ed. 1067, that the law of a state imposing a tax on private telegraph messages sent out of the state was unconstitutional, as being, in effect, a regulation of interstate commerce.

In *Brown v. Houston*, 114 U. S. 630, 29 L. Ed. 260, 5 Sup. Ct. Rep. 1095, it was declared by the court, speaking by Mr. Justice Bradley, that "the power to regulate commerce among the several states is granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations." The same thought was expressed in *Bowman v. Chicago & N. W. R. Co.*, 125 U. S. 482, 31 L. Ed. 706, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Crutcher v. Kentucky*, 141 U. S. 47, 58, 35 L. Ed. 649, 652, 11 Sup. Ct. Rep. 851, and *Pittsburg & S. Coal Co. v. Bates*, 156 U. S. 587, 39 L. Ed. 543, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415.

In *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34, 29 L. Ed. 785, 6 Sup. Ct. Rep. 635, it was said to be settled by the adjudged cases that to tax "the transit of passengers from foreign countries or between the states is to regulate commerce."

In *Western U. Teleg. Co. v. Pendleton*, 122 U. S. 347, 356, 30 L. Ed. 1187, 1188, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126, the court recognized the commerce with foreign countries and among the states which Congress could regulate as including not only the exchange and transportation of commodities, or visible, tangible things, but the carriage of persons, and the transmission by telegraph of ideas, wishes, orders, and intelligence. See also, *Ratterman v. Western U. Teleg. Co.*, 127 U. S. 411, 32 L. Ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127, and *Leloup v. Port of*

Champion v. Ames

Mobile, 127 U. S. 640, 32 L. Ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380.

In Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 218, 38 L. Ed. 962, 968, 4 Inters. Com. Rep. 649, 656, 14 Sup. Ct. Rep. 1087, 1092, the question was as to the validity, under the commerce clause of the Constitution, of an act of the Kentucky legislature relating to tolls to be charged or received for passing over the bridge of the Covington & Cincinnati Bridge Company, a corporation of both Kentucky and Ohio, erected between Covington and Cincinnati. A state enactment prescribing a rate of toll on the bridge was held to be unconstitutional, as an unauthorized regulation of interstate commerce. The court, reaffirming the principles announced in Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826, and in Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. Ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4, said, among others things: "Commerce was defined in Gibbons v. Ogden, 9 Wheat. 1, 189, 6 L. Ed. 23, 68, to be 'intercourse,' and the thousands of people who daily pass and repass over this bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool. While the bridge company is not itself a common carrier, it affords a highway for such carriage, and a toll upon such bridge is as much a tax upon commerce as a toll upon a turnpike is a tax upon the traffic of such turnpike, or the charges upon a ferry a tax upon the commerce across a river."

At the present term of the court we said that "transportation for others, as an independent business, is commerce, irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered." Hanley v. Kansas City Southern R. Co., 187 U. S. —, ante, p. 214, 23 Sup. Ct. Rep. 214.

This reference to prior adjudications could be extended if it were necessary to do so. The cases cited, however, sufficiently indicate the grounds upon which this court has proceeded when determining the meaning and scope of the commerce clause. They show that commerce among the states embraces navigation, intercourse, communication, traffic, the transit of persons, and the transmission of messages by telegraph. They also show that the power to regulate commerce among the several states is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States; that such power is plenary, complete in itself, and may be exerted by Congress to its utmost extent, subject only to such limitations as the Constitution imposes upon the exercise of the powers granted by it; and that in determining the character of the regulations to be adopted Congress has a large discretion

Champion v. Ames

which is not to be controlled by the courts, simply because, in their opinion, such regulations may not be the best or most effective that could be employed.

We come, then, to inquire whether there is any solid foundation upon which to rest the contention that Congress may not regulate the carrying of lottery tickets from one state to another, at least by corporations or companies whose business it is, for hire, to carry tangible property from one state to another.

It was said in argument that lottery tickets are not of any real or substantial value in themselves, and therefore are not subjects of commerce. If that were conceded to be the only legal test as to what are to be deemed subjects of the commerce that may be regulated by Congress, we cannot accept as accurate the broad statement that such tickets are of no value. Upon their face they showed that the lottery company offered a large capital prize, to be paid to the holder of the ticket winning the prize at the drawing advertised to be held at Asuncion, Paraguay. Money was placed on deposit in different banks in the United States to be applied by the agents representing the lottery company to the prompt payment of prizes. These tickets were the subject of traffic; they could have been sold; and the holder was assured that the company would pay to him the amount of the prize drawn. That the holder might not have been able to enforce his claim in the courts of any country making the drawing of lotteries illegal, and forbidding the circulation of lottery tickets, did not change the fact that the tickets issued by the foreign company represented so much money payable to the person holding them and who might draw the prizes affixed to them. Even if a holder did not draw a prize, the tickets, before the drawing, had a money value in the market among those who chose to sell or buy lottery tickets. In short, a lottery ticket is a subject of traffic, and is so designated in the act of 1895. 28 Stat. at L. 963, U. S. Comp. Stat. 1901, p. 3178. That fact is not without significance in view of what this court has said. That act, counsel for the accused well remarks, "was intended to supplement the provisions of prior acts, excluding lottery tickets from the mails, and prohibiting the importation of lottery matter from abroad, and to prohibit the act of causing lottery tickets to be carried, and lottery advertisements to be transferred from one state to another by any means or method." 15 Stat. at L. 196, chap. 246; 17 Stat. at L. 302, chap. 335; 19 Stat. at L. 90, chap. 186; Rev. Stat. § 3894, U. S. Comp. Stat. 1901, p. 2659; 26 Stat. at L. 465, chap. 908; 28 Stat. at L. 963, chap. 191, U. S. Comp. Stat. 1901, p. 3178.

We are of opinion that lottery tickets are subjects of traffic, and therefore are subjects of commerce, and the regulation of the carriage of such tickets from state to state, at least by independent carriers, is a regulation of commerce among the several states.

Champion v. Ames

But it is said that the statute in question does not regulate the carrying of lottery tickets from state to state, but by punishing those who cause them to be so carried. Congress in effect prohibits such carrying; that in respect of the carrying from one state to another of articles or things that are, in fact, or according to usage in business, the subjects of commerce, the authority given Congress was not to prohibit, but only to regulate. This view was earnestly pressed at the bar by learned counsel, and must be examined.

It is to be remarked that the Constitution does not define what is to be deemed a legitimate regulation of interstate commerce. In *Gibbons v. Ogden* it was said that the power to regulate such commerce is the power to prescribe the rule by which it is to be governed. But this general observation leaves it to be determined, when the question comes before the court, whether Congress, in prescribing a particular rule, has exceeded its power under the Constitution. While our government must be acknowledged by all to be one of enumerated powers (*M'Cullough v. Maryland*, 4 Wheat. 316, 405, 407, 4 L. Ed. 579, 601), the Constitution does not attempt to set forth all the means by which such powers may be carried into execution. It leaves to Congress a large discretion as to the means that may be employed in executing a given power. The sound construction of the Constitution, this court has said, "must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." 4 Wheat. 421, 4 L. Ed. 605.

We have said that the carrying from state to state of lottery tickets constitutes interstate commerce, and that the regulation of such commerce is within the power of Congress under the Constitution. Are we prepared to say that a provision which is, in effect, a prohibition of the carriage of such articles from state to state is not a fit or appropriate mode for the regulation of that particular kind of commerce? If lottery traffic, carried on through interstate commerce, is a matter of which Congress may take cognizance and over which its power may be exerted, can it be possible that it must tolerate the traffic, and simply regulate the manner in which it may be carried on? Or may not Congress, for the protection of the people of all the states, and under the power to regulate interstate commerce, devise such means, within the scope of the Constitution, and not prohibited by it, as will drive that traffic out of commerce among the states?

In determining whether regulation may not under some cir-

Champion v. Ames

cumstances properly take the form or have the effect of prohibition, the nature of the interstate traffic which it was sought by the act of May 2d, 1895, to suppress cannot be overlooked. When enacting that statute Congress no doubt shared the views upon the subject of lotteries heretofore expressed by this court. In *Phalen v. Virginia*, 8 How. 163, 168, 12 L. Ed. 1030, after observing that the suppression of nuisances injurious to public health or morality is among the most important duties of government, this court said: "Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple." In other cases we have adjudged that authority given by legislative enactment to carry on a lottery, although based upon a consideration in money, was not protected by the contract clause of the Constitution; this, for the reason that no state may bargain away its power to protect the public morals, nor excuse its failure to perform a public duty by saying that it had agreed, by legislative enactment, not to do so. *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079; *Douglas v. Kentucky*, 168 U. S. 488, 42 L. Ed. 553, 18 Sup. Ct. Rep. 199.

If a state, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evil that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several states, provide that such commerce shall not be polluted by the carrying of lottery tickets from one state to another? In this connection it must not be forgotten that the power of Congress to regulate commerce among the states is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution. What provision in that instrument can be regarded as limiting the exercise of the power granted? What clause can be cited which, in any degree, countenances the suggestion that one may, of right, carry or cause to be carried from one state to another that which will harm the public morals? We cannot think of any clause of that instrument that could possibly be invoked by those who assert their right to send lottery tickets from state to state except the one providing that no person shall be deprived of his liberty without due process of law. We have said that the liberty protected by the Constitution embraces the right to be free in the enjoyment of one's faculties; "to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper." *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 41 L.

Champion v. Ames

Ed. 832, 835, 17 Sup. Ct. Rep. 427, 431. But surely it will not be said to be a part of any one's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the states an element that will be confessedly injurious to the public morals.

If it be said that the act of 1895 is inconsistent with the 10th Amendment, reserving to the states respectively, or to the people, the powers not delegated to the United States, the answer is that the power to regulate commerce among the states has been expressly delegated to Congress.

Besides, Congress, by that act, does not assume to interfere with traffic or commerce in lottery tickets carried on exclusively within the limits of any state, but has in view only commerce of that kind among the several states. It has not assumed to interfere with the completely internal affairs of any state, and has only legislated in respect of a matter which concerns the people of the United States. As a state may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the "widespread pestilence of lotteries" and to protect the commerce which concerns all the states, may prohibit the carrying of lottery tickets from one state to another. In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those states—perhaps all of them—which, for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the states, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce. We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end. We say competent to that end, because Congress alone has the power to occupy, by legislation, the whole field of interstate commerce. What was said by this court upon a former occasion may well be here repeated: "The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject-matter specifically committed to its charge." *Re Rahrer*, 140 U. S. 545, 563, sub nom. *Wilkinson v. Rahrer*, 35 L. Ed. 572, 577, 11 Sup. Ct. Rep. 865, 869. If the carrying of lottery tickets from one state to another be interstate commerce, and if Congress is of opinion that an effective regulation for the suppression of lotteries, carried on through such commerce, is to make it a criminal offense to cause lottery tickets to be carried from one state to another, we know of no authority in the courts to hold that

Champion v. Ames

the means thus devised are not appropriate and necessary to protect the country at large against a species of interstate commerce which, although in general use and somewhat favored in both national and state legislation in the early history of the country, has grown into disrepute, and has become offensive to the entire people of the nation. It is a kind of traffic which no one can be entitled to pursue as of right.

That regulation may sometimes appropriately assume the form of prohibition is also illustrated by the case of diseased cattle, transported from one state to another. Such cattle may have, notwithstanding their condition, a value in money for some purposes, and yet it cannot be doubted that Congress, under its power to regulate commerce, may either provide for their being inspected before transportation begins, or, in its discretion, may prohibit their being transported from one state to another. Indeed, by the act of May 29th, 1884, chap. 60 [23 Stat. at L. 32, § 6, U. S. Comp. Stat. 1901, p. 3184], Congress has provided: "That no railroad company within the United States, or the owners or masters of any steam or sailing, or other vessel or boat, shall receive for transportation or transport, from one state or territory to another, or from any state into the District of Columbia, or from the District into any state, any live stock affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro-pneumonia; nor shall any person, company, or corporation deliver for such transportation to any railroad company or master or owner of any boat or vessel, any live stock, knowing them to be affected with any contagious, infectious, or communicable disease; nor shall any person, company, or corporation drive on foot or transport in private conveyance from one state or territory to another, or from any state into the District of Columbia, or from the District into any state, any live stock, knowing them to be affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro-pneumonia." *Reid v. Colorado*, 187 U. S. 137, ante, 92, 23 Sup. Ct. Rep. 92.

The act of July 2d, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), known as the Sherman anti-trust act, and which is based upon the power of Congress to regulate commerce among the states, is an illustration of the proposition that regulation may take the form of prohibition. The object of that act was to protect trade and commerce against unlawful restraints and monopolies. To accomplish that object Congress declared certain contracts to be illegal. That act, in effect, prohibited the doing of certain things, and its prohibitory causes have been sustained in several cases as valid under the power of Congress to regulate interstate commerce. *United States v. Trans-Mission Freight Asso.*, 166 U. S. 290, 41 L. Ed. 1007, 17 Sup. Ct. Rep. 540; *United States v. Joint Traffic Asso.*, 171 U. S. 505, 43 L. Ed. 259, 19

Champion v. Ames

Sup. Ct. Rep. 25; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. Ed. 136, 20 Sup. Ct. Rep. 96. In the case last named the court, referring to the power of Congress to regulate commerce among the states, said: "In *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23, the power was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution. Under this grant of power to Congress that body, in our judgment, may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent interstate commerce. (And when we speak of interstate we also include in our meaning foreign commerce.) We do not assent to the correctness of the proposition that the constitutional guaranty of liberty to the individual to enter into private contracts limits the power of Congress and prevents it from legislating upon the subject of contracts of the class mentioned. The power to regulate interstate commerce is, as stated by Chief Justice Marshall, full and complete in Congress, and there is no limitation in the grant of the power which excludes private contracts of the nature in question from the jurisdiction of that body. Nor is any such limitation contained in that other clause of the Constitution, which provides that no person shall be deprived of life, liberty, or property without due process of law." Again: "The provision in the Constitution does not, as we believe, exclude Congress from legislating with regard to contracts of the above nature while in the exercise of its constitutional right to regulate commerce among the states. On the contrary, we think the provision regarding the liberty of the citizen is, to some extent, limited by the commerce clause of the Constitution, and that the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally, and collaterally, regulate to a greater or less degree commerce among the states."

That regulations may sometimes take the form or have the effect of prohibition is also illustrated in the case of *Re Rahrer*, 140 U. S. 545, sub nom. *Wilkerson v. Rahrer*, 35 L. Ed. 572, 11 Sup. Ct. Rep. 865. In *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205, 8 Sup. Ct. Rep. 273, it was adjudged that state legislation prohibiting the manufacture of spirituous, malt, vinous, fermented, or other intoxicating liquors within the limits of the state, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege, or immunity secured by the Constitution of the United States or by the amendments thereto. Subsequently in *Bowman v. Chicago & N. W. R. Co.*, 125 U. S. 465, 31 L.

Champion v. Ames

Ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062, this court held that ardent spirits, distilled liquors, ale, and beer were subjects of exchange, barter, and traffic, and were so recognized by the usages of the commercial world, as well as by the laws of Congress and the decisions of the courts. In *Leisy v. Hardin*, 135 U. S. 100, 110, 125, 34 L. Ed. 128, 132, 138, 3 Inters. Com. Rep. 36, 41, 47, 10 Sup. Ct. Rep. 681, 684, 690, the court again held that spirituous liquors were recognized articles of commerce, and declared a statute of Iowa prohibiting the sale within its limits of any intoxicating liquors, except for pharmaceutical, medicinal, chemical, or sacramental purposes, under a state license, to be repugnant to the commerce clause of the Constitution, if applied to the sale, within the state, by the importer, in the original, unbroken packages, of such liquors manufactured in and brought from another state. And in determining that case, the court said that whether a state could prohibit the sale within its limits, in original, unbroken packages, of ardent spirits, distilled liquors, ale, and beer, imported from another state, this court said that they were recognized by the laws of Congress as well as by the commercial world as "subjects of exchange, barter, and traffic," and that "whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognized as subjects of commerce are not such."

Then followed the passage by Congress of the act of August 8th, 1890 (26 Stat. at L. 313, chap. 728, U. S. Comp. Stat. 1901, p. 3177), providing "that all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory, or remaining therein for use, consumption, sale, or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." That act was sustained in the *Rahrer Case* as a valid exercise of the power of Congress to regulate commerce among the states.

In *Rhodes v. Iowa*, 170 U. S. 412, 426, 42 L. Ed. 1088, 1096, 18 Sup. Ct. Rep. 664, 669, that statute—all of its provisions being regarded—was held as not causing the power of the state to attach to an interstate commerce shipment of intoxicating liquors "whilst the merchandise was in transit under such shipment, and until its arrival at the point of destination and delivery there to the consignee."

Thus, under its power to regulate interstate commerce, as involved in the transportation, in original packages, of ardent spirits from one state to another, Congress, by the necessary effect of the act of 1890 made it impossible to transport such

Champion v. Ames

packages to places within a prohibitory state and there dispose of their contents by sale; although it had been previously held that ardent spirits were recognized articles of commerce and, until Congress otherwise provided, could be imported into a state, and sold in the original packages, despite the will of the state. If at the time of the passage of the act of 1890 all the states had enacted liquor laws prohibiting the sale of intoxicating liquors within their respective limits, then the act would have had the necessary effect to exclude ardent spirits altogether from commerce among the states; for no one would ship, for purposes of sale, packages containing such spirits to points within any state that forbade their sale at any time or place, even in unbroken packages, and, in addition, provided for the seizure and forfeiture of such packages. So that we have in the *Rahrer Case* a recognition of the principle that the power of Congress to regulate interstate commerce may sometimes be exerted with the effect of excluding particular articles from such commerce.

It is said, however, that the principle that in order to suppress lotteries carried on through interstate commerce, Congress may exclude lottery tickets from such commerce, leads necessarily to the conclusion that Congress may arbitrarily exclude from commerce among the states any article, commodity, or thing, of whatever kind or nature, or however useful or valuable, which it may choose, no matter with what motive, to declare shall not be carried from one state to another. It will be time enough to consider the constitutionality of such legislation when we must do so. The present case does not require the court to declare the full extent of the power that Congress may exercise in the regulation of commerce among the states. We may, however, repeat, in this connection, what the court has heretofore said, that the power of Congress to regulate commerce among the states, although plenary, cannot be deemed arbitrary, since it is subject to such limitations or restrictions as are prescribed by the Constitution. This power, therefore, may not be exercised so as to infringe rights secured or protected by that instrument. It would not be difficult to imagine legislation that would be justly liable to such an objection as that stated, and be hostile to the objects for the accomplishment of which Congress was invested with the general power to regulate commerce among the several states. But, as often said, the possible abuse of a power is not an argument against its existence. There is probably no governmental power that may not be exerted to the injury of the public. If what is done by Congress is manifestly in excess of the powers granted to it, then upon the courts will rest the duty of adjudging that its action is neither legal nor binding upon the people. But if what Congress does is within the limits of its power, and is simply unwise or injurious, the remedy is that suggested by Chief Justice Marshall in *Gibbons v. Ogden*,

Champion v. Ames

when he said: "The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments."

The whole subject is too important, and the questions suggested by its consideration are too difficult of solution, to justify any attempt to lay down a rule for determining in advance the validity of every statute that may be enacted under the commerce clause. We decide nothing more in the present case than that lottery tickets are subjects of traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one state to another is therefore interstate commerce; that under its power to regulate commerce among the several states Congress—subject to the limitations imposed by the Constitution upon the exercise of the powers granted—has plenary authority over such commerce, and may prohibit the carriage of such tickets from state to state; and that legislation to that end, and of that character, is not inconsistent within any limitation or restriction imposed upon the exercise of the powers granted to Congress.

The judgment is affirmed.

MR. CHIEF JUSTICE FULLER, with whom concur MR. JUSTICE BREWER, MR. JUSTICE SHIRAS, and MR. JUSTICE PECKHAM, dissenting:

Although the 1st section of the act of March 2, 1895 (28 Stat. at L. 963, chap. 191, U. S. Comp. Stat. 1901, p. 3178), is inartificially drawn, I accept the contention of the government that it makes it an offense (1) to bring lottery matter from abroad into the United States; (2) to cause such matter to be deposited in or carried by the mails of the United States; (3) to cause such matter to be carried from one state to another in the United States; and further, to cause any advertisement of a lottery or similar enterprise to be brought into the United States, or be deposited or carried by the mails, or transferred from one state to another.

The case before us does not involve in fact the circulation of advertisements and the question of the abridgment of the freedom of the press; nor does it involve the importation of lottery matter, or its transmission by the mails. It is conceded that the lottery tickets in question, though purporting to be issued by a lottery company of Paraguay, were printed in the United States, and were not imported into the United States from any foreign country.

The naked question is whether the prohibition by Congress of the carriage of lottery tickets from one state to another by means other than the mails is within the powers vested in that body by the Constitution of the United States. That the pur-

Champion v. Ames

pose of Congress in this enactment was the suppression of lotteries cannot reasonably be denied. That purpose is avowed in the title of the act, and is its natural and reasonable effect, and by that its validity must be tested. *Henderson v. New York*, 92 U. S. 268, sub nom. *Henderson v. Wickham*, 23 L. Ed. 548; *Minnesota v. Barber*, 136 U. S. 320, 34 L. Ed. 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862.

The power of the state to impose restraints and burdens on persons and property in conservation and promotion of the public health, good order, and prosperity is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive, and the suppression of lotteries as a harmful business falls within this power, commonly called of police. *Douglas v. Kentucky*, 168 U. S. 488, 42 L. Ed. 553, 18 Sup. Ct. Rep. 199.

It is urged, however, that because Congress is empowered to regulate commerce between the several states, it, therefore, may suppress lotteries by prohibiting the carriage of lottery matter. Congress may, indeed, make all laws necessary and proper for carrying the powers granted to it into execution, and doubtless an act prohibiting the carriage of lottery matter would be necessary and proper to the execution of a power to suppress lotteries; but that power belongs to the states and not to Congress. To hold that Congress has general police power would be to hold that it may accomplish objects not intrusted to the general government, and to defeat the operation of the 10th Amendment, declaring that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

The ground on which prior acts forbidding the transmission of lottery matter by the mails was sustained, was that the power vested in Congress to establish post offices and post roads embraced the regulation of the entire postal system of the country, and that under that power Congress might designate what might be carried in the mails and what excluded. *Re Rapier*, 143 U. S. 110, 36 L. Ed. 93, 12 Sup. Ct. Rep. 374; *Ex parte Jackson*, 96 U. S. 727, 24 L. Ed. 877.

In the latter case, Mr. Justice Field, delivering the unanimous opinion of the court, said: "But we do not think that Congress possesses the power to prevent the transportation in other ways, as merchandise, of matter which it excludes from the mails. To give efficiency to its regulations and prevent rival postal systems, it may, perhaps, prohibit the carriage by others for hire, over postal routes, of articles which legitimately constitute mail matter, in the sense in which those terms were used when the Constitution was adopted, consisting of letters, and of newspapers and pamphlets, when not sent as mer-

Champion v. Ames

chandise; but further than this its power of prohibition cannot extend." And this was repeated in the Case of *Rapier*.

Certainly the act before us cannot stand the test of the rule laid down by Mr. Justice Miller in the Trade-Mark Cases, 100 U. S. 96, sub nom. *United States v. Steffens*, 25 L. Ed. 552, when he said: "When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation for commerce with foreign nations, or among the several states, or with the Indian tribes. If not so limited, it is in excess of the power of Congress."

But apart from the question of bona fides, this act cannot be brought within the power to regulate commerce among the several states, unless lottery tickets are articles of commerce, and, therefore, when carried across state lines, of interstate commerce; or unless the power to regulate interstate commerce includes the absolute and exclusive power to prohibit the transportation of anything or anybody from one state to another.

Mr. Justice Catron remarked in the License Cases [5 How. 504, 600, 12 L. Ed. 256, 299] that "that which does not belong to commerce is within the jurisdiction of the police power of the state; and that which does belong to commerce is within the jurisdiction of the United States;" and the observation has since been repeatedly quoted by this court with approval.

In *United States v. E. C. Knight Co.*, 156 U. S. 13, 39 L. Ed. 329, 15 Sup. Ct. Rep. 254, we said: "It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the states as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality. It will be perceived how far reaching the proposition is that the power of dealing with a monopoly directly may be exercised by the general government whenever interstate or international commerce may be ultimately affected. The regulation of commerce applies to the subjects of commerce, and not to matters of internal police." This case was adhered to in *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. Ed. 136, 20 Sup. Ct. Rep. 96, where it was decided that Congress could prohibit the performance of contracts, whose natural effect, when carried out, would be to directly regulate interstate and foreign commerce.

It cannot be successfully contended that either Congress or

Champion v. Ames

the states can, by their own legislation, enlarge their powers, and the question of the extent and limit of the powers of either is a judicial question under the fundamental law.

If a particular article is not the subject of commerce, the determination of Congress that it is, cannot be so conclusive as to exclude judicial inquiry.

When Chief Justice Marshall said that commerce embraced intercourse, he added, commercial intercourse, and this was necessarily so since, as Chief Justice Taney pointed out, if intercourse were a word of larger meaning than the word "commerce," it could not be substituted for the word of more limited meaning contained in the Constitution.

Is the carriage of lottery tickets from one state to another commercial intercourse?

The lottery ticket purports to create contractual relations, and to furnish the means of enforcing a contract right.

This is true of insurance policies, and both are contingent in their nature. Yet this court has held that the issuing of fire, marine, and life insurance policies, in one state, and sending them to another, to be there delivered to the insured on payment of premium, is not interstate commerce. *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357; *Hooper v. California*, 155 U. S. 648, 39 L. Ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *New York L. Ins. Co. v. Cravens*, 178 U. S. 389, 44 L. Ed. 1,116, 20 Sup. Ct. Rep. 962.

In *Paul v. Virginia*, Mr. Justice Field, in delivering the unanimous opinion of the court, said: "Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the states any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."

This language was quoted with approval in *Hooper v. California*, 155 U. S. 648, 39 L. Ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207, and it was further said: "If the power to regulate interstate commerce applied to all the incidents

Champion v. Ames

to which said commerce might give rise, and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the states; and would exclude state control over many contracts purely domestic in their nature. The business of insurance is not commerce. A contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against 'the perils of the sea.' " Or, as remarked in *New York L. Ins. Co. v. Cravens*, "against the uncertainty of man's mortality."

The fact that the agent of the foreign insurance company negotiated the contract of insurance in the state where the contract was to be finally completed and the policy delivered, did not affect the result. As Mr. Justice Bradley said in the leading case of *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 30 L. Ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592: "The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce." And see *Collins v. New Hampshire*, 171 U. S. 30, 43 L. Ed. 60, 18 Sup. Ct. Rep. 768, and other cases.

Tested by the same reasoning, negotiable instruments are not instruments of commerce; bills of lading are, because they stand for the articles included therein; hence it has been held that a state cannot tax interstate bills of lading because that would be a regulation of interstate commerce, and that Congress cannot tax foreign bills of lading, because that would be to tax the articles exported, and in conflict with article 1, § 9, cl. 5, of the Constitution of the United States, that "no tax or duty shall be laid on any articles exported from any state." *Fairbank v. United States*, 181 U. S. 283, 45 L. Ed. 862, 21 Sup. Ct. Rep. 648.

In *Nathan v. Louisiana*, 8 How. 73, 12 L. Ed. 993, it was held that a broker dealing in foreign bills of exchange was not engaged in commerce, but in supplying an instrumentality of commerce, and that a state tax on all money or exchange brokers was not void as to him as a regulation of commerce.

And in *Williams v. Fears*, 179 U. S. 270, 45 L. Ed. 186, 21 Sup. Ct. Rep. 128, that the levy of a tax by the state of Georgia on the occupation of a person engaged in hiring laborers to be employed beyond the limits of the state was not a regulation of interstate commerce, and that the tax fell within the distinction between interstate commerce or an instrumentality thereof, and the mere incidents that might attend the carrying on of such commerce.

In *Cohén v. Virginia*, 6 Wheat. 264, 440, 5 L. Ed. 257, 299, Congress had empowered the corporation of the city of Washington to "authorize the drawing of lotteries for any improve-

Champion v. Ames

ment of the city, which the ordinary funds or revenue thereof will not accomplish." The corporation had duly provided for such lottery, and this case was a conviction under a statute of Virginia for selling tickets issued by that lottery. That statute forbade the sale within the state of any ticket in a lottery not authorized by the laws of Virginia.

The court held, by Chief Justice Marshall, that the lottery was merely the emanation of a corporate power, and "that the mind of Congress was not directed to any provision for the sale of the tickets beyond the limits of the corporation."

The constitutionality of the act of Congress, as forcing the sale of tickets in Virginia, was therefore not passed on, but if lottery tickets had been deemed articles of commerce, the Virginia statute would have been invalid as a regulation of commerce, and the conviction could hardly have been affirmed, as it was.

In *Nutting v. Massachusetts*, 183 U. S. 553, 556, 46 L. Ed. 324, 325, 22 Sup. Ct. Rep. 238, 239, Mr. Justice Gray said: "A state has the undoubted power to prohibit foreign insurance companies from making contracts of insurance, marine or other, within its limits, except upon such conditions as the state may prescribe, not interfering with interstate commerce. A contract of marine insurance is not an instrumentality of commerce, but a mere incident of commercial intercourse. The state, having the power to impose conditions on the transaction of business by foreign insurance companies within its limits, has the equal right to prohibit the transaction of such business by agents of such companies, or by insurance brokers, who are to some extent the representatives of both parties."

If a state should create a corporation to engage in the business of lotteries, could it enter another state, which prohibited lotteries, on the ground that lottery tickets were the subjects of commerce?

On the other hand, could Congress compel a state to admit lottery matter within it, contrary to its own laws?

In *Alexander v. State*, 86 Ga. 246, 10 L. R. A. 589, 12 S. E. 408, it was held that a state statute prohibiting the business of buying and selling what are commonly known as "futures," was not protected by the commerce clause of the Constitution, as the business was gambling, and that clause protected interstate commerce, but did not protect interstate gambling. The same view was expressed in *State v. Stripling*, 113 Ala. 120, 36 L. R. A. 81, 21 So. 409, in respect of an act forbidding the sale of pools on horse races conducted without the state.

In *Ballock v. State*, 73 Md. 1, 8 L. R. A. 671, 20 Atl. 184, it was held that when the bonds of a foreign government are coupled with conditions and stipulations that change their character from an obligation for the payment of a certain sum of money to a species of lottery tickets condemned by the police regulations of the state, the prohibition of their sale

Champion v. Ames

did not violate treaty stipulation or constitutional provision. Such bonds with such conditions and stipulations ceased to be vendible under the law.

So lottery tickets forbidden to be issued or dealt in by the laws of Texas, the terminus a quo, and by the laws of California or Utah, the terminus ad quem, were not vendible; and for this reason, also, not articles of commerce.

If a lottery ticket is not an article of commerce, how can it become so when placed in an envelope or box or other covering, and transported by an express company? To say that the mere carrying of an article which is not an article of commerce in and of itself nevertheless becomes such the moment it is to be transported from one state to another, is to transform a non-commercial article into a commercial one simply because it is transported. I cannot conceive that any such result can properly follow.

It would be to say that everything is an article of commerce the moment it is taken to be transported from place to place, and of interstate commerce if from state to state.

An invitation to dine, or to take a drive, or a note of introduction, all become articles of commerce under the ruling in this case, by being deposited with an express company for transportation. This in effect breaks down all the differences between that which is, and that which is not, an article of commerce, and the necessary consequence is to take from the states all jurisdiction over the subject so far as interstate communication is concerned. It is a long step in the direction of wiping out all traces of state lines, and the creation of a centralized government.

Does the grant to Congress of the power to regulate interstate commerce impart the absolute power to prohibit it?

It was said in *Gibbons v. Ogden* that the right of intercourse between state and state was derived from "those laws whose authority is acknowledged by civilized man throughout the world;" but under the Articles of Confederation the states might have interdicted interstate trade, yet when they surrendered the power to deal with commerce as between themselves to the general government it was undoubtedly in order to form a more perfect union by freeing such commerce from state discrimination, and not to transfer the power of restriction.

"But if that power of regulation is absolutely unrestricted as respects interstate commerce, then the very unity the Constitution was framed to secure can be set at naught by a legislative body created by that instrument." 183 U. S. 171, 46 L. Ed. 136, 22 Sup. Ct. Rep. 70.

It will not do to say—a suggestion which has heretofore been made in this case—that state laws have been found to be ineffective for the suppression of lotteries, and therefore Congress should interfere. The scope of the commerce clause of the Constitution cannot be enlarged because of present views of public interest.

Champion v. Ames

In countries whose fundamental law is flexible it may be that the homely maxim, "to ease the shoe where it pinches," may be applied, but under the Constitution of the United States it cannot be availed of to justify action by Congress or by the courts.

The Constitution gives no countenance to the theory that Congress is vested with the full powers of the British Parliament, and that, although subject to constitutional limitations, it is the sole judge of their extent and application; and the decisions of this court from the beginning have been to the contrary.

"To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" asked Marshall, in *Marbury v. Madison* [1 Cranch, 176, 2 L. Ed. 73].

"Should Congress," said the same great magistrate in *M'Culloch v. Maryland*, "under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."

And so Chief Justice Taney, referring to the extent and limits of the powers of Congress: "As the Constitution itself does not draw the line, the question is necessarily one for judicial decision, and depending altogether upon the words of the Constitution." [*License Cases*, 5 How. 574, 12 L. Ed. 288.]

It is argued that the power to regulate commerce among the several states is the same as the power to regulate commerce with foreign nations, and with the Indian tribes. But is its scope the same?

As in effect before observed, the power to regulate commerce with foreign nations and the power to regulate interstate commerce, are to be taken *diverso intuitu*, for the latter was intended to secure equality and freedom in commercial intercourse as between the states, not to permit the creation of impediments to such intercourse; while the former clothed Congress with that power over international commerce, pertaining to a sovereign nation in its intercourse with foreign nations, and subject, generally speaking, to no implied or reserved power in the states. The laws which would be necessary and proper in the one case would not be necessary or proper in the other.

Congress is forbidden to lay any tax or duty on articles exported from any state, and while that has been applied to exports to a foreign country, it seems to me that it was plainly intended to apply to interstate exportation as well; Congress is forbidden to give preference by any regulation of commerce or revenue to the ports of one state over those of an-

Champion v. Ames

other; and duties, imposts, and excises must be uniform throughout the United States.

“The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.” This clause of the 2d section of article 4 was taken from the 4th article of Confederation which provided that “the free inhabitants of each of these states . . . shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce;” while other parts of the same article were also brought forward in article 4 of the Constitution.

Mr. Justice Miller, in the *Slaughter-House Cases*, 16 Wall. 36, 75, 21 L. Ed. 394, 408, says that there can be but little question that the purpose of the 4th article of the Confederation, and of this particular clause of the Constitution, “is the same, and that the privileges and immunities intended are the same in each.”

Thus it is seen that the right of passage of persons and property from one state to another cannot be prohibited by Congress. But that does not challenge the legislative power of a sovereign nation to exclude foreign persons or commodities, or place an embargo, perhaps not permanent, upon foreign ships or manufactures.

The power to prohibit the transportation of diseased animals and infected goods over railroads or on steamboats is an entirely different thing, for they would be in themselves injurious to the transaction of interstate commerce, and, moreover, are essentially commercial in their nature. And the exclusion of diseased persons rests on different ground, for nobody would pretend that persons could be kept off the trains because they were going from one state to another to engage in the lottery business. However enticing that business may be, we do not understand these pieces of paper themselves can communicate bad principles by contact.

The same view must be taken as to commerce with Indian tribes. There is no reservation of police powers, or any other to a foreign nation or to an Indian tribe, and the scope of the power is not the same as that over interstate commerce.

In *United States v. 43 Gallons of Whiskey*, 93 U. S. 188, 194, sub nom. *United States v. Lariviere*, 23 L. Ed. 846, 847, Mr. Justice Davis said: “Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes,—a power as broad and free from restrictions as that to regulate commerce with foreign nations. The only efficient way of dealing with the Indian tribes was to place them under the protection of the general government. Their peculiar habits and character required this; and the history of the country shows the necessity of keeping them ‘separate, subordinate, and dependent.’ Accordingly, treaties have been made and

Francis v. United States

laws passed separating Indian territory from that of the states, and providing that intercourse and trade with the Indians should be carried on solely under the authority of the United States."

I regard this decision as inconsistent with the views of the framers of the Constitution, and of Marshall, its great expounder. Our form of government may remain notwithstanding legislation or decision, but, as long ago observed, it is with governments, as with religions: the form may survive the substance of the faith.

In my opinion the act in question in the particular under consideration is invalid, and the judgments below ought to be reversed, and my brothers BREWER, SHIRAS and PECKHAM concur in this dissent.

JOHN FRANCIS, Anthony Hoff, and John Edgar, alias Peter Edgar, Petitioners, *v.* UNITED STATES.

(Argued October 16, 17, 1901. Ordered for reargument before full bench November 10, 1902. Reargued December 15, 16, 1902. Decided February 23, 1903.)

[23 Sup. Ct. Rep. 334.]

Interstate Commerce—Traffic in Lottery Tickets—Policy Slips.

Policy slips written by a customer to indicate his choice of numbers, and delivered by him to an agent of the policy game, to be forwarded by him to headquarters in another state, are not within the provisions of the act of Congress of March 2, 1895, chap. 191 (28 Stat. at L. 963, U. S. Comp. Stat. 1901, p. 3178), making it an offense against the United States to cause to be carried from one state to another any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in a lottery.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment which affirmed a judgment of the District Court for the Southern District of Ohio entered upon a conviction for the offense of causing lottery tickets or papers representing an interest in a lottery to be carried from one state to another. Reversed and remanded to the District Court, with directions to set aside the verdict and grant a new trial.

See same case below, 46 C. C. A. 25, 106 Fed. 896.

The facts are stated in the opinion.

Messrs. Miller Outcalt, George F. Edmunds, and Thomas F. Shay for petitioners on original argument.

Messrs. Miller Outcalt and John G. Carlisle for petitioners on reargument.

Assistant Attorney General Beck for respondent.

MR. JUSTICE HOLMES delivered the opinion of the court:

This is an indictment under Rev. Stat. § 5440 (U. S. Comp. Stat. 1901, p. 3676), for conspiring to commit an offense against the United States. The offense which the defendants are

Francis v. United States

alleged to have conspired to commit and to have committed is that of causing to be carried from one state to another, viz., from Kentucky to Ohio, five papers, certificates, and instruments, purporting to be and to represent chances, shares, and interests in the prizes thereafter to be awarded by lot in the drawings of a lottery, commonly known as the game of policy. Act of March 2, 1895, chap. 191 (28 Stat. at L. 963, U. S. Comp. Stat. 1901, p. 3178). It appears that the lottery in question had its headquarters in Ohio and agencies in different states. A purchaser, or person wishing to take a chance, went to one of these agencies, in this case in Kentucky, selected three or more numbers, wrote them on a slip, and handed the slip to the agent, in this case to the defendant Hoff, paying the price of the chance at the same time, and keeping a duplicate, which was the purchaser's voucher for his selection. The slip in this case was taken by the defendant Edgar to be carried to the principal office, where afterwards, in the regular course, there would be a drawing by the defendant Francis. If the purchaser's number should win, the prize would be sent to the agency and paid over. The carriage from one state to another, relied upon as the object of the conspiracy, and as the overt act in pursuance of the conspiracy, was the carriage by Edgar of slips delivered to Hoff, as above described. The case was sent to the jury by the district court, the defendants were found guilty, and the judgment against them was affirmed by the circuit court of appeals. *Reilley v. United States*, 46 C. C. A. 25, 106 Fed. 896. The case then was brought here on certiorari.

An exception was taken at every step of the trial in the hope that some shot might hit the mark. We entirely agree with the circuit court of appeals in its unfavorable comments on the practice. But, little attention as most of the objections made deserve, they at least succeeded in raising the broad questions whether the act of 1895 is constitutional, and whether the offense proved is within it. The former is disposed of by the case of *Champion v. Ames*, 187 U. S. —, ante, 321, 23 Sup. Ct. Rep. 321. The latter remains, and thus far seems to us not to have received quite sufficient notice.

The game was played by mixing seventy-eight consecutive numbers and drawing out twelve after all the purchases for the game had been reported. If the three on any slip corresponded in number and order with three drawn out, the purchaser won. The purpose of bringing in the slips to headquarters was that all purchases should be known there before the drawing, and thus swindling by agents of the lottery made impossible. It is said by the circuit court of appeals that the successful slips were returned with the prizes. If this is correct we do not perceive that it materially affects the case. The arrangement, whatever it was, was for the convenience and safety of those who managed this lottery, and was in no way essential to the interests of the person making the pur-

Francis v. United States

chase or bet. The daily report of the result of the drawings to Hoff, with whom he dealt, and the forwarding of the prize, if drawn, filled all his needs. It would seem from the evidence, as the government contended,—certainly the contrary does not appear and was not argued,—that Hoff and Edgar, the carrier, were agents of the lottery company. Thus the slips were at home, as between the purchaser and the lottery, when put into Hoff's hands. They had reached their final destination in point of law, and their later movements were internal circulation within the sphere of the lottery company's possession. Therefore the question is suggested whether the carriage of a paper of any sort by its owner or the owner's servant, properly so called, with no view of a later change of possession, can be commerce, even when the carriage is in aid of some business or traffic. The case is different from one where, the carriage being done by an independent carrier, it is commerce merely by reason of the business of carriage.

The question just put need not be answered in this case. For on another ground we are of opinion that there was no evidence of an offense within the meaning of the act of 1895. The assumption has been that the slips carried from Kentucky to Ohio were papers purporting to be or represent a ticket or interest in a lottery. But in our opinion these papers did not purport to be or do either. A ticket, of course, is a thing which is the holder's means of making good his rights. The essence of it is that it is in the hands of the other party to the contract with the lottery as a document of title. It seems to us quite plain that the alternative instrument mentioned by the statute, viz., a paper representing an interest in a lottery, equally is a document of title to the purchaser and holder,—the thing by holding which he makes good his right to a chance in the game. But the slips transported, as we have pointed out, were not the purchasers' documents. It is true that they corresponded in contents, and so in one sense represented or depicted the purchasers' interests. But "represent" in the statute means, as we already have said in other words, represent to the purchaser. It means stand as the representative of title to the indicated thing, and that these slips did not do. The function of the slips might have been performed by descriptions in a book, or by memory, if the whole lottery business had been done by one man. They as little represented the purchaser's chances as the stubs in a check book represent the sums coming to the payees of the checks.

We assume, for purposes of decision, that the papers kept by the purchasers were tickets, or did represent an interest in a lottery. But those papers did not leave Kentucky. There was no conspiracy that they should. We need not consider whether, if it had been necessary to take them to Ohio in order to secure the purchaser's rights, the lottery keepers could be

Francis v. United States

said to conspire to cause them to be carried there, when the carriage would be in an interest adverse to theirs, and they would be better off and presumably glad if the papers never were presented. See *Com. v. Peaslee*, 177 Mass. 267, 271, 59 N. E. 55; *Graves v. Johnson*, 179 Mass. 53, 58, 60 N. E. 383.

The judgment of the Circuit Court of Appeals is reversed; the judgment of the District Court is also reversed, and the cause remanded to that court, with directions to set aside the verdict and grant a new trial.

MR. JUSTICE HARLAN dissenting:

This is a criminal prosecution based upon the 1st section of the act of Congress of March 2d, 1895, chap. 191, entitled "An Act for the Suppression of Lottery Traffic through National and Interstate Commerce and the Postal Service, Subject to the Jurisdiction and Laws of the United States."

That section reads: "§ 1. That any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same or deposited in or carried by the mails of the United States, or carried from one state to another in the United States, any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so-called gift concert, or similar enterprises offering prizes dependent upon lot or chance, to be brought into the United States, or deposited in or carried by the mails of the United States, or transferred from one state to another in the same, shall be punishable in the first offense by imprisonment for not more than two years or by a fine of not more than \$1,000, or both, and in the second and after offenses by such imprisonment only." 28 Stat. at L. 963, U. S. Comp. Stat. 1901, p. 3178.

The indictment charges a conspiracy to commit the offense denounced by that section.

Judge Severens, delivering the judgment of the circuit court of appeals, thus stated, and I think accurately, the result of certain evidence on the part of the government: "Upon the trial the government offered evidence tending to prove that the respondents adopted a scheme of lottery business called by them 'policy,' which they subsequently carried into operation, of the character following: The principal office for the transaction of the business was located in a building in Cincinnati, Ohio. The place where the drawings of numbers from a wheel were made was located in another building or room adjoining the principal office and connected with it by a private way. In various places in that city and elsewhere, in Ohio and other states, one, at least, being in Newport, Kentucky, they had offices or stations at which the patrons purchased tickets or chances in the drawings to be

Francis v. United States

thereafter made in Cincinnati, at the place mentioned. Successive numbers from one to seventy-eight, inclusive, were each day put into the wheel, and at each drawing twelve numbers were taken out. A list of these twelve numbers was taken into the principal office and there recorded. Several hours in the day before these drawings respectively took place the patrons purchased chances at the sub-offices or stations from an agent of the respondents, or from one of the latter, in charge at that place. In this instance the purchase was made of the respondent Hoff at the Newport office. The purchaser (Harrison, in this instance) chose three of the numbers from one to seventy-eight, inclusive, and wrote them upon a slip of paper, of which, according to the method of doing business, he kept a duplicate. He handed his list of numbers, with figures to denote the sum paid, upon a slip of paper, and the money to pay for his chance, to the person in charge, to be transmitted to the principal office in Cincinnati by the 'carrier,' who would call to take them up. When these slips and the moneys were all brought into the principal office, the drawing above mentioned took place. If the three numbers on the slip were of the twelve drawn from the wheel, the purchaser would win the prize, \$200, when the game (of which there were several forms) was played on the basis above stated. If not, he lost. A report of the drawings was sent back to the station from which the slip came, and if any purchaser had made a 'hit' his slip would be returned with the prize, to be there delivered to him. Of the respondents, Reilley was in charge of the principal office, Francis of the drawings, Hoff of the station in Newport, as already stated, and Edgar was the carrier. The slip of paper taken by the carrier represented the interest of the purchaser of the chance, and, although containing figures only, it had a definite meaning and was understood by all the parties concerned. It was the transportation of some of such lists, one being that of Harrison, from Newport, Kentucky, to Cincinnati, Ohio, with knowledge of their character that constituted the overt act done in pursuance of the conspiracy." That the counsel for the accused held the same view of the evidence is shown in an extract from their brief printed in the margin.*

I. The act of March 2d, 1895, chap. 191, was under examina-

*"In the Francis Case, now before the court, it was shown that the principal office of the 'policy' concern was located in Cincinnati, Ohio, that the drawings took place in an adjoining building or room, and that sub-offices or agencies were maintained in various places in that city and in other cities in Ohio and other states, at which patrons or players would select numbers in the drawings to be made in Cincinnati. One desiring to play such a game would choose three of the numbers from 1 to 78 inclusive, and write them upon a slip of paper, of which he kept a duplicate. He would hand his list of numbers, with figures to denote the sum paid, together with the money to pay for his chance, to the person in charge of the sub-office or agency, to be transmitted to the principal office in Cincinnati. When these slips and the moneys were brought to the principal office, the drawing took

Francis v. United States

tion by this court in *France v. United States*, 164 U. S. 676, 41 L. Ed. 595, 17 Sup. Ct. Rep. 219. That was an indictment for a conspiracy to violate its 1st section. The judgment of conviction in that case was reversed upon the ground that the evidence showed that the papers and instruments which the defendants caused to be carried from Kentucky to Ohio did not relate to a lottery to be thereafter drawn, but to one that had previously been drawn. The court said: "There is no contradiction in the testimony, and the government admits and assumes that the drawing in regard to which these papers contained any information had already taken place in Kentucky, and it was the result of that drawing only that was on its way in the hands of messengers to the agents of the lottery in Cincinnati. The statute does not cover the transaction, and, however reprehensible the acts of the plaintiffs in error may be thought to be, we cannot sustain a conviction on that ground. Although the objection is a narrow one, yet the statute being highly penal, rendering its violator liable to fine and imprisonment, we are compelled to construe it strictly. Full effect is given to the statute by holding that the language applies only to that kind of a paper which depends upon a lottery the drawing of which has not yet taken place, and which paper purports to be a certificate, etc., as described in the act. If it be urged that the act of these plaintiffs in error is within the reason of the statute, the answer must be that it is so far outside of its language that to include it within the statute would be to legislate, and not to construe legislation."

No such point can be made in this case, because the indictment presents a case within the provisions of the statute as interpreted in *France v. United States*; for it refers to papers and instruments relating to a lottery thereafter to be drawn. Besides, there was evidence tending to show that the papers and instruments which the defendants were charged to have caused to be carried from Kentucky to Ohio had reference to a future drawing, and not to one that had already occurred. And the trial judge, after stating the facts, said to the jury: "Did these papers, or so-called lottery tickets, which it is alleged defendants conspired to carry from Kentucky to Ohio, purport to represent interests of players in a

place. Successive numbers, from 1 to 78 inclusive, were put into a wheel and at each drawing twelve numbers were taken out. If the three numbers on the slip were of the twelve drawn from the wheel, the purchaser would win a prize. If not, he lost. A report of the drawings was sent back to the agency from which the slip came, and, if any purchaser had won a prize, or, as it is termed, made a 'hit,' his slip was returned with the prize, to be there delivered to him. In the instance shown by the testimony, the selection was made by the witness Harrison at the Newport office. The defendant Reilley was claimed to be in charge of the principal office in Cincinnati, Francis in charge of the drawings, and Hoff in charge of the station in Newport. Edgar carried the slips from Newport to Cincinnati, and this carriage of the slips constituted the alleged overt act done in pursuance of a conspiracy in violation of the act of Congress."

Francis v. United States

drawing afterwards to take place? It is not necessary, gentlemen, that they should purport or show upon their face that they were tickets in a lottery giving an interest to the holder in a drawing afterwards to take place, but their purport may be shown outside of the papers. Now, as to the evidence offered by the government upon that point, you will recall the evidence of France, who was introduced as an expert, to tell what they were, and the evidence of Harrison, that he wrote out his ticket and delivered one half of it to the agent, paid his money and held the duplicate,—one of the duplicates, his evidence of the interest he had in the drawing that was to come off that day,—and the evidence to which I have before referred as to the fact that the duplicate left with Hoff was afterwards found in possession of Edgar at the end of the bridge, shortly after the play was made. If, from these facts, you are satisfied that it represented an interest in the drawings afterwards to take place, then, within the meaning of the law, it purported to represent the interest of the player in the drawing, although it did not so state upon its face."

II. In *Champion v. Ames*, 187 U. S. —, ante, 321, 23 Sup. Ct. Rep. 321, it has been held that lottery tickets were subjects of traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one state to another was therefore interstate commerce; that under its power to regulate commerce among the several states, Congress—subject to the limitations imposed by the Constitution upon the powers granted by it—has plenary authority over such commerce, and may prohibit the carriage of such tickets from state to state; and that legislation to that end and of that character is not inconsistent with any limitation or restriction imposed by the Constitution upon the exercise of the powers granted to Congress.

Here, there was no carrying of lottery tickets from Kentucky to Ohio by an independent carrier engaged in the transportation, for hire, of freight and packages from one state to another. But the carrying was by an individual acting in pursuance of a conspiracy between himself and others that had for its object the carrying from Kentucky to Ohio of certain papers or instruments representing a chance, share, or interest in or dependent upon the event of a lottery, thereafter to be drawn, which offered prizes dependent upon lot or chance. Those who were parties to the conspiracy were, in effect, partners in committing the crime denounced by the above act of Congress; and the act of one of the parties in execution of the objects of such conspiracy was the act of all the conspirators.

The judgment therefore should be affirmed, unless it be that the carrying of lottery tickets from one state to another by an individual, acting in co-operation with his co-conspirators, is not interstate "commerce." But is it true that the "commerce among the several states," which Congress has the

Francia v. United States

power to regulate, cannot be carried on by an individual, or by a combination of individuals? We think not. In *Paul v. Virginia*, 8 Wall. 168, 183, 19 L. Ed. 357, 361, the court, referring to the grant to Congress of power to regulate commerce among the several states, said: "The language of the grant makes no reference to the instrumentalities by which commerce may be carried on; it is general and includes alike commerce by individuals, partnerships, associations, and corporations." In *Welton v. Missouri*, 91 U. S. 275, 280, 23 L. Ed. 347, 349, it was said that the power to regulate commerce embraces "all the instruments by which such commerce may be conducted." That the commerce clause of the Constitution embraces alike commerce by individuals, partnerships, associations, and corporations was recognized in *Pensacola Teleg. Co. v. Western U. Teleg. Co.*, 96 U. S. 1, 21, 24 L. Ed. 708, 715. And in *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 205, 29 L. Ed. 158, 162, 1 Inters. Com. Rep. 382, 386, 5 Sup. Ct. Rep. 826, 828, the court said that commerce among the states "includes commerce by whomsoever conducted, whether by individuals or by corporations."

In *Champion v. Ames* the carrying of lottery tickets happened to be by an incorporated express company. But if it had been by an express company organized as a partnership or joint-stock company the result of the decision could not have been different. In this case, if the carrying had been by an ordinary express wagon, owned by a private person, but employed by the accused and other conspirators to carry the lottery papers in question from Kentucky to Ohio, surely the carrying in that mode would be commerce within the meaning of the Constitution. It cannot be any less commerce because the carrying was by an individual who, in conspiracy or co-operation with others, caused the carrying to be done in violation of the act of Congress. The learned counsel for the accused, referring to the legislation enacted prior to 1895, which had for its object to exclude lottery matter from the mails, and to prohibit the importation of lottery matter from abroad, says: "In 1895 the act now in question was passed, supplementing the provisions of the prior acts so as to prohibit the act of causing lottery tickets to be carried and lottery advertisements to be transferred from one state to another by any means or methods."

It seems to me that the evidence made a case within the act of Congress, and that no error of law was committed by the trial court. The papers carried from Kentucky to Ohio were of the class described in the act, "any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance." The paper or instrument carried from Kentucky to Ohio, of which the purchaser had

Savannah, F. & W. Ry. Co. v. Elder

a duplicate, certainly represented to all the parties concerned, a chance, or interest dependent upon an event of a lottery or "similar enterprise," offering prizes dependent upon a lot or chance. To hold otherwise is to stick in the bark. It informed the policy gambler, if a prize was drawn, that the person who held the duplicate was entitled to the prize, and it was therefore a paper the carrying of which from one state to another made the conspirators causing it to be so carried guilty of an offense under the act of Congress. The reasoning by which the case is held not to be embraced by the act of Congress is too astute and technical to commend itself to my judgment. It excludes from the operation of the act a case which, as I think, is clearly within its provisions.

SAVANNAH, F. & W. RY. CO. v. ELDER.

(*Supreme Court of Georgia, Jan. 10, 1903.*)

[43 S. E. Rep. 379.]

Connecting Carriers—Duty to Trace Freight—Statute.*

Upon the trial of an action against a common carrier for failure to comply with an application to trace freight and give the information as provided, under the "tracing act" (Civ. Code, §§ 2317, 2318), evidence that the defendant delivered the freight in question to the next connecting line in good order is not admissible, because the act expressly applies "where, under the contract of shipment or by law, the responsibility of each or either [common carrier] shall cease upon delivery to the next 'in good order.' "

Motion for Nonsuit.

The only office of a motion for nonsuit is to test the sufficiency of the plaintiff's evidence to support his petition. *Kelly v. Strouse*, 43 S. E. 280, 116 Ga.—It follows that neither the legal sufficiency of the application given under the "tracing act," nor the validity of the act itself, can properly be tested by a motion to nonsuit. See *Flewellen v. Flewellen*, 40 S. E. 301, 114 Ga. 403; *Barge v. Robinson*, 41 S. E. 258, 115 Ga. 41; *McCandless v. Conley*, 41 S. E. 256, 115 Ga. 48.

Same.

The grounds of the motion for nonsuit, that the evidence failed to show that defendant had not complied with plaintiff's application, and that it did show that whatever damage was done to the freight was the result of the plaintiff's negligence, were not meritorious.

Constitutional Law.

The provisions of Civ. Code, §§ 2317, 2318, are not unconstitutional for any of the reasons set forth in the motion for a new trial, which are substantially the same as those ruled on in *Railway Co. v. Murphey* (decided by this court on yesterday) 43 S. E. 265.

(Syllabus by the Court.)

Error from superior court, Thomas County; J. S. Candler, Judge.

Action by M. R. Elder, for use, against the Savannah,

*As to the liability for the negligence of a connecting carrier under this act, see *Central of Georgia Ry. Co. v. Murphey* (Ga.), 21 Am. & Eng. R. Cas., N. S., 555.

City of Pittsburg v. Pittsburg, etc., R. Co

Florida & Western Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. C. Snodgrass and D. H. Pope, for plaintiff in error.

W. M. Hammond, for defendant in error.

FISH, J. Judgment affirmed. All the justices concurred, except LUMPKIN, P. J., absent, and CANDLER, J., disqualified.

CITY OF PITTSBURG v. PITTSBURG, C. & W. R. Co. *et al.*

(*Supreme Court of Pennsylvania, Jan. 5, 1903.*)

[54 Atl. Rep. 464.]

Railroads—Occupation of Streets.

Act April 4, 1868, § 12 (P. L. 62), preventing the occupation of a street by a railway without municipal consent, is not repealed by Const. 1874, art. 17, § 1, providing that any association organized for that purpose shall have the right to construct a railroad between any points within the state, and connect at the state line with railroads of other states.

Appeal from Court of Common Pleas, Allegheny County.

Bill by the city of Pittsburg against the Pittsburg, Carnegie & Western Railroad Company and Arthur McMullen. From the decree, plaintiff appeals. Reversed.

The following is the agreed statement of facts: "The plaintiff in this case is the city of Pittsburg, and the defendants are the Pittsburg, Carnegie & Western Railroad Company and Arthur McMullen. McMullen is simply a contractor whom the railroad company defendant has employed to do the work which the plaintiff seeks to enjoin. His rights, then, are simply those of the other defendant, and therefore the case may be discussed as if the railroad company were the only defendant. The defendant railroad company was formed by consolidation of the Washington County Railroad Company and the Pittsburg & Mansfield Railroad Company July 17, 1901. The Pittsburg & Mansfield Railroad Company was originally incorporated in 1894, and reorganized, after judicial sale, August 24, 1898. The defendant railroad company is incorporated under the general railroad act of 1868 (P. L. 62), as were its constituent companies, the charters of which were all obtained in or since 1894. Said charters together authorized the defendant railroad company to construct a railroad from Pittsburg to the state line, where it is intersected by Cross creek. The defendant is authorized by the act of Congress to bridge the Monongahela river at a point where the pier whose construction is sought to be enjoined by the bill is located, provided it completes said bridge by March 2, 1904; and the location of the pier, etc., has been approved by the Secretary of War. The defendant's contractor proposed to remove a pier that had been erected upon a wharf. This pier had been erected by the Pittsburg & Mans-

City of Pittsburg v. Pittsburg, etc., R. Co

field Railroad Company prior to the filing of the bill in this case, with the assent of the city of Pittsburg, by its ordinance, duly passed, which limited the time for the construction of the bridge, which time limit has expired long before the time of filing the bill in this case. The defendant railroad company proposes to construct from the pier located upon the wharf a span of its bridge or approach, to an abutment or anchor pier situate about 120 feet north of the north line of Water street, in the city of Pittsburg; and the span, when constructed, will be at least 346 feet in length, being at least twenty-five feet for the full width of the street. The defendant railroad company proposes to construct and operate its railroad on a viaduct reaching from the anchor pier on private property 120 feet north of the north line of Water street to its terminus at or near Ferry street and Liberty avenue, in the city of Pittsburg. Said viaduct will have a clearance of not less than twenty-five feet over First, Second, Third, and Fourth avenues, and all the pedestals and supports necessary to support said viaduct will be located upon real estate owned by the defendant railroad company. The defendant railroad company intends to connect its bridge across the Monongahela river, on the south side of the river, with an iron and steel trestle or viaduct, extending from said bridge across Carson street to the bluff of Mt. Washington, and thence proceed to a tunnel through Mt. Washington to the city line, crossing several streets and highways, but never at grade, either crossing them overhead or on undergrade crossings, leaving the roadway between building lines unimpaired, and where the crossing is overhead, in all cases, provided at least twenty-five feet headway or clearance. The railroad being constructed by the defendant company is an original construction, and not an elevation or reconstruction of a railroad heretofore constructed and in operation. The defendant company has expended in the counties of Allegheny and Washington, in the state of Pennsylvania, the sum of \$3,036,298.75 for actual construction in its railroad, and the acquisition of property necessary thereto. The defendant railroad company, together with Cross Creek Railroad Company, a corporation incorporated under the laws of the state of West Virginia, the Pittsburg, Toledo & Western Railroad Company, a corporation incorporated under the laws of the state of Ohio, will form, when the railroad of the defendant company is completed, a system of transportation between the city of Pittsburg and the town of Jewett, in Ohio; and the defendant railroad company and the Wheeling & Lake Erie Railroad Company, a corporation of the state of Ohio, affording the defendant company trackage rights which will enable it to transport freight and passengers from Pittsburg to Toledo, Chicago, and points west. The defendant company has contracted for and is now actually engaged in completing the construction of its road

City of Pittsburg v. Pittsburg, etc., R. Co

as authorized by its charter, and is actually crossing with said construction the streets and highways of the city of Pittsburg alleged in the bill of complaint filed in this case."

The court found: "Our conclusion is that a railroad company incorporated under the act of 1868, since the constitution of 1874 went into effect, where one of its termini is a city, whilst it is liable for all injury to property, cannot be prevented by the city from crossing a street, where such crossing is necessary in order that it may reach that part of the city to which it must go to do its work effectively."

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

W. A. Blakeley, Thomas D. Carnahan, and A. M. Thompson, for appellant.

A. M. Neeper and W. M. Lindsay, for appellees.

DEAN, J. There is compressed in the question involved, as stated by appellant's counsel, the entire history of this case: "Has a railroad company, incorporated under the general railroad laws of 1868 and its supplements, the power to enter upon, occupy, and cross the streets of a municipality without the consent of the municipality?" The company is organized under, and derives its being from, the general railroad act. Section 12 of the act of April 4, 1868 (P. L. 62) reads: "This act shall not be so construed as to authorize the formation of street passenger railway companies, to construct passenger railways under or by virtue of its provisions in any city, or borough of this commonwealth, nor to authorize any corporations, formed under this act, to enter upon and occupy any street, lane or alley, in any incorporated city in this commonwealth, without the consent of such city having been first obtained."

The defendant desires to cross the city without its consent. Just what street it will occupy, or to what extent, it is not material to inquire. If the answer to the question involved be determined solely by the powers of defendant under the statute authorizing its corporation, we would not attempt to answer it by trying to prove that two and two make four, not five, but would at once say, clearly, it has no such power; but the court below and appellee's counsel say we must write into the act of 1868 this much of section 1, art. 17, of the constitution of 1784: "Any association or corporation organized for the purpose shall have the right to construct and operate a railroad between any points within the state, and to connect at the state line with railroads of other states."

The court was of opinion that, if the act of 1868 forbids mere crossing of the city without its consent, then, to that extent, it is in conflict with the constitution, and the statute must give way. It will be noticed the language is general. At the adoption of the constitution, no legislation conferred such powers on railroads as claimed here. The act of 1849

City of Pittsburg v. Pittsburg, etc., R. Co

(P. L. 79) and its supplements and the act of 1868 express the scope and limits of their powers at the time of the adoption of the constitution. That instrument would not enlarge these limits unless the intention to do so was clearly expressed or plainly to be implied. In *Cronise v. Cronise*, 54 Pa. 255, we said: "The Constitution is to be interpreted with reference to previous legislation of the state, and powers always previously exercised by the Legislature remain to them, unless expressly or impliedly prohibited." And this is the doctrine of the text-writers. See *Cooley on Const. Limitations*, 57, and *Story on the Constitution*, c. 5. Where a power, theretofore, has always been exercised by the Legislature, a constitutional withdrawal of it by the people must be plain. If doubtful, it will not be made clear by construction. The people, through the Legislature, have unlimited power, except where they impose upon themselves constitutional restraints. If the words of the instrument convey a definite meaning, involving no contradiction of other parts of it, they are to receive their obvious meaning. The learned judge of the court below is of opinion that the general purpose of this clause was to encourage competition between railroad companies, and the particular intent was to take away the power of the Legislature to smother it by discriminating between different companies. We are not inclined to question the general correctness of these observations, but we think his conclusion that this general purpose gives a specific meaning, such as he gives here to the words "between any points within the state," is not warranted by any authoritative rule of interpretation.

The cases cited do not meet the point raised here. The subject-matter in those cases was different, and the decisions must be understood with reference thereto. For example, *Commonwealth v. Erie, etc., Railroad Company*, 27 Pa. 339, 67 Am. Dec. 471. The railroad company was authorized by its charter to build a road from the borough line as fixed at the date of the charter. Afterwards the borough was enlarged. The company asserted a right to build the road from a point 60 rods south of the old borough line. It was held that the change in the limits did not authorize the company to change the terminal. In *Western Pa. Railroad Co.'s Appeal*, 99 Pa. 155, the question was, what were the rights of the railroad company to change its terminal after it had entered into the city by the latter's express authority? *Pa. Railroad Co. v. Marchant*, 119 Pa. 541, 13 Atl. 690, 4 Am. St. Rep. 659, was a construction of section 8, art. 16, of the Constitution, on an entirely different subject from that in section 1, art. 17—the one under consideration. The question here is not what construction is to be placed upon the words of a statute or a charter passed after the adoption of the Constitution, but what construction is to be placed upon the Constitution in view of the legislation existing at the adoption of that instrument? The answer is that given in *Cronise v. Cronise*,

City of Pittsburg v. Pittsburg, etc., R. Co

supra: "The Constitution is to be interpreted with reference to previous legislation of the state and powers always previously exercised by the Legislature." The Constitution, we may assume, with the court below, sought to encourage railroad competition. The act of 1868 promoting that object was fully before the convention. It gave the absolute right to any railroad company to construct a railroad between any two points within the state—just what the Constitution aimed to accomplish. Under this act, all the large cities with traffic demands, the sea, and state boundaries of other states, could be reached without discrimination by the act of the Legislature. But this act could be amended, modified, or repealed by the same power which passed it. Therefore any change must be placed beyond the reach of the Legislature. This was plainly the object of section 1, art. 17, and the only object. The court below carries it further, and holds that "between any points within the state" means through, under, or over any city within the state, without its consent, notwithstanding the plain inhibition of the act of 1868. Whether the Legislature, in the exercise of its sovereignty, could, by express language, grant to railroad corporations the right to occupy the street, lanes and alleys of a municipal corporation without the consent of the latter, is not involved in the issue before us, and we intimate no opinion thereon. What we do decide is that the implication from the constitutional provision is too farfetched. It is more than doubtful. It reaches into the conjectural—goes entirely too far. If carried to its legitimate conclusion, then a railroad can be run through any burial ground, place of public worship, or dwelling house, from which they were excluded by the general railroad act of 1849. The learned counsel for appellee does not shrink from the conclusion the reasoning of the court below fairly leads to, for he says in his printed argument, after giving the same constitutional interpretation: "We must conclude, therefore, that the defendant railroad company has the right to build its line between any two points in the state, without limitation by the courts or individuals, or restrictions in any degree whatever, except that residing in the discretion of its board of directors."

While one object of the Constitution, probably, was to encourage competition between carrying corporations, it just as plainly sought to promote another object; that is, by the prohibition of all local legislation, to encourage self-government by the people under general laws providing for local control of their local affairs. It would require a very plain mandate of the Constitution to move us to interpret the section in question as one practically handing over to railroad corporations the authority to control, occupy, and obstruct the streets and highways of a great city, in disregard of the convenience of citizens. While the interest of the carrying corporation and the municipal one are not in themselves an-

Donovan v. Pennsylvania Co

tagonistic, they may easily become so by selfishness and indifference to each other's rights. It is to the interest of the citizen that his city should grow and expand. With its growth commercially and industrially the railroad thrives. This, however, is only sound theory. In practice, the railroad, without regard to the city, very often assumes that its only interest is to make money for its stockholders. It is therefore of the utmost importance to the well being of the city that it should control its means of local business and social communication. In no reasonable interpretation of section 1, art. 17 of the constitution, having regard to the legislation then existing and other parts of the same instrument, can we see that it intended, with the act of 1868 plainly before the convention, to take away from the municipal government the control of its streets and highways, as argued by appellee and decided by the court below.

The decree is therefore reversed, the bill reinstated, and injunction directed to issue as prayed for.

DONOVAN *et al.* v. PENNSYLVANIA CO.

(Circuit Court of Appeals, Seventh Circuit, January 6, 1903.)

[120 Fed. Rep. 215.]

Railroad Stations—Use by Hackmen—Right of Company to Exclude.*

A railroad company is under no duty, as a common carrier, to permit hackmen to enter its stations for the purpose of soliciting business from its passengers, and therefore its granting of such right to one person or concern does not entitle others to equal privileges on the same terms.

Same—Obstruction of Entrance—Injunction.

A railroad company has a property right to a free and unobstructed entrance to its stations for its passengers and employees, and is entitled to protection in such right by injunction to restrain hackmen from continuously congregating upon the sidewalk around the doors of a station, for the purpose of soliciting business, in such numbers as to interfere with ingress and egress; but such an injunction should go no further than is necessary to protect complainant's private right of property, leaving any obstruction to the use of the street or walk by the public generally to be dealt with by the municipality.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

For opinion below, see 116 Fed. 907.

Richard J. Coney and Wm. Thompson, for appellants.

E. A. Bancroft and Frank J. Loesch, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

BAKER, Circuit Judge. The temporary injunction appealed from, entered at the suit of appellee, a railroad corpo-

*As to the rights of hackmen and other local carriers at stations, see note appended to *New York, etc., R. Co. v. Bork* (R. I.), 22 Am. & Eng. R. Cas., N. S., 511.

Donovan v. Pennsylvania Co

ration organized and existing under the laws of Pennsylvania, commands appellants, citizens of Illinois, to desist (1) from soliciting the custom of incoming passengers for cabs, carriages, express wagons, and hotels within appellee's passenger station at Chicago; and (2) from congregating upon the sidewalk in front of, adjacent to, or about the entrances, and there soliciting the custom of passengers.

1. Appellee has a contract with the Parmelee Transfer Company under which two agents of the transfer company are stationed within the depot building to solicit the custom of passengers. Those appellants who are hackmen have continuously asserted the right, over appellee's repeated objections, to have two of their number enter the building to solicit custom, and have acted accordingly, and threaten to continue. Those appellants who are not hackmen claim no right to enter appellee's building for the purpose of applying their trades. The question on this branch of the case is the right of the hackmen to solicit business within the station, over appellee's protest. That appellee may exclude all hackmen is not denied. But it is insisted that appellee may not lawfully give an exclusive privilege to one hackman; that, by granting the privilege to one, it has waived its right of exclusion; and that its only remaining right is to promulgate and enforce reasonable rules and regulations under which all hackmen, without discrimination, shall be afforded equal facilities in soliciting patronage within the station. In support of this view (*Montana Ry. Co. v. Langlois*, 9 Mont. 419, 24 Pac. 209, 8 L. R. A. 753, 18 Am. St. Rep. 745; *Cravens v. Rodgers*, 101 Mo. 247, 14 S. W. 106; *Kalamazoo Hack. Co. v. Sootsma*, 84 Mich. 194, 47 N. W. 667, 10 L. R. A. 819, 22 Am. St. Rep. 693; *McConnell v. Pedigo*, 92 Ky. 465, 18 S. W. 15; *Lindsay v. Anniston*, 104 Ala. 257, 16 South. 545, 27 L. R. A. 436, 53 Am. St. Rep. 44; *Mississippi v. Reed*, 76 Miss. 211, 24 South. 308, 43 L. R. A. 134, 71 Am. St. Rep. 528; *Indianapolis Union Ry. Co. v. Dohn*, 153 Ind. 10, 53 N. E. 937, 45 L. R. A. 427, 74 Am. St. Rep. 274; *Pennsylvania Co. v. Chicago*, 181 Ill. 289, 54 N. E. 825, 53 L. R. A. 223), as well as against it (*Jencks v. Coleman*, 2 Sumn. 221, 13 Fed. Cas. 442 [No. 7,258]; *Barker v. Midland Ry. Co.*, 18 C. B. 46, 86 E. C. L. 45; *Marriott v. London & S. W. Ry. Co.*, 1 C. B. [N. S.] 499, 87 E. C. L. 498; *Beadell v. Eastern Counties Ry. Co.*, 2 C. B. [N. S.] 509, 89 E. C. L. 509; *Painter v. London, B. & S. C. Ry. Co.*, 2 C. B. [N. S.] 702, 89 E. C. L. 701; *Barney v. Oyster Bay Steamboat Co.*, 67 N. Y. 301, 23 Am. Rep. 115; *Barney v. The D. R. Martin*, 11 Blatchf. 233, 2 Fed. Cas. 892 [No. 1,030]; *Old Colony R. Co. v. Tripp*, 147 Mass. 35, 17 N. E. 89, 9 Am. St. Rep. 661; *Commonwealth v. Carey*, 147 Mass. 40, 17 N. E. 97; *Fluker v. Georgia Ry. Co.*, 81 Ga. 461, 8 S. E. 529, 2 L. R. A. 843, 12 Am. St. Rep. 328; *Griswold v. Webb*, 16 R. I. 649, 19 Atl. 143, 7 L. R. A. 302; *Smith v. N. Y. L. F. & W. R. Co.*, 149 Pa. 249, 24

Donovan v. Pennsylvania Co

Atl. 304; N. Y. Cent. R. Co. v. Flynn, 74 Hun, 124, 26 N. Y. Supp. 859; N. Y. Cent. Ry. Co. v. Sheeley [Sup.] 27 N. Y. Supp. 185; Brown v. N. Y. Cent. & H. R. R. Co., 75 Hun, 355, 27 N. Y. Supp. 69; Id., 46 N. E. 1145; Summitt v. State, 76 Tenn. 413, 41 Am. Rep. 637; Lucas v. Herbert, 148 Ind. 64, 47 N. E. 146, 37 L. R. A. 376; N. Y. R. R. Co. v. Scovill, 71 Conn. 136, 41 Atl. 246, 42 L. R. A. 157, 71 Am. St. Rep. 159; Snyder v. Union Depot Co., 19 Ohio Cir. Ct. R. 368; Kates v. Cab Co., 107 Ga. 636, 34 S. E. 372, 46 L. R. A. 431; Godbout v. St. Paul Union Depot, 79 Minn. 188, 81 N. W. 835, 47 L. R. A. 532; N. Y. Cent. & H. R. R. Co. v. Warren [Sup.] 64 N. Y. Supp. 781; Boston & Albany R. Co. v. Brow, 177 Mass. 65, 58 N. E. 189, 52 L. R. A. 418; Boston & Maine R. Co. v. Sullivan, 177 Mass. 230, 58 N. E. 689, 83 Am. St. Rep. 275; N. Y., etc., R. Co. v. Bork, 23 R. I. —, 49 Atl. 965; Express Cases, 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791; St. Louis Drayage Co. v. Louisville & Nashville R. Co. [C. C.] 65 Fed. 39), our attention is directed to a large number of cases.

The asserted right of the hackmen necessarily postulates a correlative duty on the part of the railroad company. The company owes the duty to all persons, without discrimination, to carry them on equal terms of service and compensation. As a common carrier of passengers, the company must provide facilities for the reception, carriage, and discharge of its passengers, and must establish rates which are available equally to all who desire to become passengers. But the company does not owe to its passengers the duty to provide on its trains the opportunities for them to purchase newspapers, books, fruit, and the like, or to employ the services of a stenographer or of a barber, or to buy cab or express tickets. Much less does it owe the duty to any one to permit him to pursue his vocation on the trains. And if not on the trains, then not in the station buildings. The relation of carrier and passenger continues not merely on the train, but within the station at the end of the journey. The right of way on which the trains run, and the lands on which the depots are built, were obtained and are held for purposes of the same general character.

The fact that the person who asserts the right to carry on his business for his own profit upon the trains or within the station buildings is himself a common carrier does not affect the question. The railroad company is a common carrier of merchandise, but is not a common carrier of common carriers of merchandise. It owes no duty to express companies to haul their cars and safes and messengers. Express Cases, 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791. If it owed the duty it would have to treat all alike. Owing no duty, it may engage, or not, as it pleases, in the business of serving express companies, and may choose the company, and name the terms that are acceptable to it. It may therefore contract

Donovan v. Pennsylvania Co

against its own negligence in injuring express messengers (Baltimore, etc., Railroad Co. v. Voight, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560; Louisville, etc., Railroad Co. v. Keefer, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 93, 58 Am. St. Rep. 348; Pittsburgh, etc., Railroad Co. v. Mahoney, 148 Ind. 196, 46 N. E. 917, 47 N. E. 464, 40 L. R. A. 101, 62 Am. St. Rep. 503), though public policy forbids such exemption in the case of passengers (Railroad Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627). Similarly, a railroad company is not a common carrier of common carriers of passengers. It owes no duty to sleeping car companies to haul their cars and clerks and porters, and may therefore exempt itself from liability for negligence. Russell v. Pittsburgh, etc., Railroad Co., 157 Ind. 305, 61 N. E. 678, 55 L. R. A. 253, 87 Am. St. Rep. 214. So, also, a railroad company is under no obligation to issue passes, and may therefore exempt itself from liability for negligence. Payne v. Terre Haute, etc., Railroad Co., 157 Ind. 616, 62 N. E. 472, 56 L. R. A. 472. Through all of these particulars, namely, the relations between railroad companies and news dealers, fruit venders, restaurateurs, hotel runners, hackmen, baggage agents, transfer companies, express companies, sleeping car companies, and pass holders, there runs one common principle: Whatever a railroad company does as a common carrier, it is compelled to do for all without discrimination. Whatever it may lawfully do outside of its obligations as a common carrier is a matter of favor. And by the term, favor goes not by right.

The true relations of the parties are the same, whether the suit be instituted by the one who seeks to participate in the favor, or by the railroad company that withholds it. No taint of uncleanness can justly attach to the complainant who asks protection in the possession of his own, on the ground that he declines to license the defendant to enter, though he licenses others. And if it were to be held that the granting of such favors was beyond the charter powers of a railroad company, appellants would not be helped. It is the part of the public authorities to restrain and punish ultra vires acts. No one can maintain that the law shall be violated with him as a particeps criminis because it is broken with another.

Appellee, a Pennsylvania corporation, comes into the federal courts, not on account of its citizenship, for it has none, but by virtue of the irrebuttable presumption that all of its stockholders are citizens of states other than Illinois. If it were to be conceded that the question now under consideration is one of local law, we would nevertheless feel free to act as we see the right, because we do not find that the Supreme Court of Illinois has decided the question. No statute is referred to that touches the question. No case is cited in which the Supreme Court of Illinois has decided that hackmen have the right, over the objection of a railroad company, to ply

Donovan v. Pennsylvania Co

their trade on trains and within stations unless all are excluded. In *Pennsylvania Company v. Chicago*, 181 Ill. 289, 54 N. E. 825, 53 L. R. A. 223, the company unsuccessfully prosecuted a suit and an appeal against the city to avoid an ordinance which established a hack stand in the street in front of a portion of the station. Certain hackmen were permitted to intervene and file an answer. They denied the invalidity of the ordinance, and asserted, in effect, that, since the company had leased ground owned by it, and situated near its passenger depot, to an owner of hacks for use in his business, it could not contest the right of the city to establish a hack stand in the street adjoining its property. But no claim was set up in the hackmen's answer, or adjudicated in the decree appealed from, that hackmen, under any circumstances, could compel a railroad company to permit them to carry on their business by soliciting patronage on the company's premises.

2. The main entrance to the station comprises three doorways, each five feet wide. Most of the thirty-odd thousand passengers a day go through this entrance. The building abuts upon the street. In the street, in front of the building, some distance from the entrance, is the hack stand established by the city ordinance. From 10 to 20 hackmen throughout each day have persisted in congregating about the entrance, to the material interference with the ingress and egress of passengers and railroad employees. The number has been swelled by the presence of baggagemen, hotel runners, and Parmelee agents. The Parmelee Company has no greater rights in the street and on the sidewalk than the others, and appellee has not undertaken to give it any. Every one who has an existing contract to deliver or receive a passenger has, through the passenger, the right of access and entry to serve the passenger. This the appellee concedes.

The title and the right of control of the streets for street purposes are in the city. If the streets are obstructed, the city should clear them. Appellee may not take upon itself the vindication of the city's or the public's rights. But to have a free and unobstructed entrance is a property right—an easement appurtenant to the abutting realty. From continuous infractions of that right, appellee is entitled to relief. *Benjamin v. Storr*, L. R. 9 C. P. 400; *Lyon v. Fishmongers' Co.*, 1 App. Cas. 662; *Fritz v. Hobson*, 14 Ch. Div. 542; *Jacques v. Natl. Exhibit Co.*, 15 Abb. N. C. 250; *Hallock v. Scheyer*, 33 Hun, 111; *Flynn v. Taylor*, 53 Hun, 167, 6 N. Y. Supp. 96; *Callanan v. Gilman*, 10 N. Y. 360, 14 N. E. 264, 1 Am. St. Rep. 831; *Shook v. Cohoes*, 108 N. Y. 649, 15 N. E. 531; *Cohen v. Mayor*, 113 N. Y. 535, 21 N. E. 700, 4 L. R. A. 406, 10 Am. St. Rep. 506; *Flynn v. Taylor*, 127 N. Y. 596, 28 N. E. 418, 14 L. R. A. 556; *Porth v. Manhattan Ry. Co.*, 134 N. Y. 615, 32 N. E. 649; *Carter v. Chicago*, 57 Ill. 283; *Field v. Barling*, 149 Ill. 557, 37 N. E. 850, 24 L. R. A. 406, 41 Am. St. Rep. 311; *Newell v. Sass*, 142 Ill. 104, 31 N. E.

Buston v. Pennsylvania R. Co

176; Hart v. Buckner, 5 C. C. A. 1, 54 Fed. 925; McDonald v. Newark, 42 N. J. Eq. 136-138, 7 Atl. 855; 2 Dillon on Munic. Corp. (4th Ed.) sec. 587b, 656a; 1 Lewis on Eminent Domain (2d Ed.) pp. 170 to 196; 1 Am. & Eng. Corp. Rep. 47, 1 Am. & Eng. Ency. of Law (2nd Ed.) 225, 238; Elliott on Roads (2nd Ed.) 761; Branahan v. Hotel Co., 39 Ohio St. 333, 48 Am. Rep. 457; Lahr v. Metropolitan El. R. Co., 104 N. Y. 268, 10 N. E. 528.

But a decree that enjoins appellants "from congregating on the sidewalk in front of, adjacent to or about the entrances, and there soliciting the custom of passengers," appears to us to be too broad. If the congregating created only a public nuisance, that would be the public's concern. The congregating that may be restrained in this suit of appellee is only such as interferes with the ingress and egress of passengers and employees.

Inasmuch as the decree, by its terms, is not limited to protecting appellee's private right of property, as above indicated, the second part thereof should be modified to restrain appellants "from congregating upon the sidewalk in front of, adjacent to, or about the entrances of appellee's passenger station in Chicago, and from there soliciting the custom of passengers, so as to interfere with the ingress and egress of passengers and employees"; and it is so ordered.

BUSTON v. PENNSYLVANIA R. CO.

(Circuit Court of Appeals, Third Circuit, January 19, 1903.)

[110 Fed. Rep. 808.]

Carriers of Goods—Connecting Carriers—Duty in Respect to Forwarding.*

An intermediate carrier, who receives goods to be carried to a point short of their final destination, is bound only to use reasonable diligence to secure further transportation by tendering them to the connecting line, and, if acceptance be refused, then to notify the consignor or consignee without unreasonable delay, and store or otherwise care for the goods while awaiting instructions. Having done this, its liability as a carrier will cease, and liability as a warehouseman be substituted.

Same.

Defendant railroad company received cotton from a connecting carrier, to be transported over its line, and delivered to a steamship company for further shipment. Before it was tendered, fire broke out in two of the cars, and on a subsequent tender the steamship company refused to receive it, deeming it in unsafe condition, and the steamer on which it was to be shipped sailed without it. Notice was promptly given to the shipper, and instructions asked for, but none were given. Defendant again offered the cotton to the steamship company to be taken on a later vessel, but, another fire having occurred before the time for sailing, the company definitely refused to take it. The owner was again notified, and, no instructions being received, defendant stored the cotton subject to the owner's order.

*See generally, Rutland Cent. R. Co. v. Bellows Falls & S. R. St. Ry. Co. (Vt.), 23 Am. & Eng. R. Cas., N. S., 675, and foot-note.

Buston v. Pennsylvania R. Co

having held it over a month. Defendant was in no way responsible for the fires nor for the condition of the cotton: *held*, that it had discharged its duty by tendering the cotton to the connecting carrier, and notifying the owner of its refusal, and was not required to put it in condition and again tender it, but was justified in storing it to await the owner's orders.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 116 Fed. 235.

Samuel Dickson and R. C. Dale, for plaintiff in error.

Frank P. Prichard, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. On July 19, 1900, the New York, Philadelphia & Norfolk Railroad Company contracted with the agents of R. A. Lee & Co., of Charlotte, N. C., for the transportation of 300 bales of compressed cotton from Norfolk, Va., by rail to Philadelphia, and thence by steamer of the American Line, appointed to sail on August 11, 1900, to Liverpool, England. Accordingly, the said railroad company afterwards issued its through bills of lading for the cotton, of which 50 bales were consigned to the order of H. B. Moses, Liverpool, and the remaining 250 bales were consigned to the order of R. A. Lee & Co., Liverpool, "to be carried to the port of Philadelphia, and thence by the American Line to the port of Liverpool." On or about August 6th the initial carrier, the New York, Philadelphia & Norfolk Railroad Company, delivered to the defendant the Pennsylvania Railroad Company, at the point of connection with its road, the cars containing said cotton for transit to Philadelphia. The original cars containing the cotton reached the terminal of the Pennsylvania Railroad adjacent to the wharves of the American Line on the Delaware river on or before August 7th, and there stood with certain other cars of the same train, containing cotton shipped by J. E. Gilbert & Co., under independent contracts, destined for carriage by the same steamer of the American Line that was to take the cotton of R. A. Lee & Co. On August 7th a fire broke out in one of the cars containing bales of the Gilbert cotton. It was promptly extinguished. On the next day another fire broke out in a car containing 50 bales of the R. A. Lee & Co. cotton. This also was promptly extinguished. In each case the fire began inside the car, and there was no evidence whatever that either of the fires originated through any cause for which the carriers were in any wise responsible. This the learned judge below states in his opinion, and the statement is fully warranted by the proof. Upon the occurrence of these fires the defendant informed the agents of the American Line of the facts. On August 10th the defendant made an actual tender of the cotton here in question (the 250 bales of the Lee cotton) to the agents of the American Line, in time for the delivery of the whole of it before the departure of the vessel, which

Buston v. Pennsylvania R. Co

was to leave on August the 11th. The agents of the American Line declined to receive this cotton on the ground that it was dangerous, and the steamer, on the 11th of August, left without the cotton. The defendant gave prompt notice of the facts to the initial carrier, the New York, Philadelphia & Norfolk Railroad Company, "requesting orders for disposition," and through the original carrier R. A. Lee & Co., the shippers, were promptly notified of the facts. The defendant, not having heard from the initial carrier or the shippers as to the disposition of the cotton, applied to the American Line to know whether it could go forward on its next scheduled steamer, and in reply, by letter dated August 27th, the American Line, while insisting that it had contracted only for the steamer of August 11th, and that the contract was at an end, offered to carry the cotton on its steamer, the *Ikbāl*, appointed to sail on September 15th, provided, upon an examination by an expert, the cotton was found free from danger; the shippers to bear one half of the expense of the expert examination. The defendant immediately telegraphed this offer to the initial carrier, by whom it was communicated to the shippers, R. A. Lee & Co., but neither made any reply to the telegram. A third fire having occurred on September 2d in another of the cars containing bales of the Gilbert cotton, the American Line, by its authorized agent, sent the following notification to the agent of the defendant company:

"International Navigation Company.

"Philadelphia, September 6, 1900.

"Mr. F. H. Meyers, Philada.—Dear Sir: Since my letter of August 27th, offering to enter into a new arrangement, and carry forward the cotton on the next voyage of the *Ikbāl*, provided it was proven free from danger, another fire has occurred on September 2d on car N. & W. 20,388, which, from all the attendant circumstances, the entirely spontaneous nature of the fire occurring inside a loaded car, the long period elapsing before it manifested itself, etc., indicates such a dangerous condition in the cotton that we cannot now, in safety to our ships, carry it forward, under any circumstances. We regret that such is the case, and had hoped, prior to this last fire, that all further danger had passed.

"Yours truly,

Lee R. McKinstry, East-Bound Freight Agent."

The defendant sent prompt notice directly to R. A. Lee & Co. of this refusal of the American Line to carry the cotton forward under any circumstances, and urged them to take steps to dispose of the cotton, and to act at once. By letter of September 13th, R. A. Lee & Co. informed the defendant that they could not interfere, because (as they stated) they had sold this cotton to A. J. Buston & Co., of Liverpool (the plaintiff); and they further stated in their letter: "Mr. A. J. Buston sailed from Liverpool on the 7th inst. for New York, and we wired him at New York to-day to call at Philadelphia

Buston v. Pennsylvania R. Co

on his way south to look after this cotton." Not having received any instructions as to the disposition of this cotton, the defendant, on September 18, 1900, caused it to be stored for safe-keeping in the warehouse of D'Olier & Co., in Philadelphia. Before putting it into the warehouse, D'Olier & Co. examined the cotton, to see whether it was safe to take on storage, and, finding it to be free from danger, stored it in their warehouse, where it was thereafter kept ready for delivery to the owner or upon his order. R. A. Lee & Co., it appears from the evidence in this case, had drawn drafts (with the bills of lading indorsed and attached) on the plaintiff for the value of the cotton here in question, and these drafts the plaintiff accepted in Liverpool in ignorance of the fire, and subsequently paid them. On or about August 12th the plaintiff heard by cable in Liverpool that the 50 bales of cotton had been burned. The steamer of August the 11th arrived at Liverpool while the plaintiff was there, without any of the cotton, and this the plaintiff then knew. He testifies that he sailed from Liverpool to New York on the 4th or 5th of September. Upon his arrival in New York (and certainly before September 20th) the plaintiff was fully informed of all the facts touching this cotton. Mr. Lee, of the firm of R. A. Lee & Co., and Mr. Putnam, an insurance adjuster (both of whom knew of the storage of the cotton with D'Olier & Co.), met the plaintiff in New York, and advised him of all the circumstances. As early as September 20, 1900, the plaintiff had the fullest information of all that had occurred. Thereupon he took the position that he had nothing to do with the cotton until it was delivered to him in Liverpool, and claimed that R. A. Lee & Co. were bound to have it delivered to him there. Upon this point a dispute at once arose between the plaintiff and the shippers of the cotton. The plaintiff also set up a claim for the value of the cotton against the insurers. The plaintiff gave no instructions whatever to the defendant; neither did the shippers; and the cotton remained on storage in the warehouse of D'Olier & Co. until the time of the trial of this case in April, 1902.

The facts, as hereinbefore stated, were shown by uncontradicted evidence, all of the evidence in the case coming from the plaintiff's side. This suit was brought on December 10, 1901, by A. J. Buston, doing business under the name of A. J. Buston & Co., against the Pennsylvania Railroad Company, to recover the sum of \$12,828.80, which the plaintiff had paid for the 250 bales of cotton, and also special damages alleged to have been sustained by him "by reason of the action of the defendant in not forwarding the cotton."

The relation of the defendant to this cotton was altogether that of an intermediate carrier between the initial carrier, which issued the through bills of lading, and the American Steamship Line, which was to carry the cotton from Philadelphia to its ultimate destination. The defendant had not

Buston v. Pennsylvania R. Co

entered into any engagement whatever binding it to transport the cotton beyond its terminus adjacent to the wharves of the American Line on the Delaware river. Upon accepting the cotton from the initial carrier, the defendant's duty was to safely transport it to the point of connection with the American Steamship Line, and there tender the cotton to that line. This the defendant did. It made an actual and timely tender of the cotton to the American Line. The tender was refused because of the supposed dangerous condition of the cotton. The defendant promptly notified the initial carrier, and, through it, the shippers, of the facts, and asked for instructions. No instructions came. In response to an inquiry of the defendant, the American Line made an offer to carry the cotton on its next outgoing steamer, upon certain conditions. This offer was immediately communicated to the shippers, but no reply was made. Then the American Line notified the defendant that it would not, under any circumstances, carry the cotton. The defendant sent prompt notice of this peremptory refusal to the shippers, and called on them to act. Now, the shippers of this cotton were also the consignees thereof. The first information of the plaintiff's title came to the defendant in the shipper's letter of September 13th, in which the shippers wrote that the plaintiff had sailed for New York, and that they had wired him there to come to Philadelphia, and look after the cotton. This was the situation on September 18th,—more than a month after the tender and refusal,—and we think that, in the absence of instructions from any quarter, the defendant was fully justified in depositing the cotton for safe-keeping in the warehouse of D'Olier & Co., to await instructions. The general rule of law is that an intermediate carrier, who receives goods to be carried to a point short of their final destination, is bound only to use reasonable diligence to secure further transportation by tendering them to the connecting line, and, if acceptance be refused, then to notify the consignor or consignee, without unreasonable delay, and store or otherwise take care of the goods while awaiting instructions. Having done this, the liability of the carrier as such will cease, and the liability of a warehouseman be substituted. Elliott, R. R. §§ 1432, 1449; Schouler, Bailm. & C. § 609; Johnson v. Railroad Co., 33 N. Y. 610, 612, 88 Am. Dec. 416; Rawson v. Holland, 59 N. Y. 611, 615, 17 Am. Rep. 394. Upon the indisputable facts this case falls within the rule of law just stated. Whether or not the American Line had good cause for refusing to accept the cotton when tendered is immaterial here. The defendant was in no wise responsible for the actual or supposed condition of the cotton. The defendant was free from fault. There is not a particle of evidence tending to show that any of the mentioned fires occurred through negligence or want of proper care on the part of the defendant. So far as the defendant was concerned, its tender of the cotton to the connecting carrier on August 10th

Texas & P. Ry. Co. v. Cau

was good. We are not then able to adopt the view, expressed by the learned judge below, that the defendant was bound to make another tender of the cotton after D'Olier & Co. had made their examination and pronounced it free from danger. The examination was made by the warehousemen for their own safety. It was not the expert examination which the American Line had proposed in the offer which the shippers would not accept. Moreover, by its letter of September 6th, the American Line had notified the defendant that it would not carry the cotton under any circumstances. Certainly, in the face of that absolute and final refusal, the defendant was not bound to incur the expense and trouble of making a second, and an apparently vain, tender. Then again, the owners of the cotton had contracted for its shipment in the steamer sailing August 11th, and it was not for the defendant, in the absence of instructions, to take upon itself the responsibility of forwarding the cotton more than a month afterwards. *Johnson v. Railroad Co.*, supra. But finally, R. A. Lee & Co., the shippers and consignees of the cotton, and their transferee, the plaintiff, had due notice of all the facts. Both were near at hand,—on the ground, it may be said. The defendant had the right to await instructions from the owner. Indeed, this was its plain duty under the circumstances. It was for the owner of the cotton to direct what should be done with it. The cotton was kept safely stored, subject to the plaintiff's order, and ready at all times to be delivered to him. More than this the plaintiff had no right to ask. Upon his own showing he had no cause of action against the defendant. Therefore the judgment of the circuit court in favor of the defendant was rightly rendered, and, for the reasons expressed in this opinion, is affirmed.

TEXAS & P. RY. CO. v. CAU.

(*Circuit Court of Appeals, Fifth Circuit, January 27, 1903.*)

[120 Fed. Rep. 15.]

Carriers—Stipulation Exempting from Liability for Fire—Agreement Not to Enforce—Consideration.

Act of a consignor of cotton in giving up insurance thereon in his favor, and taking out a policy in favor of the carrier, fully protecting it from loss or destruction by fire, constituted a valuable consideration for a promise on the part of the carrier not to insist on a provision in the bill of lading exempting it from liability for loss or damage by fire.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

N. W. Finley, W. W. Howe, W. B. Spencer, and C. P. Cocke, for plaintiff in error.

William S. Parkerson and Branch K. Miller, for defendant in error.

Smoak v. Savannah, F. & W. R. Co

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The undisputed evidence shows that while the bills of lading contained a provision "that neither the Texas & Pacific Railway Company, nor any connecting carrier handling said cotton, shall be liable for damages to or the destruction of said cotton by fire," the owner and consignor, Cau, had taken out insurance which fully protected him in case of damage or destruction of said cotton by fire, and that in this state of the case, upon representation made by the company, through its authorized agent, that the company would be responsible for damages or destruction caused by fire, amounting, in substance, to a representation that the company would not insist upon exemption from liability as excepted in the bill of lading, and at the instance and request of the railway company, the owner and consignor gave up the insurance in his favor, and took out and paid for insurance in favor of the carrier company, fully protecting the carrier from loss or destruction of the cotton by fire. The insurance in favor of the carrier was a valid, valuable consideration for the promise, if not contract, not to insist upon the exemption from loss or damage on account of destruction by fire, which was contained in the bill of lading, for it fully protected the carrier company from loss or damage by fire for which it was "legally liable," and this included liability resulting from the negligence of its own employees, and for which it was unquestionably liable to the consignor, notwithstanding the exemption contained in the bill of lading.

The judgment of the circuit court does substantial justice between the parties, and we affirm the same.

SMOAK v. SAVANNAH, F. & W. R. Co.

(Supreme Court of South Carolina, March 3, 1903.)

[43 S. E. Rep. 662.]

Stations and Depots—Use of Platform Steps—Evidence.

In an action against a railroad company for injuries received by failure to provide steps to the platform of its station, evidence as to the use of steps at such platform was admissible to show that they were adopted by defendant as a part of its accommodations for the public.

Same—Licensees—Degree of Care.

A person doing business at a railroad station is entitled to the same accommodations for that purpose as would be furnished a passenger.

Same—Platform Steps—Notice of Condition.

In an action for injuries caused by defects in the platform at a railway station, evidence of statements of a member of the railroad commission to an official of the railroad company as to the depot and its platform is admissible to show notice of its condition to the company.

Smoak v. Savannah, F. & W. R. Co**Same—Care Due Person Meeting Passenger.***

A railroad company owes the duty, in relation to the platform accommodations, of ordinary prudence to a licensee coming to the depot for the purpose of meeting his daughter on a train.

Appeal from Common Pleas Circuit Court of Colleton County; Klugh, Judge.

Action by D. E. Smoak against the Savannah, Florida & Western Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

This is an action for damages alleged to have been sustained by the plaintiff through the negligence and recklessness of the defendant in failing to provide suitable lights and steps to the platform at its station. On the 15th February, 1901, the plaintiff's daughter, with her infant children, was a passenger on defendant's train from Green Pond to Ruffin; both stations being on said railroad. The material allegations are set forth in paragraph 4 of the complaint as follows:

"(4) That, just prior to the arrival of the said passenger car, this plaintiff entered upon the platform of the defendant company at the said station (such platform adjoining the defendant company's depot), and there awaited the arrival of the said car, believing that the officers and employees of the said defendant company would have the said passenger car drawn up to the said platform, and cause the company's passengers to alight thereon; but as said car was approaching the said station, and was only a short distance away, this plaintiff learned, for the first time, that the defendant company did not permit its passengers to alight from its cars on the said platform, but brought its passenger cars to a halt before reaching such platform, causing them to alight on the opposite side of the railroad track. That this plaintiff then started to descend the steps of the said platform for the purpose of crossing to the opposite side of the railroad track, where he could receive his said daughter and her infant children, and assist them in alighting from said car, but the defendant company having carelessly, negligently, and recklessly failed and neglected to provide any light or lights at its said station (it then being about 9 o'clock at night, and the night being very dark), and the said defendant company having so negligently, carelessly, and recklessly built and constructed its steps whereon to mount and descend from the said platform (the said steps being very narrow and very insecure), this plaintiff lost his footing thereon, and fell to the ground, a distance of several feet, with great force, one of his arms striking the iron rail of the railroad track, and the said arm being thereby broken in three different places, and was otherwise bruised and injured in limb and body."

The defendant denied the material allegations of the com-

*See *Berry v. Louisville & N. R. Co. (Ky.)*, 20 Am. & Eng. R. Cas., N. S., 401, and foot-note.

Smoak v. Savannah, F. & W. R. Co

plaint, and set up the defense of contributory negligence. The jury rendered a verdict in favor of the plaintiff for \$2,500. The defendant appealed upon the following exceptions:

"First. That his honor erred in overruling the objection of defendant to the following question proposed to Henry Crosby: 'Did people generally, in going up on the platform and in coming down, use those steps?' As the plaintiff was endeavoring to establish the custom of the public and permission of the company in the use of the steps, whereas, no foundation had been laid for such question, either in showing the length of time such steps has existed, or that the witness Henry Crosby had any personal knowledge of such use by the public with the permission of the railroad company.

"Second. That his honor erred in overruling the objection of defendant to the following question proposed to Henry Crosby: 'You either stopped on the platform or in the swamp?' As such question and answer were not relevant to any issue in the complaint, as the plaintiff was not a passenger, and the acts of negligence relied upon in the complaint were the failure of lights on the platform, and the insecurity of the steps.

"Third. That his honor erred in overruling the objection of defendant to the following question proposed to Henry Crosby: 'You either stopped on the platform or in the swamp?' As said question was not relevant to any issue in the complaint, and was asked for the purpose of prejudicing the minds of the jury against the company on a matter not involved in the issues to be tried.

"Fourth. That his honor erred in overruling the objection of the defendant to the question proposed to the witness Gus Smith: 'Now, you say they got off twenty-five or thirty yards down the track below the public highway crossing at the railroad. What was the character of the ground from there to the depot?' As the complaint does not allege that the injuries to the plaintiff, D. E. Smoak, were caused by the condition of the railroad premises at that point, but confines the negligence of the defendant to the failure of lights on the depot platform and to the insecurity of the steps.

"Fifth. Because his honor erred in overruling objection of the defendant to the question proposed to the witness Gus Smith: 'Now, you say that they got twenty-five or thirty yards down the track below the public highway crossing at the railroad. What was the character of the ground from there to the depot?' As said question was entirely irrelevant to any issues in the cause, and as the witness Smith was not a passenger, nor was the plaintiff a passenger, and the cause of action did not involve the rights of passengers alighting at that point; said question being propounded solely for the purpose of prejudicing the minds of the jury against the defendant company on an issue not involved in the pending action.

"Sixth. Because his honor erred in admitting the testimony

Smoak v. Savannah, F. & W. R. Co

of the witness C. W. Garris, as, if the railroad commissioner had served notice upon the defendant company of any defect in its station, said notice must be in writing, and should have been produced; and, further, because the said C. W. Garris could not testify as the representative of the board—simply as an individual member of the board; and, further, because the testimony of the said C. W. Garris was entirely irrelevant to any of the issues involved in the case, and had no reference whatever to the failure of the company to provide lights at the station, or to the insecurity of the steps, but simply tended to prejudice the minds of the jury against the defendant company for failure to provide facilities for passengers, which are not complained of in the complaint.

“Seventh. Because his honor erred in charging the jury: ‘If you think that a person of ordinary prudence—that is to say, a railroad of ordinary prudence—would provide lights about its station at night for the safety of the passengers, or persons who come to the station to receive passengers, then you are bound to conclude that that is one of the duties which the law requires of railroad companies.’ As the duty required by law of the railroad company to its passengers is of very much higher nature than that required of the railroad company to a licensee, such as the plaintiff in this case.

“Eighth. Because his honor erred in charging the jury: ‘If you think it is prudent—a mere matter of ordinary prudence—for them to have such things, then you are bound to conclude it is the duty of the railroad company to have such things.’ As, the plaintiff being a licensee, the railroad company was not liable to him for the high degree of care to which it is held in the case of a passenger, and would not be responsible for omitting to do or perform an act of mere ordinary prudence.

“Ninth. Because his honor erred in charging the jury: ‘If you should conclude that it is a matter of ordinary safety and precaution for the railroad company to have safe steps at its station, then you are bound to conclude that that is a duty which the law imposes upon this company, and, if the plaintiff has established by the preponderance of the evidence that the railroad company failed to have safe steps, then you will be bound to conclude that the railroad company failed in that duty, and was in that particular negligent.’ Whereas, the plaintiff being a licensee, the railroad company was not responsible to him for the same degree of care as in the case of a passenger, and would not be held liable for the omission of an act of mere ordinary prudence or precaution.

“Tenth. Because his honor erred in charging the jury throughout as to the duties of a railroad company required by law, whereas the plaintiff was admittedly a licensee, and therefore the company was not liable to him for mere ordinary negligence, and was not held to the high degree of care required of railroad companies in the case of passengers; and

Smoak v. Savannah, F. & W. R. Co

his honor, throughout his charge, failed to draw this distinction to the jury."

Mordecai & Gadsden, for appellant.

Howell & Gruber, for respondent.

GARY, A. J. (after stating the facts). The exceptions will be considered in regular order:

First exception: In order to understand how the question arose, it will be necessary to refer to the testimony. The following took place during the examination of Henry Crosby, a witness for the plaintiff: "Q. How many pairs of steps were there to the depot? A. Only one original pair of steps there. Q. After the original pair were put there, how many additional were put there? A. Another additional pair, but they were on the opposite side to the original. Q. They were on the north—the additional pair? A. Yes, sir. Q. Who put them up? A. I couldn't say; only I heard the man say who put them there—Mr. Lemacks. Q. You heard Mr. Lemacks say he put them there? A. Yes. Q. Do you know how long these steps have been there before the accident occurred? A. They had not been there very long. I suppose, a week—probably ten days. I could not say they had been there any longer than that. Q. What was the character of these steps? How wide were they, I mean? I don't mean the width of the plank. A. They were not over twelve inches. Q. What were those steps built out of? A. Two blocks sawed off a piece of square timber. Q. Did the people generally, in going up on the platform and coming down, use those steps? Mr. Gadsden: Counsel is attempting to prove the custom, and the foundation has not been shown that this witness is familiar with the custom. He says that these steps were not there but about ten days previous to that time, and the foundation has not been laid either to the length of time the steps were there, or his acquaintance with the facts. Mr. Gruber: It is not to show custom. I am endeavoring to prove that people who were accustomed to visiting the station, with the knowledge and consent of the railroad authorities, made use of these steps. The Court: I think the testimony is competent. Q. Did the people who had business with the railroad company use these steps, going up on the platform and coming down? A. Yes; I did myself. Q. Did the agent know that the steps were being used? A. Yes; I suppose so." Conceding that the testimony was not competent to prove custom (which was not contended by the plaintiff), it was nevertheless admissible for the purpose of showing that the steps were adopted by the defendant as part of its accommodations for the use of the public, even if not so intended in the first instance. *Rinake v. Mfg. Co.*, 55 S. C. 179, 32 S. E. 983.

Second and third exceptions: The question arose as follows during the examination of one of the plaintiff's witnesses: "Q. What provision was made for passengers at the depot

Smoak v. Savannah, F. & W. R. Co

while waiting on trains? A. None at all. Q. Any waiting room? A. Never heard tell of such a thing there. Q. You either stopped on the platform or in the swamp? Mr. Gadsden: There is no testimony that Mr. Smoak was a passenger, and the complaint does not state that he was a passenger. The Court: I think the testimony is competent. He had the right to the same treatment that a person doing business there ordinarily expects." It will be observed that the only objection to the testimony was on the ground that the plaintiff was not a passenger, which was not contended by him. In order to sustain the exception, it would be necessary to rule that the defendant owed no duty to any one except a passenger. This proposition is conclusively settled against the appellant's contention by the case of Izlar v. R. Co., 57 S. C. 332, 35 S. E. 583. Furthermore, the testimony was responsive to the allegations of the complaint.

Fourth and fifth exceptions: The only objection to the testimony was as follows: "Mr. Gadsden: I object. Mr. Smoak was not a passenger, and there is no passenger complaining here about bad treatment, or being put off in the dark thirty yards below the depot." In addition to what was said in considering the second and third exceptions, the testimony was admissible as explanatory of the surroundings.

Sixth exception: Mr. Garris testified that prior to the plaintiff's injury he and another of the railroad commissioners passed over this road on a tour of inspection, accompanied by the president or vice president of the road, the superintendent, and the road master. The record discloses the following: "Q. Did you examine the depot and platform at that place? A. Yes. Q. Did you at that time call to the attention of those officials— Mr. Gadsden: It has every indication of a leading question. Mr. Gruber: No; it is not. Q. Did you at that time, upon making examination of the depot and platform, have any conversation with those officials with reference to the depot and platform? A. Yes. Q. Will you kindly state what was said? Mr. Gadsden: I object, on the ground that the board of railroad commissioners, speaks as a whole, acting officially by a majority of its members. If the railroad commissioners have made any official report to the Plant System about that station, it is in writing, and I call for it. The individual members speak as individuals, but the board speaks as a unit. Any action must be by the majority of the board, and must be in writing. The Court: I think, Mr. Gadsden, that it is competent to show whether or not the railroad company had notice." His honor's ruling is sustained by the case of Stuckey v. R. R., 60 S. C. 237, 38 S. E. 416, 85 Am. St. Rep. 842.

Seventh, eighth, ninth, and tenth exceptions: The errors assigned are: First. That the law exacts a higher degree of care towards a passenger than it does to a licensee. The presiding judge recognized this distinction, and charged

Hanley v. Kansas City Southern Ry. Co

the appellant's request, which was as follows: "A railroad company is not held to the same high degree of care in reference to a licensee as it is to one of its passengers." Second. That a railroad company would not be liable for an injury to a licensee for its omission to observe towards him ordinary prudence. The ruling of the circuit judge is so fully sustained by the case of *Stuckey v. R. R.*, 60 S. C. 237, 38 S. E. 416, 85 Am. St. Rep. 842, that we only deem it necessary to refer to that case to show that the exceptions cannot be sustained.

It is the judgment of this court that the judgment of the circuit court be affirmed.

FELIX M. HANLEY *et al.*, Members of the Railroad Commission of Arkansas, Appts., v. KANSAS CITY SOUTHERN RAILWAY COMPANY.

(Argued and Submitted December 18, 1902. Decided January 5, 1903.)

[23 Sup. Ct. Rep. 214.]

Interstate Commerce—State Regulation of Railroad Rates—Points within State—Shipment over Route Partly outside State.*

The railroad commission of Arkansas cannot, without violating the commerce clause of the Federal Constitution, fix and enforce rates for the continuous transportation of goods between two points within the state of Arkansas, where a large part of the route is outside of the state, through the Indian territory or Texas.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas to review a decree for plaintiff in a suit to enjoin the railroad commissioners of Arkansas from fixing and enforcing railroad rates. Affirmed.

See same case below, 106 Fed. 353.

The facts are stated in the opinion.

Mr. Charles E. Warner and Messrs. Winchester & Martin for appellants.

Messrs. Gardiner Lathrop, Thomas R. Morrow, James B. Read, and Max Pam for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court:

This is a bill in equity brought in the circuit court by a railway company incorporated under the laws of Missouri, against the railroad commissioners of Arkansas, seeking an injunction against their fixing and enforcing certain rates, as we shall explain. The bill was demurred to for want of equity, the demurrer was overruled, and a decree was entered for the plaintiff. The defendants bring the case here by appeal.

The plaintiff owns a road running through several states and territories. The road after leaving Missouri runs for 28 miles and a fraction through Arkansas to the dividing line between

*See foot-note appended to *United States v. Lehigh Val. R. Co.* (D. Ct.), 3 R. R. R. 682, 26 Am. & Eng. R. Cas., N. S., 682.

Hanley v. Kansas City Southern Ry. Co

that state and the Indian territory, then nearly 128 miles in the territory, and then over 117 miles in Arkansas, again to Texas. There is also a branch line running from Fort Smith, in Arkansas, to Spiro, in the Indian territory, about a mile of which is in the state and 15 in the territory, and there are other branches. Goods were shipped from Fort Smith by way of Spiro and the road in the Indian territory to Grannis, in Arkansas, on a through bill of lading, the total distance being a little more than 52 miles in Arkansas and nearly 64 in the Indian territory. For this the railroad company charged a sum in excess of the rate fixed by the railroad commissioners, and was summoned before them under the state law. The commissioners decided that the company was liable to a penalty under the state statute, assert their right to fix rates for continuous transportation between two points in Arkansas, even when a large part of the route is outside the state through the Indian territory or Texas, and intend to enforce compliance with these rates. The only question argued, and the only one that we shall discuss, is whether the action of the commissioners is within the power of a state, or whether it is bad as interfering with the power of Congress to regulate commerce among the several states and with the Indian tribes. *Smyth v. Ames*, 169 U. S. 466, 517, 42 L. Ed. 819, 838, 18 Sup. Ct. Rep. 418.

It may be assumed that this power of Congress over commerce between Arkansas and the Indian territory is not less than its power over commerce among the states (*Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. Ed. 637, 9 Sup. Ct. Rep. 256), and the distinction hardly is important, since the appellants are asserting similar authority where the loop beyond the state boundary runs through Texas. We may as well add, in this connection, that the present railroad gets the authority for its line in the Indian territory, through a predecessor in title, from an act of Congress of 1893, chap. 169, 27 Stat. at L. 487, and that, by that act, Congress "reserves the right to regulate the charges for freight and passengers on said railroad . . . until a state government shall be authorized to fix and regulate the cost," etc.; "but Congress expressly reserves the right to fix and regulate, at all times, the cost of such transportation by said railroad or said company whenever such transportation shall extend from one state into another, or shall extend into more than one state."

It may be assumed further, as implied by the language just quoted, that the transportation in the present case was commerce. See also the act of February 4, 1887, chap. 104, § 1, 24 Stat. at L. 379 [U. S. Comp. Stat. 1901, p. 3154]; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 203, 29 L. Ed. 158, 161, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826, and *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. Ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4. Transportation for others, as an independent business, is commerce,

Hanley v. Kansas City Southern Ry. Co

irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered.

The transportation of these goods certainly went outside of Arkansas, and we are of opinion that in its aspect of commerce it was not confined within the state. Suppose that the Indian territory were a state, and should try to regulate such traffic, what would stop it? Certainly not the fiction that the commerce was confined to Arkansas. If it could not interfere the only reason would be that this was commerce among the states. But if this commerce would have that character as against the state supposed to have been formed out of the Indian territory, it would have it equally as against the state of Arkansas. If one could not regulate it the other could not.

No one contends that the regulation could be split up according to the jurisdiction of state or territory over the track, or that both state and territory may regulate the whole rate. There can be but one rate, fixed by one authority, whether that authority be Arkansas or Congress. *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. Ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 38 L. Ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; *Hall v. DeCuir*, 95 U. S. 485, 24 L. Ed. 547. But it would be more logical to allow a division according to the jurisdiction over the track than to declare that the subject for regulation is indivisible, yet that the indivisibility does not depend upon the commerce being under the authority of Congress, but upon a fiction which attributes it wholly to Arkansas, although that fiction is quite beyond the power of Arkansas to enforce.

It is decided that navigation on the high seas between ports of the same state is subject to regulation by Congress (*Lord v. Goodall, N. & P. S. S. Co.*, 102 U. S. 541, 26 L. Ed. 224), and is not subject to regulation by the state (*Pacific Coast S. S. Co. v. Railroad Commissioners*, 9 Sawy. 253, 18 Fed. 10); and, although it is argued that these decisions are not conclusive, the reason given by Mr. Justice Field for his decision in the last-cited case disposes equally of the case at bar. "To bring the transportation within the control of the state, as part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the state." 9 Sawy. 258, 18 Fed. 13. Decisions in point are *State ex rel. Railroad Warehouse Commission v. Chicago, St. P. M. & O. R. Co.*, 40 Minn. 267, 3 L. R. A. 238, 2 Inters. Com. Rep. 519, 41 N. W. 1047; *Sternberger v. Cape Fear & Y. Valley R. Co.*, 29 S. C. 510, 2 L. R. A. 105, 7 S. E. 836. See also *Milk Producers' Protective Asso. v. Delaware, L. & W. R. Co.*, 7 Inters. Com. Rep. 92, 160, 161.

There are some later state decisions contrary to those last cited. *Campbell v. Chicago, M. & St. P. R. Co.*, 86 Iowa, 587, 17 L. R. A. 443, 4 Inters. Com. Rep. 403, 53 N. W. 351; *Seawell v. Kansas City, Ft. S. & M. R. Co.*, 119 Mo. 222, 5 Inters.

Porter v. Raleigh & G. R. Co

Com. Rep. 262, 24 S. W. 1002; State ex rel. Railroad Comrs. v. Western U. Teleg. Co., 113 N. C. 213, 22 L. R. A. 570, 18 S. E. 389. But these decisions were made simply out of deference to conclusions drawn from Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192, 36 L. Ed. 672, 4 Inters. Com. Rep. 87, 12 Sup. Ct. Rep. 806, and we are of opinion that they carry their conclusions too far. That was the case of a tax, and was distinguished expressly from an attempt by a state directly to regulate the transportation while outside its borders. 145 U. S. 204, 36 L. Ed. 676, 4 Inters. Com. Rep. 91, 12 Sup. Ct. Rep. 809. And although it was intimated that, for the purposes before the court, to some extent commerce by transportation might have its character fixed by the relation between the two ends of the transit, the intimation was carefully confined to those purposes. Moreover, the tax "was determined in respect of receipts for the proportion of the transportation within the state." 145 U. S. 201, 36 L. Ed. 675, 4 Inters. Com. Rep. 90, 12 Sup. Ct. Rep. 808. Such a proportioned tax had been sustained in the case of commerce admitted to be interstate. *Maine v. Grand Trunk R. Co.*, 142 U. S. 217, 35 L. Ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163. Whereas it is decided, as we have said, that when a rate is established, it must be established as a whole.

We are of opinion that the language which we have quoted from Mr. Justice Field is correct, and that the decree of the circuit court should be affirmed.

Decree affirmed.

PORTER v. RALEIGH & G. R. Co.

(Supreme Court of North Carolina, March 10, 1903.)

[43 S. E. Rep. 547.]

Common Carriers—Failure to Ship Goods—Evidence.

Evidence in an action against a railroad company, for damages resulting from negligent failure to ship goods, examined and held sufficient to go to the jury.

Same—Unauthorized Contract by Agent—Ratification.

Where a railroad company ratified and undertook to perform a contract for the transportation of goods made by a local agent in violation of its rule, which required advance payment of freight, and accepted in lieu thereof a deposit of the amount at the point of destination, it was bound to perform such contract.

Appeal from superior court, Vance county; Winston, Judge.

Action by Albert N. Porter against the Raleigh & Gaston Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

T. M. Pittman, for appellant.

J. H. Bridgers, for appellee.

MONTGOMERY, J. The plaintiff brought this action to recover damages of the defendant company on account of al-

Porter v. Raleigh & G. R. Co

leged negligence on its part in failing to ship on its railroad certain household goods and furniture belonging to the plaintiff. He, at the time of the alleged negligence, was living in Illinois. One of his friends in Henderson, N. C., at his request, carried the goods and furniture to the agent of the defendant company in that town, to be shipped to the plaintiff at his home in Illinois. Prepayment of the freight charges was demanded by the company's agent, and that demand was not complied with.

The plaintiff introduced evidence tending to show that in a conversation between the station agent and the plaintiff's agent, it was agreed that upon the payment by the plaintiff of the amount of the freight charges—about \$50—to the railroad agent, at Alexis in Illinois (agent of Chicago, Burlington & Quincy Railway Company), the defendant would at once ship the goods upon the defendant's being notified of the deposit; that the plaintiff was notified of the arrangement, and on the 19th or 20th of July, 1900, the required amount was paid to the agent at Alexis by the plaintiff; that on the same day J. G. Cantrell, the general western agent of the defendant company, was properly notified of the transaction by H. D. Mack, division freight and passenger agent of the Chicago, Burlington & Quincy Railway Company, Alexis, Ill., being in his division; that Mack on the same day, July 20th, by telegram, informed the agent at Alexis that he might advise Porter that the necessary steps had been taken towards having his goods forwarded; that, on the 23d of July, Cantrell notified the general freight agent of the defendant company of the whole arrangement, with request to forward the shipment of the goods from Henderson to Alexis; that the defendant did not repudiate the agreement but took steps to carry it out; that the goods were never shipped, but were consumed in the burning of the warehouse of the defendant company on the 26th of July.

His honor was of opinion that upon the evidence the plaintiff could not recover.

The defendant, in this court, contended that the complaint did not set out a cause of action as to the relation of shipper and carrier, and that there was no allegation of the relation of shipper and carrier. We think that relation was sufficiently stated in the second, fourth, fifth, and sixth allegations of the complaint. As will be seen from a statement of the evidence of the plaintiff, the amount of the charges for the shipment of the goods from Henderson to Alexis was paid by the plaintiff at Alexis, according to agreement; that a division freight agent of the line of destination notified the general western agent of the defendant company, whose division extended over Alexis, of the entire arrangement; that the general freight agent of the defendant company was also notified of the same three days later (on the 23d); that the defendant acquiesced in the agreement, and took steps to carry it out, and that the goods were burned on the 26th.

Porter v. Raleigh & G. R. Co

The question now is, was this evidence of sufficient consequence (more than a scintilla) to be submitted to the jury on the question of the defendant's negligence? We are of the opinion that it was, if the station agent at Henderson had the authority and right to make the agreement with the plaintiff's agent, or if the defendant ratified the agreement by accepting its terms. It was not contested on the part of the defendant that the station agent at Henderson could not make an agreement to ship goods by freight from Henderson to Illinois, over connecting lines, upon the prepayment of the freight. The objection urged was that he could not, in violation of the rules of this company, contract to ship the goods without the prepayment of the freight charges at Henderson, including those of the connecting lines.

It is not necessary to the decision of this case to consider whether the station agent had the right—the authority—to make the freight charges payable at Alexis instead of at Henderson, as the rule of the company required (the plaintiff having been made acquainted with that rule). There was evidence, as we have seen, that the general freight agent received official knowledge of the agreement made between the station agent at Henderson and the agent of the plaintiff, and of the payment by the plaintiff of the freight charges at Alexis under the agreement; that the agreement was acquiesced in and plans begun to have the agreement carried out, and that the defendant was in treaty with other railway systems as to which connecting lines the goods should be carried over to their destination. The general western agent of the defendant, five or six days after having been notified of the agreement, in a communication to Mack, said: "Dear Sir: Further your letter of July 20 and my reply yesterday. I have just received the following wire from C. R. Capps, our general freight agent, 'Your wire July 23 regarding household goods for Rev. Albert N. Porter of Alexis, it will be necessary for Mr. Mack to wire the Big Four and have them in turn wire the C. & O. who should telegraph us that they will accept from us without prepay the shipment of household goods in question. We could not consent to handle the business up to Portsmouth and have it turned down by our connection here.' Will you please take this matter up with the Big Four people by telegraph and have them in turn wire the C. & O. instruction to accept this shipment from Portsmouth, Va. Freight charges collect on your guarantee. We will then issue instructions for shipment to be forwarded at once to your care at such gateway as you prefer."

There was no evidence to the effect that the plaintiff had any knowledge of the rule of any of the connecting or intermediate roads requiring prepayment of freight charges upon freight received from the others, if any such rule or rules did in fact exist.

There was error in the judgment of nonsuit for which there must be a new trial. New trial.

LOUISVILLE & N. R. Co. *et al.* v. S. D. CHESTNUT & BRO.

(*Court of Appeals of Kentucky, March 4, 1903.*)

[72 S. W. Rep. 351.]

Negligence—Connecting Carriers—Liability of Receiving Carrier—Bill of Lading.*

Where a contract between a carrier receiving goods for transportation beyond its lines and the shipper provides that the agreement is between the shipper, the carrier, and the connecting lines, and that no line shall be liable for the negligence of any other, and that the car in which shipment is made may be transferred to all necessary connecting lines, the receiving carrier is not liable for any negligence of other carriers.

Service of Process upon Company.

Civ. Code Prac. § 51, subsecs. 3, 4, provide that, if defendant operates a railroad, summons may be served on its passenger or freight agent stationed at or nearest to the county seat of the county where suit is brought: *held*, that the phrase "passenger or freight agent," etc., refers to a person in the service of defendant, and stationed by it at some point, and hence, in an action against the last of several connecting carriers by a shipper for negligence in transporting goods, service on the agent of the first carrier is insufficient.

Appearance.

Where the service of process is insufficient to give the court jurisdiction, but defendant appeals to a reviewing court, it is, in effect, a general appearance in the action.

Appeal from circuit court, Todd county.

"To be officially reported."

Action by S. D. Chestnut & Bro. against the Louisville & Nashville Railroad Company and others. From a judgment for plaintiffs, certain defendants appeal. Reversed.

Perkins & Trimble, E. W. Hines, and B. D. Warfield, for appellants.

W. L. Reeves and B. B. Petrie, for appellees.

HOBSON, J. Appellees, S. D. Chestnut & Bro., shipped a car load of turkeys from Trenton, Ky., to Chicago, Ill., on December 11, 1898. The car was carried by the Louisville & Nashville Railroad Company to Evansville, Ind., and there delivered to the Evansville & Terre Haute Railroad Company, which took it to Terre Haute, and there delivered it to the Chicago & Eastern Illinois Railroad Company, which transported it to Chicago all right, but failed to take it from its yard to the unloading track at Chicago; and while the car was so delayed it turned very cold, and a number of the turkeys were frozen. The car reached Chicago about 7 o'clock in the morning, and should, in the ordinary course of business, have been unloaded in a few hours; but, by reason of the delay, the unloading of it was not finished until some time the next day. The proof by the defendants tended to show that the turkeys were not in good

*See foot-note appended to *Fremont, etc., R. Co. v. New York, etc., R. Co.* (Neb.), 5 R. R. R. 470, 28 Am. & Eng. R. Cas., N. S., 470.

Louisville & N. R. Co. v. Chestnut & Bro

condition, and the loss on them was due in part to this fact, and in part to the delay of the consignee in unloading the car after it was placed on the proper track. The court peremptorily instructed the jury to find for the defendant the Evansville & Terre Haute Railroad Company, and submitted the case to the jury as to the Louisville & Nashville Railroad Company and the Chicago & Eastern Illinois Railroad Company. There was no evidence showing negligence on the part of the Louisville & Nashville Company, and therefore the only question in the case is whether it is liable under the contract, as a through carrier, for the negligence of its connecting line.

The written contract, so far as is material, is in these words:

"Received by the Louisville & Nashville Railroad Company the following-described live stock to be transported in accordance with the terms and conditions of the contract entered into below:

Consignee, Destination, &c.	Description of Stock.	Car No.
S. D. Chestnut & Bro. Care of H. L. Brown & Son, Chicago, Ill. Charges \$22.00	Poultry Recd.	Tacoma 623

"Tariff rate on this shipment from Trenton to Evansville is \$62.00 per car.

"Contract for Transportation of Live Stock.

"Trenton, Ky., Station, Dec. 11, 1898.

"This agreement made between the Louisville & Nashville Railroad Company and its connecting lines of the first part and S. D. Chestnut & Bro. of the second part Witnesseth, That, whereas the said Louisville & Nashville Railroad Company and its connecting lines transport live stock only as per above tariff; but in consideration that the said party of the first part will transport from the said party of the second part one car of poultry from Trenton, Kentucky, to Evansville, Indiana, a station at the rate of thirty one dollars per car and a free passage to the owner or his agent on the train with the animals (if shipped in car load quantities), the same being a special rate lower than the regular rate mentioned in the said tariff, the said party of the second part hereby releases said party of the first from all liability in the transportation of said animals, except as herein after agreed and agrees that such liability shall be only that of a private carrier for hire; and it is further distinctly understood by the parties hereto that all liability of said Louisville & Nashville Railroad Company as carrier of said animals shall cease at its destined station if on said company's railroad, or if destined to a point beyond

Louisville & N. R. Co. v. Chestnut & Bro

said company's railroad, then at said company's station at its terminus, when ready to be delivered to the owner, consignee, or carrier, whose line may constitute a part of the route to destination. * * *

"And it is further agreed that when necessary for said animals to be transported over the line or lines of any other carrier or carriers to the point of destination, delivery of the said animals may be made to such other carrier or carriers for transportation, upon such terms and conditions as the carrier may be willing to accept: provided that the terms and conditions of this bill of lading shall inure to such carrier or carriers, unless they shall otherwise stipulate; but in no event shall one carrier be liable for the negligence of another."

The proof shows that appellees were charged \$22 for the poultry car Tacoma, \$31 for transporting it from Trenton to Evansville, and \$54.40 as the freight from Evansville to Chicago; making, in all, \$107.40, which was paid by the consignees in Chicago. It is insisted for appellees that the written contract is an undertaking by the Louisville & Nashville Railroad and its connecting lines to carry the car Tacoma from Trenton to Chicago; that they are all parties of the first part, who received the car to be carried to its destination, and are all bound alike by the stipulations of the contract to transport the car from Trenton to Evansville, and from Evansville to its destination. It is also urged that the limitations of the contract are not limitations on the obligation of any of the lines, but only an attempt to limit their liability by reason of the obligation; and the case of *Ireland v. Mobile & Ohio Railroad Company*, 105 Ky. 400, 49 S. W. 188, 453, is relied on. But it will be observed that while the writing is a receipt by the Louisville & Nashville Railroad Company for the poultry car Tacoma, consigned to Chicago, Ill., it is stipulated that the party of the first part will transport the car from Trenton, Ky., to Evansville, Ind., and that all liability on the part of the Louisville & Nashville Railroad Company for the car shall cease at its terminus, when ready to be delivered to the connecting line; and it is also agreed that the car may be transferred to such connecting lines as are necessary to reach its point of destination. Taking the contract as a whole, we think it means that the Louisville & Nashville Railroad Company is to transport the car to its terminus, and there deliver it to the connecting line, and to be no further responsible for it. The bill of lading in the Case of the *Mobile & Ohio Railroad Company* read very differently. There the *Mobile & Ohio Railroad Company* was the only contracting party, and the court reached the conclusion that the covenants of the paper could only refer to it. A bill of lading on substantially the same form as that above quoted was before this court in *L. & N. Railroad v. Tarter*, 39 S. W. 698, and it was held that the initial carrier was not liable beyond its line. The court said: "The general rule is that a

Louisville & N. R. Co. v. Chestnut & Bro

carrier is not liable beyond its own line, unless by contract to that effect, express or implied. Elliott on Railroads, sec. 1433; Bryan v. Memphis, etc., Railroad, 11 Bush, 597. It is held in most of the courts that the mere acceptance of goods directed to a point off the carrier's line is not a sufficient basis for the implication of a contract for extraterminal liability; but, whether so or not, it has never been held that such liability existed in the face of a contract to the contrary. This is not a case of attempted limitation of liability for negligence; hence the cases cited by appellee's counsel do not apply." The same rule was followed in L. & N. Railroad v. Cooper, 42 S. W. 1134, on the same form of bill of lading. The soundness of these rulings was recognized in the Ireland Case, where the court said: "It is urged that the clause is an attempted limitation of the carrier's common-law liability, and is therefore void. We do not think so. At the common law, without a contract to the contrary, there was no liability beyond the carrier's own line." 105 Ky. 405, 49 S. W. 188, 453. This was recently approved in P., C., C. & St. L. Railroad Co. v. Viers, etc., 68 S. W. 469. We therefore conclude that, under the contract referred to, the Louisville & Nashville Railroad Company was not responsible beyond its own line.

As to the appellant the Chicago & Eastern Illinois Railroad Company a different question is presented. It had no officer in the state, and the process for it was served on the president of the Louisville & Nashville Railroad Company, on the idea that the Louisville & Nashville Railroad Company was its agent in the state in the making of the contract sued on, and therefore the process might be properly served on such agent. In Nashville, etc., Railroad Co. v. Carrico, 95 Ky. 489, 26 S. W. 177, under a bill of lading similar to that before us, it was held that as the contract was made in Marion county by the Louisville & Nashville Railroad Company, acting as agent for the appellant, the Nashville, etc., Railroad Company, the contract must, within the meaning of section 73 of the Civil Code of Practice, be regarded as made there by appellant itself, and as, by that section, an action against a common carrier upon a contract to carry property may be brought in the county in which the contract is made, the Marion circuit court properly had jurisdiction of the action. This case was followed in P., C., C. & St. L. Ry. Co. v. Viers, etc., 68 S. W. 469; but in both these cases the summons was served on an agent of the defendant in this state. By subsections 3, 4, § 51, of the Civil Code of Practice, it is provided that if the defendant operate a railroad the summons "may be served upon the defendant passenger or freight agent stationed at or nearest to country seat of the county in which the action is brought." The words "passenger or freight agent stationed at or nearest to the county seat of the county" must refer to a person who is in the service of the defendant, and is sta-

Elgin, J. & E. Ry. Co. v. Bates Mach. Co

tioned by it at some point. The Louisville & Nashville Railroad Company, although it may have acted as the agent of the defendant in making the contract, is not such an agent as the statute contemplates; and therefore the service of process upon it was invalid, and should have been quashed. But on the return of the case to the circuit court no further process will be necessary, as the appeal enters the defendant's appearance to the action. In 3 Cyc. 510, the rule on this subject is thus stated: "Taking an appeal or suing out of a writ of error from an inferior court to an intermediate appellate court, which tries the same de novo, constitutes a general appearance in the intermediate court, and confers jurisdiction of the person on that court, whether the court from which the appeal was taken had acquired jurisdiction of the person or not. If the appeal is to a reviewing court, it is a general appearance, in the sense that on reversal and remand to the trial court the defendant is in court for the purpose of further proceedings without any further steps to bring him into court, even though the judgment was reversed on the ground that the trial court had not acquired jurisdiction of the person of defendant." This rule was laid down in the year 1809 by this court in *Grace v. Taylor*, 4 Ky. 430. It was followed in 1815 in *Graves v. Hughes*, 7 Ky. 84, and *Wharton v. Clay*, 7 Ky. 167; also in 1826 in *Hockaday, etc., v. Commonwealth and Adkins*, 20 Ky. 12. In a number of subsequent cases the rule is adhered to. *Bradford v. Gillaspie*, 38 Ky. 67; *Chesapeake, Ohio & Southwest R. R. Co. v. Heath's Adm'r*, 87 Ky. 651, 9 S. W. 832; *Thompson v. Moore*, 15 S. W. 6, 358; *Lillard v. Brannin*, 91 Ky. 511, 16 S. W. 349.

After its objection to the process was overruled, the defendant filed answer to the merits, and there was a trial, and judgment on the whole case. From this judgment the appeal before us is prosecuted. It will therefore be before the court on the merits when the action is returned to the lower court.

Judgment reversed, and causes remanded for further proceedings consistent herewith.

ELGIN, J. & E. RY. CO. v. BATES MACH. CO.

(Supreme Court of Illinois, Feb. 18, 1903.)

[66 N. E. Rep. 326.]

Connecting Carriers—Liability of Receiving Carriers for Injury on Connecting Line.*

A carrier, who receives a consignment of freight under contract to transport it "to destination, if on its road, or otherwise to the place on its road where same is to be delivered to any connecting carrier," through rate of freight as designated being guarantied by the car-

*See foot-note appended to *Chicago, etc., R. Co. v. Western Hay & Grain Co. (Neb.)*, 2 R. R. R. 953, 25 Am. & Eng. R. Cas., N. S., 953.

Elgin, J. & E. Ry. Co. v. Bates Mach. Co

rier, is liable for an injury on a connecting carrier's line, the car being treated as a through car, and sent to its destination without unloading.

Question of Fact.

The question, in an action against a carrier for injury to goods, whether the loss was proximately caused by the shipper's negligence in loading, is one of fact, which, having been determined on conflicting evidence by the trial and appellate courts, cannot be reviewed by the supreme court.

Appeal from appellate court, Second district.

Action by the Bates Machine Company against the Elgin, Joliet & Eastern Railway Company. From a judgment of the appellate court (98 Ill. App. 311) affirming a judgment for plaintiff, defendant appeals. Affirmed.

J. L. O'Donnell, for appellant.

Garnsey & Knox, for appellee.

RICKS, J. This was a suit begun by appellee in the circuit court of Will county against appellant for the recovery of the value of a fly wheel shipped by appellee from Joliet to Louisville, Ky. The shipment was made via appellant's railway, and was mounted and loaded by appellee on a car furnished by appellant. The receipt for the shipment was, as follows:

Joliet, Ill., July 14, 1899.

Received from Bates Machine Company by the E., J. & E.—C. G. & L. R. R., in apparent good order, except as noted, the packages described below (contents and value unknown), marked and consigned as indicated, which said company agrees to transport with as reasonable dispatch as its general business will permit, to destination, if on its road, or otherwise to the place on its road where same is to be delivered to any connecting carrier. Through rate of freight as designated below is hereby guaranteed by this company. Rate 15c. per cwt. Joliet, Ill., to Joliet via Louisville, Ky.

Consignee.	Destination and Marks.	Description.	Weight. Subject to Correction.
Hope Worsted Mills Co.,	E., J. & E.,	Car No. 1528	48000
Louisville, Ky.	Staty Eng's O. & L. S. L. & C.	117	

P. L. McManus, Agent.

The wheel was carried by appellant to Dyer, Ind. At that point the car containing said wheel was turned over to the Monon road, and while in the care of the latter road the wheel was broken, and totally destroyed in value. The cause was submitted to the court without a jury, and there was a finding and judgment in favor of appellee for \$1,200. Upon appeal to the appellate court the judgment was affirmed.

Two reasons are urged why the case should be reversed: First, that the court erred in refusing to find that the liability of appellant be limited to its own line; and, secondly, that the proof shows that the proximate cause of the injury to the fly wheel was the improper loading of the same by appellee.

The bill of lading offered in evidence was a "through

Elgin, J. & E. Ry. Co. v. Bates Mach. Co

freight'' contract, and the undertaking of the appellant was to carry the fly wheel safely from Joliet to Louisville, Ky., and it was liable for any injury or damage that might occur to the goods in transit, either upon its own line or that of a connecting carrier, unless its liability was limited by contract. *Chicago & Northwestern Railway Co. v. Simon*, 160 Ill. 648, 43 N. E. 596; *Toledo, Peoria & Warsaw Railway Co. v. Merriman*, 52 Ill. 123, 4 Am. Rep. 590; *Chicago & Northwestern Railway Co. v. Calumet Stock Farm*, 194 Ill. 9, 61 N. E. 1095; *Illinois Central Railroad Co. v. Carter*, 165 Ill. 570, 46 N. E. 374, 36 L. R. A. 527. In *Toledo, Peoria & Warsaw Railway Co. v. Merriman*, supra, the bill of lading provided that appellant would transport the freight "over the line of this railway to the company's freight station at its terminus, and deliver in like good order to the consignee or owner, or to such company (if the same are to be forwarded beyond the limits of this railway) whose line may be considered a part of the route to the place of destination of said goods or packages, it being distinctly understood that the responsibility of this company as a common carrier shall cease at the station where such goods are delivered to such persons or carrier." In that case, as in this, it was contended that appellant was not liable as common carrier beyond the terminus of its road, and that, as it was not shown the loss happened on its road, appellee could not recover. In discussing this question the court said: "This defense is utterly groundless, as the receipt or bill of lading offered in evidence shows upon its face it was a 'through freight contract,' and it was in proof by the defendant's agent that freight received by this company as through freight was never unloaded or delivered at their terminus, but forwarded on to its place of destination in the cars in which it was received." We regard the contract in the case cited as a contract much more favorable to appellant's position than is the one now before us. We are unable to find anything in the bill of lading which limits the liability to loss or damage occurring upon its own line. Neither the point of destination on appellant's road was mentioned in the contract, nor was the road to which appellant intended to deliver the car for carriage from its terminus to the point of destination mentioned, nor was the proportion of freight that was to be paid to appellant and to the connecting carrier stated. In fact, there was simply a through freight rate of 15 cents per hundredweight fixed. The undisputed evidence in this case shows that the car in which this wheel was loaded was treated by appellant as a through car, and in fact the wheel was sent therein to the point of destination, and there is no evidence tending to show that any other rule obtained with this company in shipping through freight that was to be delivered to connecting lines. We think the *Merriman Case*, supra, decisive of the case at bar.

Mexican Nat. R. Co. v. Jackson

The defense that the proximate cause of the injury to the fly wheel was the improper loading by appellee, was an issue of fact, and this has been determined adversely to appellant by the trial and appellate courts. There is a conflict of evidence upon this issue, hence the finding of the trial and appellate courts is conclusive.

Finding no error in the record, the judgment will be affirmed. Judgment affirmed.

MEXICAN NAT. R. CO. v. JACKSON.

(Circuit Court of Appeals, Fifth Circuit, November 18, 1902.)

[118 Fed. Rep. 549.]

Statutes—Titles—Plurality of Subjects—Constitution—Construction.

Const. art. 3, § 35, provides that no bill shall contain more than one subject, which shall be expressed in its title: *held*, that the word "subject" as used in such section was not synonymous with "provisions," and that where the different provisions of the statute refer directly to the same subject, and have a mutual connection and are not foreign to the subject expressed in the title, the statute is not in violation of the constitutional provision.

Same—Injuries to Railroad Employees.

Laws Tex. 1897, Sp. Sess., p. 14, is entitled "An act to prescribe and define the liability of persons, receivers or corporations operating railroads or street railways, for injuries to their servants and employees, to define who are fellow servants, and to prohibit contracts between employer and employee based on the contingency of injury or death of the employee, limiting the liability of the employer for damages": *held*, that such act was not in violation of Const. art. 3, § 35, as containing a plurality of subjects.

Injury to Employee—Place of Accident—Release.*

Where plaintiff, a resident of Texas, executed a contract with his employer, a sleeping car company, exempting it, and any corporation over whose railroads its cars might be transported, from liability for any injuries to plaintiff, which contract was void under Laws Tex. 1897, Sp. Sess., p. 14, providing that no such contract will be binding, the fact that plaintiff's injury, for which suit was brought in the federal court in Texas, occurred in Mexico, was immaterial as affecting the invalidity of such contract, when pleaded as a defense.

Pardee, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Western District of Texas.

Thos. W. Dodd, for plaintiff in error.

W. W. King, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. Neil Jackson, the defendant in error, brought his action against the Mexican National Railroad Company, the plaintiff in error (hereinafter styled

*As to the validity of contracts purporting to relieve masters from liability for negligence, see note appended to *Shook v. Illinois Cent. R. Co.* (C. C. A.), 3 R. R. R. 202, 26 Am. & Eng. R. Cas., N. S., 202.

Mexican Nat. R. Co. v. Jackson

the railroad), to recover damages for personal injuries claimed to have been received by reason of the negligence of the railroad and its servants. Besides other defenses not necessary to notice, the railroad pleaded: That it was a corporation owning and operating a line of railway in the Republic of Mexico, from the eastern margin of the Rio Grande, in Laredo, Tex., to the City of Mexico. That on the 15th day of April, A. D. 1888, before the date of the injury claimed to have been received by Neil Jackson, it had entered into a contract with the Pullman Palace Car Company (hereinafter called the Pullman Company), under and according to the terms of which the Pullman Company furnished the railroad with sleeping cars, to be owned and controlled by the Pullman Company, and (with exceptions not necessary to name) to be kept and maintained by it, and to furnish with each sleeping car one or more employees, as may be necessary, whose duty it was to collect fares for the accommodations furnished, for account of the Pullman Company, and generally to wait upon and provide for the comfort of passengers occupying seats or berths in the Pullman cars. That this contract by its terms was to run for a period of 15 years from May 1, 1888, and was in force on the 20th of December, 1900. That on the last-named date Neil Jackson was a porter upon the sleeper "Celaya," in the employment of the Pullman Company, and had been so engaged from July 11, 1900, under a contract in writing made at San Antonio, Tex., on July 11, 1900, in which contract, amongst other things, he agreed as follows:

"(1) I assume all risks of accident or casualties by railway travel or otherwise, incident to such employment and service, and I hereby, for myself, my heirs, executors, administrators, or legal representatives, forever release, acquit, and discharge the Pullman Company and its employees from any and all claims for liability of any nature or character whatsoever, on account of any personal injury or death to me in such employment or service.

"(2) I am aware that said Pullman Company secures the operation of its cars upon lines of railroads, and hence my opportunity for employment, by means of contracts, wherein the Pullman Company agrees to indemnify the corporations or persons owning or controlling such lines of railroad against liability on their part to employees of the Pullman Company in cases provided for in such contracts; and I do hereby ratify all such contracts, made or to be made, by the Pullman Company, and do agree to protect, indemnify, and hold harmless the Pullman Company with respect to any and all sums of money it may be compelled to pay or liability it may be subject to under any such contract in consequence of any injury or death happening to me; and this agreement may be assigned to any such corporations or persons, and used in its defense.

"(3) I will obey all rules and regulations made for

Mexican Nat. R. Co. v. Jackson

the government of their own employees by the corporations or persons over whose lines of railroad the cars of the Pullman Company may be operated, while I am traveling over said lines in the employment or service of the Pullman Company; and I expressly declare that while so traveling I shall not have the rights of a passenger with respect to such corporations or persons, which rights I do expressly renounce; and I hereby, for myself, my heirs, executors, administrators, or legal representatives, forever release, acquit, and discharge any and all such corporations and persons from all claims for liability of any nature and character whatsoever on account of any personal injury or death to me while traveling over such lines in said employment or service."

The railroad submitted that at the time Neil Jackson claims to have been injured he was in the Pullman Company's sleeper "Celaya," as an employee of that company as a porter, under the terms and conditions of his contract of employment, by which he had waived all rights as a passenger, and all damages for or on account of any injuries he might have received while in that employment, which the railroad here pleads in bar of any and all rights he otherwise might have been entitled to. To this plea in bar Neil Jackson excepted, on the ground that the contract on which it is based is in violation of law, and in contravention of the statute of Texas, which prohibits an employer from exacting such contract from one of its employees, and declares such contracts void. The railroad assigns as error the action of the trial court in sustaining the foregoing exception, on the grounds (1) that the statute referred to violates section 35, art. 3, of the constitution of the state of Texas, which reads: "No bill [with exceptions not necessary to note] shall contain more than one subject, which shall be expressed in the title." The statute referred to is entitled "An act to prescribe and define the liability of persons, receivers or corporations operating railroads or street railways, for injury to their servants and employees; to define who are fellow servants, and to prohibit contracts between employer and employee based upon the contingency of the injury or death of the employee, limiting the liability of the employer for damages." Laws 1897, Sp. Sess. p. 14. (2) That the act referred to is class legislation, applying especially to one class of persons, fixing limitations upon persons, receivers, or corporations operating railroads or street railways not imposed upon other persons, and is therefore in violation of the constitution of the United States.

The second ground urged to support the assignment of error seems to us to be manifestly not well taken, when we consider the utterances of the supreme court in the cases cited by the plaintiff in error. *Hayes v. Missouri*, 120 U. S. 68, 7 Sup. Ct. 350, 30 L. Ed. 578; *Railroad Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; *Walston v. Nevin*, 128 U. S. 578, 9 Sup. Ct. 192, 32 L. Ed. 544; *Bell's*

Mexican Nat. R. Co. v. Jackson

Gap Ry. Co. v. Pennsylvania, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. Ed. 892; *Railroad Co. v. Matthews*, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611; the later case of *Railroad Co. v. Matthews*, 174 U. S. 96-110, 19 Sup. Ct. 609, 43 L. Ed. 909; and the case of *Association v. Yoakum*, 39 C. C. A. 56, 98 Fed. 251.

In reference to the other ground urged in support of the assignment of error, it is conceded by counsel for the railroad that under the decisions of the supreme court of the state of Texas the most liberal construction should be given to the act to uphold its constitutionality, citing numerous cases, and making special reference to the case of *State v. Parker*, 61 Tex. 265, which announces the doctrine that none of the provisions of a statute should be regarded as unconstitutional on this ground when they relate, directly or indirectly, to the same subject, have a mutual connection, and are not foreign to the subject expressed in the title. The section of the constitution in question is not to be given a strict or literal construction. Such a construction would tend to unduly embarrass legislation. The object of the organic provision was to prevent the bringing together in one bill subjects diverse in their nature, and having no necessary connection, with a view to combine in their favor the advocates of each, respectively, and thus secure the passage of several measures neither of which could succeed on its own merits, and to prevent the inserting in bills pregnant clauses of which the title of the act gave no information, and thereby secure legislation the real scope and effect of which had escaped the attention of many members. The first section of the act in question defines the liability of persons, receivers, or corporations operating railroads or street railways. The second section defines who are not fellow servants. The third section defines who are fellow servants. The fourth section prohibits such persons, receivers, or corporations from limiting their liability to their employees. Its language is as follows: "No contract made between the employer and the employee, based upon the contingency of death or injury of the employee, and limiting the liability of the employer under this act, or fixing damages to be recovered, shall be valid or binding." The word "subjects" as used in the constitution is not synonymous with "provisions." It does not require the interest of a party or the zeal of an advocate to discern that the provisions of this statute refer directly to the same subject, have a mutual connection, and are not foreign to the subject expressed in the title.

Neil Jackson, the plaintiff below, was at the time of instituting his suit, and at the time of entering into his contract with the Pullman Company, a citizen of Texas, and a resident of the county of Bexar, in that state. His contract with the Pullman Company was made at San Antonio, in Bexar county, Tex. One of the provisions of that contract is that

Mexican Nat. R. Co. v. Jackson

"this agreement may be assigned to any such corporations or persons operating railroads, and used in its defense." It is wholly immaterial that the injury occurred in the Republic of Mexico. The citizenship of the parties, and the general law applicable thereto and to such cases, as we have held in recent decisions, and as seems to us to be settled by the decisions of the supreme court (and is not questioned in this case so far as the record shows), gave the United States court for the Western district of Texas jurisdiction of the parties and of the subject-matter. The contract on which the plea in bar reposes contemplates in its letter, on its face, and in the very nature of the contract itself that it is to be used, when used at all, as matter of defense. It does not provide, or, if it may be held to so provide, it is not urged to support any affirmative action against Neil Jackson. If it could in any state of case be sought to be enforced against him to support an affirmative recovery, it is not sought to be so enforced in this action, but it is sought to be enforced as matter in bar of Neil Jackson's suit. It is therefore unprofitable to inquire what might or might not be the result of pleading this contract in another forum. We are dealing with it as it is presented on this record, where it is sought to be enforced by one not originally a party to it against one of the makers. In the presence of the express statute on the subject (which is as binding on the circuit court of the United States sitting in Texas as it is on the state courts), we need not discuss or consider the question whether such a contract is against the general public policy. It is too clear for discussion that it is against the public policy declared by the statute, which fixes the law on that subject for the tribunal which took and rightfully exercised jurisdiction in this case. Therefore we do not discuss the bearing of the case of Railroad Co. v. Voight, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560, nor express any view as to the similarity or identity of the question presented and answered in that case to the question that would arise on the plea in this case in the absence of the statute. We have carefully examined and considered the decision and all the reasoning of the opinion in the Voight Case. But holding, as we do, that the contract which is attempted to be made the basis of the plea in bar falls within the provisions of the Texas statute, and is manifestly sought to be used to avoid those provisions, it seems to us superfluous to discuss the distinction between the liability of a common carrier and the liability of the same carrier as a private carrier, as is exhaustively done in the cases reviewed in the opinion in the Voight Case. And whether the relation of the porter on the Pullman car to the transportation company, in cases like the present one, more nearly resembles that of an employee than that of a passenger, or whether he is, technically, the one or the other, seems to us to be entirely immaterial, under the comprehen-

Hollingsworth v. Chicago, etc., Ry. Co

sive provisions of the statute. We consider that the case before us presents only the question, is the statute of Texas a valid law? We hold that it is, and that the plea in bar has no support.

The judgment of the circuit court is therefore affirmed.

PARDEE, Circuit Judge, dissents.

HOLLINGSWORTH v. CHICAGO, I. & L. Ry. Co.

(Supreme Court of Indiana, Dec. 16, 1902.)

[65 N. E. Rep. 750.]

Death of Brakeman—Low Bridge—Absence of Telltales.

A brakeman killed by a low bridge while riding on top of a train cannot be presumed to have been thrown off his guard or deceived by the absence of telltales, where it was not alleged that he had any knowledge of telltales, or that he knew what they were intended for, or that they were in common use on railroads as a means of warning, or that he knew defendant had erected, or pretended to erect, any warning device at such bridge.

Same—Same—Assumption of Risk.*

A brakeman who had been repeatedly warned, and knew from his own observation, that it was dangerous to ride on top of the train while passing under a certain bridge, and voluntarily continued in the employment without assurance that the danger would be abated, assumed the risk.

Appeal from circuit court, Clark county; James K. Marsh, Judge.

Action by Marshall P. Hollingsworth, administrator, against the Chicago, Indianapolis & Louisville Railway Company. From a judgment for defendant, plaintiff appeals. Transferred from the appellate court under section 13370. Burns' Rev. St. 1901. Affirmed.

See 64 N. E. 1127.

M. W. Fields and C. L. & H. E. Jewett, for appellant.

E. C. Field, W. S. Kinnan, and M. Z. Stannard, for appellee.

HADLEY, C. J. Appellant, as administrator of William A. Francis, deceased, prosecutes this action to recover damages on account of the death of his decedent, alleged to have been caused by the negligence of appellee. The only error assigned calls in question the action of the trial court in sustaining appellee's motion for judgment in its favor on the answers of the jury to the interrogatories, notwithstanding the general verdict in favor of appellant.

The negligence charged is the constructing and maintaining of an overhead bridge at a point where the highway crosses appellee's railroad near the town of Putnamville; the charge being that the bridge was constructed, and had been so main-

*See *Myers v. Chicago, etc., Ry. Co.* (C. C. A.), 14 Am. & Eng. R. Cas., N. S., 749, and foot-note.

Hollingsworth v. Chicago, etc., Ry. Co

tained for many years, at such a height from its track that there was less than five feet of space between the bridge and the top of the box freight cars used by the company, when said cars were moving under the bridge; that the brakes to said cars were so constructed that they could be operated only by brakemen standing on the top of the cars; that the space between the top of a moving freight train and the bridge was so limited that it was impossible for a brakeman to stand or operate the brake on the top of a box car, while the same was passing under, without being struck by the bridge, and this appellee well knew, because previous to the death of the intestate, at different times, 19 other brakemen in its employ had been killed or injured by coming in contact with the same bridge while in the performance of their duties on the top of freight trains running thereunder; that, on account of its dangerous character, it was the duty of the company to erect, at a proper distance from the bridge, signals known as "telldales," to warn brakemen of the proximity of the bridge, and the company, in erecting such telldales, had negligently constructed them so high above the track and cars as to be ineffective, and negligently permitted the ropes of which said signals were composed to become and remain wound around the beam to which they were attached, and negligently permitted the ropes to become and remain worn off at the ends, and so frayed and unraveled that they were, and had been for a long time, to the knowledge of the company, wholly insufficient as a means of warning to the brakemen. It is further alleged that appellee's said railroad runs from New Albany, Ind., to Chicago, Ill.; that the decedent had, but two days before his death, been employed by appellee as a brakeman on its freight trains running between New Albany and Chicago, and was killed while performing his duty on the top of a box car, by being carried while on a moving train into violent contact with said bridge; that, at the time of the fatal accident, intestate was wholly ignorant of the dangerous character of the bridge, and ignorant of its position and location, and of the fact that appellee had permitted the telldales to get out of repair and become inadequate to give warning of the proximity of the bridge. The answer is a general denial.

The facts disclosed by the answers to interrogatories, in substance, are these: At the time of his death the deceased was 36 years of age, 5 feet 8 inches high, and was employed by the company as an extra brakeman June 14, 1899, and continued in service as an extra brakeman until July 7, 1899. On five occasions prior to his death he passed under said bridge in the daytime, and was warned two or three times of its dangerous character by the conductor. A week or ten days before his death he was on a south-bound train that stopped at Putnamville to discharge freight. As the train started southward, while he was climbing up the ladder on the side of a box

Hollingsworth v. Chicago, etc., Ry. Co

car to the top, the conductor warned him that, unless he lay down, the overhead bridge, which was near by, "would cut him off at the pockets," and, heeding the warning, Francis prostrated himself on the top of the car while he passed under the bridge. Francis had opportunity after his employment, on several occasions, as he passed over the road, to ascertain that the bridge at Putnamville was a low bridge, and dangerous to one standing on a box car while it was passing under it. At 9 o'clock a. m. on July 7, 1899,—the same being a bright morning,—the deceased, being on a north-bound train, while sitting on a brake wheel which extended 2 feet and 1 inch above the top of the car, with his back to the bridge, with his hat over his eyes, and head drooped as if asleep, was struck by the bridge and killed. Within a distance of 130 feet there was nothing to obstruct a view of the bridge, and if the deceased, within that distance, had looked,—which he did not do, though he was not so engaged as to prevent it,—he might have seen the bridge and avoided the injury. To warn brakemen of the proximity of the bridge, the company had previously, at a point 240 feet south of the bridge in question, constructed telldales, composed of ropes 1 inch in diameter, 8 inches apart, suspended in vertical sections from a beam across, and 23 feet above, the track, so as to touch and drag harmlessly over the person of a brakeman who happened to be on top of a box car; but the company at the time of the injury had permitted the telldales to become frayed, worn off, and so shortened as to be of inadequate length for the purpose designed, while, if they had been of proper length and in proper condition, Francis would probably have been warned of the nearness of the bridge. That he lost his life on account of the dangerous character of the bridge, and the imperfect condition of the telldales. The deceased was in a proper place and in the discharge of his duties when killed, and was not able to escape after he discovered the nearness of the bridge. Counsel for the company admit that both the general verdict and answers to the interrogatories establish the negligence of appellee as alleged, and furthermore that the general verdict is a finding of all the material facts against the appellee, and that the same must stand unless the answers to the interrogatories state the existence of facts that are in irreconcilable conflict with the general verdict. These admissions remove from the case all the questions discussed, except that relating to the assumption of risk by the intestate.

The complaint is constructed upon one theory,—that the bridge was erected and maintained at a height so low that a brakeman could not safely ride thereunder on top of a box car, and that such condition was known to appellee and unknown to the decedent. The averments concerning telldales do not pretend to constitute an independent, substantive, charge of negligence; but their insufficient condition is set forth as an element entering into, and forming a part of, the dangerous

Hollingsworth v. Chicago, etc., Ry. Co

character of the bridge. But for this purpose, as we view the complaint, they amount to nothing more than surplusage. It is nowhere alleged that the deceased had any knowledge of telldales, or that he knew what they were intended for, or that they are in common use on railroads as a means of warning, or that he knew appellee had erected, or pretended to erect, any warning device at its Putnamville bridge. We cannot presume such knowledge, in aid of the complaint; and without knowing something about telldales, their object and purpose, or that some such device was in common use on railroads as a means of warning against low bridges, it cannot be assumed that the deceased was thrown off his guard or deceived by their absence, in his approach to the bridge. It would not do to say that he was misled by the absence of that which he did not know or have any cause to believe existed. We must therefore eliminate from consideration, as not being within the issues, the discussion concerning the impaired telldales.

Certain general principles have been so often declared by this court that we deem it unprofitable to cite cases: (1) A railroad company owes to its employees the duty to observe reasonable care in the construction of its road, including all lateral and overhead structures that affect their safety; and, if it fails to construct and maintain its overhead bridges of sufficient height to make them safe for its employees who are required to work on top of moving trains as they run under them, the company is guilty of actionable negligence to one who without fault is injured thereby. (2) A degree of peril being necessarily incident to service on a railroad train, one accepting such service impliedly agrees to take upon himself the risk of all ordinary and usual dangers that attend such service. (3) An employee has the right to presume that his employer has performed all those duties which the law imposes upon him, and the former does not, therefore, assume a risk which arises out of the latter's negligence. (4) But it is the duty of an employee, in all situations, to be vigilant for his own safety; and when the negligence of his employer has produced an extra hazardous condition, which has become known to the employee, or the dangerous condition is so obvious that an ordinarily prudent person would have seen it, and such employee thereafter, with knowledge of the extent of the peril, voluntarily enters upon or continues in such employment without the promise of the employer to remove it, he will be held to have assumed the risk, and without the right of recovery against the employer for any injury suffered therefrom. *Railroad Co. v. Kemper*, 147 Ind. 561, 47 N. E. 214; *Railway Co. v. Sandford*, 117 Ind. 265, 19 N. E. 770; *Railway Co. v. Watson*, 114 Ind. 20, 14 N. E. 721, 15 N. E. 824, 5 Am. St. Rep. 578.

View as we will the conduct of appellee in maintaining the bridge at Putnamville, which in the previous 25 years had

Hollingsworth v. Chicago, etc., Ry. Co

caused the death or injury of 19 of its employees, according to the complaint, we are thereby furnished with no legal warrant to excuse the decedent, if, with knowledge of the dangerous character of the bridge, he voluntarily continued to encounter it. And this the answers to the interrogatories show that he did. He had passed the bridge five times in daylight. Two or three times he had been warned by those in charge of his train, and ten days before his death, when but a short distance from the bridge, and about climbing to the top of a car, he received from the conductor such pointed caution as induced him to lie down upon the top of the car while the train passed under the bridge. These several warnings, and the observations that he necessarily must have made as he lay prostrate upon the car as the same passed under the bridge, were sufficient to impress one of ordinary understanding and caution with the gravity of the danger to one caught on top of a moving train at that place. Having been thus acquainted with the bridge and its hazards, he was no longer in a position to be deceived by it, or to be protected by the presumption that the bridge had been safely constructed. He then knew as much as his employer about its dangerous character; they were then on an equal footing; and the voluntary continuance of the deceased in the employment, without assurance from appellee to abate the danger, was an assumption of the risk. It is no justification of his conduct to say that appellee's railroad was more than 100 miles long, and that the deceased was an extra brakeman, had been but five times over the road in daylight, and had not had sufficient time and opportunity to become acquainted with the many varying physical aspects of the long line of the road, so as to discern, by the exercise of caution, the proximity of the bridge. The answers show that he did know, or had sufficient opportunity to know,—which amounts to the same thing,—that somewhere on the line of the road was a dangerous overhead bridge; and, thus knowing, he was found to approach the bridge sitting on a brake wheel, with his back to the forward end of the train, with his head drooped, and his cap pulled over his eyes. This apparently thoughtless conduct, however, is unimportant. Having, by continuing in the service after notice of the danger, impliedly agreed to take his chances of injury by the bridge, his observance of caution and care in approaching it would not have strengthened appellant's claim. The issue tendered by the complaint is that the intestate did not know of the dangerous bridge. The answers of the jury are to the effect that he did know of it. If he did know of it, as we have seen, and voluntarily continued to encounter it, his next of kin cannot recover, and this universal rule arrays the answers to the interrogatories in irreconcilable conflict with the general verdict for appellant.

We find no error. Judgment affirmed.

DRAKE v. AUBURN CITY RY. CO.

(Court of Appeals of New York, Feb. 10, 1903.)

[66 N. E. Rep. 121.]

Injury to Employee—Assumption of Risk.*

Plaintiff's intestate was conductor on a street railway, and was killed by coming in contact with a tree near the track. He had been over the road about 160 times as conductor and about 50 trips as motorman, and was familiar with the situation: *held* that, by continuing in the employment with the knowledge of the facts, deceased assumed the risk, and it was error to submit the question of defendant's negligence to the jury.

Appeal from supreme court, appellate division, Fourth department.

Action by Carrie E. Drake, administrator of Delbert M. Drake, against the Auburn City Railway Company. From a judgment of the appellate division (75 N. Y. Supp. 1124) affirming a judgment for plaintiff, defendant appeals. Reversed.

William Nottingham, for appellant.

Danforth R. Lewis, for respondent.

BARTLETT, J. On the 4th day of July, 1899, the intestate, a conductor on one of the cars of the defendant, was killed; and this action is brought by his widow, the administratrix, to recover damages. The defendant's railroad runs southerly from the city of Auburn to Owasco Lake. The northerly portion of the road is within the city limits, and the remainder, for a distance of some two miles, is in the town of Owasco; running along Owasco street to a park upon the shore of the lake. On the westerly side of Owasco street is a row of large trees for almost the entire distance from the city line to the lake. The commissioner of highways of the town of Owasco issued a permit for the construction of this portion of the road, in which it was provided that it should be "constructed and laid upon the westerly side of said highway, so that the easterly rail of said track shall be within eight feet from the line of trees standing and growing upon the west side of said highway." The evidence establishes that under this mode of construction the nearest point of the car to the trees was about 21 inches. At the time of the accident the intestate was conducting what is known as an "open car" (this being a trolley line), with a running board upon each side, from which the conductor collected fares and discharged his general duties in the premises. The car was running south towards the lake, and at the time of the accident the intestate was standing upon the running board, on the westerly or right-hand side of the car, nearest the trees. The evidence shows that the travel on this holiday was heavy, and

*See generally, foot-note appended to *Kenney v. Meddaugh* (C. C. A.), 5 R. R. R. 226, 28 Am. & Eng. R. Cas., N. S., 226.

Drake v. Auburn City Ry. Co

at the time of the accident, between 2 and 3 o'clock in the afternoon, it was raining slightly. The intestate had collected the fares, and was engaged in adjusting a curtain, at the request of a passenger, when in some manner his head came in contact with a tree, resulting in a fracture of the skull, causing death. There was a sharp conflict of evidence as to the condition of the track at the point where the accident occurred. The plaintiff's evidence tended to show that at this point there was a slight curve, of 1 degree, and that the inner rail, which was nearest the trees, should have been depressed about 1 inch in order to overcome it; that, as matter of fact, this rail was depressed about $4\frac{1}{2}$ inches. This condition was due, according to plaintiff's witnesses, to the dangerous and decayed condition of the ties, which were covered with dirt and sod. The fish plate that held the rails together at the joint was broken, one of the bolts gone, and several spikes drawn from the ties. If the jury believed this evidence they were justified in finding that the effect of this condition of the track was to cause the car to lean over, more or less, toward the line of trees. There was also evidence tending to establish the fact that the tree against which the intestate's head struck leaned somewhat toward the track, and at the point of contact was some 12 inches nearer the track than at its base. The defendant not only contradicted, to some extent, this evidence in relation to the condition of the track, but gave proof tending to show, as is contended, contributory negligence on the part of the intestate, by reason of the fact that the open cars had been provided with a signal bell cord and register rope on each side, so as to enable conductors, under instructions, to avoid, as much as possible, the use of the running board nearest the trees. The plaintiff, in reply, gave evidence to the effect that the usual way for passengers, in entering and leaving the car when traveling south in the town of Owasco, was on the westerly side; that it was a part of the conductor's duty, under the rules, to assist women and children on and off the car; and that it was quite impossible for the intestate, under the conditions existing at the time of the accident, to wholly operate his car from the easterly running board.

In this state of the record, there were two questions for the consideration of the jury, on conflicting evidence, to wit, as to the condition of the track, and the contributory negligence of the intestate. It is urged by the counsel for the defendant that the trial judge erred, in his charge to the jury, in submitting for their consideration an additional question, as to the general liability of the defendant by reason of operating its road so near the line of trees in question. The charge bearing upon this point is as follows: "It will be for you to say whether, as a fact, negligence is attributable because of the condition of things. Negligence is a question of fact for the jury, and it will be necessary for you to pass upon that

Drake v. Auburn City Ry. Co

question. If the track was maintained so near the tree that conductors, in the performance of their ordinary duties, while performing them carefully and with due regard for their own safety, were likely to receive such an injury as this, then it is a fact upon which you may predicate negligence on the part of the defendant. If you find it to be dangerous,—if you find the track to be so near the tree as alleged, and likely to cause such an injury,—you will be justified in saying that the defendant was negligent in maintaining its road in the position so near that object." The trial judge then charged the jury as to the defendant's negligence growing out of the condition of the track, concerning which there is no objection.

It was clearly error to submit to the jury the question whether it was negligence on the part of the defendant to maintain its road so near the line of trees. It appears from the defendant's evidence that the intestate had been over the road about 160 times as a conductor, and about 40 or 50 trips as a motorman, and consequently was familiar with the situation. The claim of the defendant is that whatever peril existed by reason of the proximity of these trees was, under the circumstances, an obvious risk, which was assumed by the intestate. It is well settled that the risks of the service a servant assumes in entering upon the employment of a master are only those which occur after the due performance by the employer of those duties which the law enjoins upon him. *Benzing v. Steinway & Sons*, 101 N. Y. 552, 5 N. E. 449; *McGovern v. Central Vermont R. R. Co.*, 123 N. Y. 280, 25 N. E. 373. This rule, however, as to the risks of the service, or ordinary risks, in connection with the duty of the master to furnish a safe place in which a servant is to work, has no application to the situation here presented. It is often a close question to determine whether a single obstruction, located too near the track of a railroad, causing the death of an employee on a passing train, is or is not an obvious risk that he assumed. In the case before us no such difficulty is presented. The intestate, when passing over this road frequently, was fully advised as to the proximity of the trees, and if, in his opinion, there was peril in operating an open car, it was his duty to have retired from the employment. As he failed to do this, it must be held that he assumed whatever risk there was in the situation. *Gibson v. Erie Railway Co.*, 63 N. Y. 449, 20 Am. Rep. 552; *De Forest v. Jewett*, 88 N. Y. 264; *Sweeney v. Berlin & Jones Envelope Co.*, 101 N. Y. 520, 5 N. E. 358, 54 Am. Rep. 722; *Appel v. Buffalo, N. Y. & P. Railway Co.*, 111 N. Y. 550, 19 N. E. 93; *Williams v. Del., L. & W. R. R. Co.*, 116 N. Y. 628, 22 N. E. 1117; *Crown v. Orr*, 140 N. Y. 450, 35 N. E. 648; *Kennedy v. Manhattan Ry. Co.*, 145 N. Y. 288, 39 N. E. 956; *Maltbie v. Belden*, 167 N. Y. 307, 312, 60 N. E. 645, 54 L. R. A. 52. The rule of the assumption of obvious risks does not rest wholly upon the implied agreement of the employee, but on an independent

Louisville & N. R. Co. v. Gilliam's Adm'x

act of waiver, evidenced by his continuing in the employment with a full knowledge of all the facts. In *O'Maley v. South Boston Gaslight Co.*, 158 Mass. 135, 32 N. E. 1119, 47 L. R. A. 161, the supreme judicial court of Massachusetts uses this language: "The doctrine of the assumption of the risks of his employment by an employee has usually been considered from the point of view of a contract, express or implied; but, as applied to actions of tort for negligence against an employer, it leads up to the broader principle expressed by the maxim, 'Volenti non fit injuria;' one who, knowing and appreciating a danger, and voluntarily assumes the risk of it, has no just cause of complaint against another who is primarily responsible for the existence of the danger. As between the two, his voluntary assumption of the risk absolves the other from any particular duty to him in that respect, and leaves each to take such chances as exist in the situation, without a right to claim anything from the other. In such a case there is no actionable negligence on the part of him who is primarily responsible for the danger."

The counsel for the defendant makes the additional point that negligence on the part of the company could not properly be predicated upon the location of its tracks on the side of the street, as it had no choice in the premises, but was compelled to obey the direction contained in the permit of the highway commissioner of the town of Owasco. The defendant can claim no immunity by reason of the terms of this permit, and we rest our decision upon the error in the charge already pointed out.

The judgment and order appealed from should be reversed, and a new trial ordered, with costs to abide the event.

HAIGHT, MARTIN, CULLEN and WERNER, JJ., concur. PARKER, C. J., concurs in result. O'BRIEN, J., absent.

Judgment reversed, etc.

LOUISVILLE & N. R. CO. v. GILLIAM'S ADM'X.

(*Court of Appeals of Kentucky, Feb. 5, 1903.*)

[71 S. W. Rep. 863.]

Injury to Employee—Breaking of Train—Negligence.

Evidence in an action for the death of a railroad fireman, occasioned by the breaking in two of the train and the subsequent collision of the sections, whereby deceased was hurled from the tender, considered, and *held* to justify the submission to the jury of the question of defendant's negligence in failing to have the conductor and brakeman stationed in their proper places on the train so as to discover the break.

Same—Same—Willful Negligence—Punitive Damages.

The train on which decedent was a fireman broke in two between stations, and on the stoppage of the first section for water the second collided with it, hurling decedent, who was at the time on

Louisville & N. R. Co. v. Gilliam's Adm'r

the tender, adjusting the water spout, to the ground, causing his death. None of the employees on the train were aware of the break, the conductor and one brakeman being in the passenger coach, another brakeman in the cab with the engineer, and the third unaccounted for in the testimony, except that one witness testified that at or immediately after the collision he saw him on the caboose: *held*, that the evidence warranted an instruction on punitive damages on the ground of willful negligence.

Appeal from circuit court, Logan county.

"Not to be officially reported.

Action by J. H. Gilliam's administratrix against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. F. Browder, J. C. Browder, B. D. Warfield, and Edward W. Hines, for appellant.

B. F. Proctor, for appellee.

NUNN, J. The appellant has appealed from a judgment of the Logan circuit court against it for the sum of \$10,000 in favor of appellee for the death of her intestate, J. H. Gilliam, caused by the negligence of its agents and servants superior in authority to him. The facts, in substance, are as follows: The decedent was a fireman on the train of appellant, composed of an engine and tender, 13 box cars, a passenger coach, and a caboose. The box cars were loaded, and the seven box cars next to the engine had air brakes; the others without air brakes. The train crew was composed of a conductor, engineer, three brakemen, and a fireman, the deceased. This train and crew started from Russellville to Owensboro, Ky., on the morning of the 13th of February, 1900. The last stop made before Gilliam lost his life at Pettit station was at Crow Hickman, about four miles from Pettit. Between these two stations the train parted in some way, not known, and in stopping the train for the engine to take water at Pettit the detached portion ran against the front part, and the collision knocked the intestate off of the tender, where he had gone in the discharge of his duty to adjust the spout of the water tank to take water. He was badly bruised, and unconscious when found, and died in a few hours. The proof in the record shows that the conductor was in the passenger coach, making out a report of his trip; one brakeman was on the passenger coach with him; the front brakeman was in the cab with the engineer; and the other, or middle, brakeman was not located on the train (he did not testify). One witness stated that at the time or immediately after the collision he saw him sliding down a rod on the caboose. Some half a dozen witnesses who lived at Pettit and along the railroad track back in the direction of Crow Hickman state that they did not see any one on the train of cars except the brakeman who was on the front end of the passenger coach, and appeared to be setting the brake. The first witness who saw that the train had parted was about a mile back from Pettit, and stated

Louisville & N. R. Co. v. Gilliam's Adm'r

that the sections were about 250 yards apart then, and that the detached portion was gaining on the front portion; and the next witness, about a half mile from Pettit, stated that when the train passed him the sections were about three car lengths apart, and the rear section was gaining on the front; and when the train arrived at Pettit the witnesses vary from one to two car lengths apart. The water tank is 300 or 400 yards further on. The conductor, engineer, and the two brakemen who testified stated that they did not know that the train had parted, nor what caused it; that the track was straight, and there were some high and some lower cars in the train, and the high cars cut off their view, and therefore they did not see the break in the train. Not one of them states that he made any effort to see the condition of the train between said stations, nor was there a brakeman in his proper place or position on the train, and the engineer and conductor both knew of this fact, and made no effort to have them in their proper places. The rules of the company were introduced as evidence, and the same, with the other evidence, showed that the conductor's place was in the cupola of the caboose; the brakemen's on the top of the train, one at the rear end, one in the middle, and the other on the front end. All were violating the rules, and by reason thereof the intestate lost his life.

The lower court refused to give a peremptory instruction offered by appellant. The court did right in this. The court, at the instance of the appellee, gave to the jury five instructions, to the giving of all of which the appellant objected and excepted. Appellant then offered seven instructions, and the court gave them all, without objection from appellee. The twelve instructions submitted to the jury cover every conceivable hypothesis of the case. They had two approved definitions of "gross negligence." All the instructions, taken together, were more favorable to appellant than it was entitled to.

The appellant contends that the court should not have given the instruction on punitive damages. We think that the court did not err in giving same. In the case of *Newport News & M. V. Co. v. Dentzel's Adm'r*, 91 Ky. 45, 14 S. W. 958, it appears that Dentzel was the head brakeman, and was in his proper place on the train, near the front end. The train parted, and left him on the front portion. The engineer increased the speed of the engine to keep out of the way of the rear portion, and blew his whistle for the rear section to put on the brakes. Supposing that they had done so, he checked the engine, and immediately there was a collision, and Dentzel lost his life by reason thereof. The conductor was in the caboose, and the rear brakeman was with him. The court, on these facts, said: "While the appellant is not liable to an employee for injury arising from the neglect of a co-laborer not superior to the one injured, yet in this in-

Kitzberger v. Chicago, etc., R. Co

stance the conductor, who was in charge of the train, was a party to the neglect. He not only permitted it upon the part of the rear brakeman, but also failed to give attention otherwise to the conduct of the train. The rule of respondeat superior, therefore, applies, and it is evident that the neglect was willful. It was an intentional failure upon the part of the one in charge of the train, and who represented the company, to perform a known and manifest duty, important to the safety of the deceased." The court did not err in giving said instruction.

The appellant insists that the lower court erred in overruling its plea to the jurisdiction of the Logan circuit court. It claims that appellee was a resident of Daviess county, Ky., and that her intestate's death occurred there, and appellant's residence or home office was in Jefferson county, Ky. Appellee admitted all this, except she denied that she was at the time or then a resident of Daviess county, Ky, and alleged that at the time of bringing the action and at that time she was a resident of Logan county, Ky. On the first plea the only evidence heard was that of appellee, and the court dismissed the plea of appellant. About one year after this order was made the appellant filed another plea to the jurisdiction, in which the same allegations were made, and also charged that appellee obtained the first order in her favor by fraud and false testimony. The court again heard all the testimony, and decided the question in favor of appellee. Conceding that the first order was not final,—which we do not decide,—the court, on the second application, heard all the evidence, saw and knew most of the witnesses, and, since the evidence was conflicting, we do not feel justified in deciding that appellee made a false statement when she said that her resident in Owensboro was only a temporary residence; that she claimed her residence all the time in Logan county, Ky., and that Logan county, Ky., at the time she instituted this action, was her place of residence.

The verdict appears large, but when considered in the light of all the facts introduced in evidence, and the age (29), strength, and health of the deceased, we cannot say that the jury exceeded the amount the appellee was entitled to recover. Wherefore the judgment of the lower court is affirmed.

KITZBERGER v. CHICAGO, R. I. & P. R. Co.

(Supreme Court of Nebraska, March 4, 1903.)

[93 N. W. Rep. 935.]

Degrees of Negligence—Harmless Error.

While no degrees of negligence are recognized in this state, and the use in instructing a jury of the word "slight" to characterize either negligence or contributory negligence is not approved, where

Kitzberger v. Chicago, etc., R. Co

the finding of the jury is amply supported by evidence, a judgment will not be reversed on account of such use of the word.

Injury to Trackman—Care Required for Own Safety.

A trackman on a railroad, whose opportunities to observe any of the dangers incident to his employment are as good as are those of his foreman, is not at liberty to rely upon the foreman entirely for his safety. He should call attention to dangers observed by him.

Commissioners' opinion. Department No. 1. Error to district court, Douglas county; Keysor, Judge.

"Not to be officially reported."

Action by Wencel A. Kitzberger against the Chicago, Rock Island & Pacific Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

E. T. Farnsworth and J. L. Kaley, for plaintiff in error.
Woolworth & McHugh, for defendant in error.

HASTINGS, C. Plaintiff in this case commenced his action in the district court of Douglas county against the defendant company, asking judgment in the sum of \$1,995 for an injury received by falling in a jump from a hand car while working as a trackman or section laborer on defendant's road. He alleges that on January 23, 1900, the defendant's foreman ordered him and four other sectionmen to take a hand car at Albright and start southwestward to a place of work about three miles from Albright; that, while proceeding under the direction of the foreman, and after they had gone about two miles, the noise of an approaching freight train, which was coming on its regular schedule time, was heard behind, through a deep cut and around a curve along which the hand car was proceeding; that plaintiff and the other men were at once ordered to remove the hand car from the track; that the freight train was coming about 30 miles an hour, and close behind; that the brakes were applied to the hand car, but the tracks were frosty and slippery, and the brakes would not control it, and the wheels slipped for a long distance on the tracks; that there was no sand upon the hand car for the purpose of placing upon the track, and the hand car was in imminent danger of being run down by the freight train; that plaintiff was on the rear end of the hand car, and, after using all efforts to stop it, fearing that it would be overtaken, and knowing that his life was in danger, without fault or negligence, he stepped back upon the ground, and in so doing fell and broke his left wrist; that, immediately after the plaintiff stepped off, the freight train came up, and the other men had barely time to remove the hand car from the track. He says that the hand car was defective, unsafe for use, and had no proper brake; that it was negligence on the part of the foreman to start the hand car ahead of the freight train, knowing that by its schedule time the latter would immediately overtake the hand car; that the company was negligent in using the car without a proper brake, and without sand or appliances for stopping it, and negligence in not, through its foreman,

Kitzberger v. Chicago, etc., R. Co

stopping the hand car much sooner, and while the freight train was at a safe distance.

The defendant admitted the receiving of an injury by plaintiff, but denied that it was the result of any carelessness or negligence of its foreman, but alleged that the injury was caused by plaintiff's own carelessness and negligence; that the character and condition of the hand car, and of the tracks and the schedule time of the freight train, were all known to the plaintiff, and he assumed all the dangers and risk incident thereto, and negligently and carelessly alighted from the car while the same was in motion, and thereby received the injury. This answer was denied. The jury returned a verdict for the defendant. Motion for a new trial was filed, and from the judgment rendered on the verdict the plaintiff brings error. The errors complained of relate wholly to instructions given and refused by the trial court.

The complaint as to the instructions given is of No. 1, which contained this statement: "Contributory negligence is any degree of carelessness, however slight, on the part of a person injured, which co-operates in producing the injury complained of;" and of No. 3, that, if the jury found that defendant's negligence was the direct cause of plaintiff's injury, they should return a verdict for the plaintiff, "unless you further find from a preponderance of the evidence that the plaintiff was guilty of a want of care of some degree, however slight, which contributed to the happening of the accident in question." The "however slight" in these two instructions is claimed to be error calling for a reversal of the case. It would hardly seem so. The jury we fully and carefully instructed in several places that whoever charges carelessness and contributory negligence must establish it by a preponderance of the evidence. They were also told what would constitute negligence in the act of jumping off. While a large number of cases are cited from this court discountenancing the use of the term "slight" in negligence cases, it is not claimed, and could not be, that the instructions, taken as a whole, did not fully and distinctly apprise the jury that contributory negligence which would serve to defeat the plaintiff's claim must be such as would aid in causing the injury complained of. The evidence seems to us hardly sufficient to establish negligence on the part of the defendant, and it seems ample to sustain a finding that the act of plaintiff in stepping off the car was not in the exercise of due caution on his part. The plaintiff himself swears that he was not unaccustomed to stepping back from the car while it was in motion. Another workman stepped off at the same time and was not injured; as plaintiff says, laughed at the latter for his fall. Plaintiff fell between the rails, striking one wrist across the rail at that side, and so fracturing it; he then arose, followed on, still between the rails, to the hand car, which had stopped in two rails length, and helped to lift off the hand car, which was safely out of

Kitzberger v. Chicago, etc., R. Co

the way when the train passed. While we do not wish to modify anything which is said in *Village of Culbertson v. Holliday*, 50 Neb. 229, 69 N. W. 853, or in *M. P. R. R. Co. v. Fox*, 60 Neb. 531, 83 N. W. 744, or in *City of Friend v. Burleigh*, 53 Neb. 680, 74 N. W. 50, or in *O. S. R. Co. v. Craig*, 39 Neb. 603, 58 N. W. 209, as to degrees of negligence, and the use of the term "slight" in defining or describing negligence or contributory negligence, we do not think the verdict of this jury should be disturbed because of these two instructions.

The other error complained of is the refusal of the following instruction: "You are instructed that if you find from the evidence that the section foreman, Logan, had power and authority to hire and discharge the section hands, including the plaintiff, and that said Logan had charge, control, and direction over said sectionmen at the time of the injury complained of, that by the terms of their hiring or agreement said sectionmen were bound to obey the orders of said Logan, and that at the time and under the circumstances it was attended with unusual and peculiar hazard to proceed to ride to the place of work on said hand car ahead of said freight train, without stopping said car in time for said train to pass it, on account of the approaching train, that Logan knew and had time, the power and authority, and ability to notify said men and warn them of the near approach of said train, that said sectionmen relied upon said Logan to give said notice and warning, and that he failed to stop said car in time for the men thereon to alight with safety, and that in consequence thereof the plaintiff met with the injury complained of, then in that case you are instructed that this was negligence for which the defendant company was responsible." It was not error to refuse to give this instruction. It involves a number of elements which do not appear in the present case. There is nothing to show that the sectionmen were relying upon their foreman. The train is alleged to have been on schedule time. Plaintiff says that as they were leaving Albright on the hand car they saw the train coming in. He also says that its whistle was heard. There seems nothing to warrant an instruction authorizing a verdict on the basis that the situation of this sectionman was one of unusual peril. The passage of trains on their regular time is a constant incident of a trackman's employment. This refused instruction is taken substantially from the case of *C., St. P., M. & O. R. Co. v. Lundstrom*, 16 Neb. 254, 20 N. W. 198, 49 Am. Rep. 718. In that case men employed on a construction train were sent by their conductor to widen a passage through snow in a deep cut, where they could not climb out. While there, they were struck by a passing train of whose coming the conductor entirely failed to warn them. Such failure was held negligence on the part of the construction train conductor, and he was held to be a vice principal for whose acts

Savannah, etc., Ry. v. Williams

and negligence the company was liable. The men were under his orders. They were sent by him where they could not look out for their own safety, and he neglected the commonest precaution to warn them. It was the man's duty to obey the conductor's orders unless "their execution would carry him into palpable danger," says the opinion. In the present case, whatever danger there was could be seen as plainly by plaintiff as by the foreman. He made no objection to starting with the hand car, nor to remaining on the track with it till the brakes were applied. If there was danger, it was, as plaintiff's testimony shows, audible and visible, if not "palpable." It was not error to refuse this instruction under the evidence in this case.

It is recommended that the judgment of the district court be affirmed.

KIRKPATRICK and LOBINGIER, CC., concur.

PER CURIAM. The conclusions reached by the Commissioners are approved, and, it appearing that the adoption of the recommendations made will result in a right decision of the cause, it is ordered that the judgment of the district court be affirmed.

SAVANNAH, T. & I. OF H. RY. v. WILLIAMS.

(*Supreme Court of Georgia, March 17, 1903.*)

[43 S. E. Rep. 751.]

Street Railroads—Injury to Employee—Negligence of Fellow Servant.*

A chartered street railroad is a railroad company within the meaning of sections 2297 and 2323 of the Civil Code of 1895, and therefore is liable to one servant for injuries inflicted by the negligence of a fellow servant.

(Syllabus by the Court.)

Error from City Court of Savannah; T. M. Norwood, Judge.

Action by Zaid Williams against the Savannah, Thunderbolt & Isle of Hope Railway. Judgment for plaintiff, and defendant brings error. Affirmed.

Osborne & Lawrence, for plaintiff in error.

Twiggs & Oliver, for defendant in error.

LAMAR, J. The sole question in this case is whether a street railroad is a "railroad company" within the meaning of sections 2297 and 2323 of the Civil Code, making railroad companies liable to one servant for injuries inflicted by a fellow servant. The importance of the question, the fact that it has never been directly decided by this court, that the decisions outside of this state are in some conflict, and that the courts of Texas and Minnesota have reached a conclusion dif-

*See *Board of Railroad Com'rs v. Market St. Ry. Co.* (Cal.), 23 Am. & Eng. R. Cas., N. S., 21, and foot-note.

Savannah, etc., Ry. v. Williams

erent from ours, makes it proper to refer to the authorities at some length. We think the conflict is more apparent than real, and that close examination will show that there was always present some special reason for holding that a street railroad was not a railroad within the meaning of the statute under consideration.

A statute giving a laborer a lien on railroads does not apply to a street railroad, since the fee of the street on which the track is laid is in the city. *Front Street Cable Road v. Johnson* (Wash.) 25 Pac. 1084, 11 L. R. A. 693. Street Railroads are not within the jurisdiction of the California Railroad Commission. The court reached this conclusion on general principles, though the act itself was limited to companies owning railroads "other than street railroads." *Board R. Com'rs v. Market St. Ry. Co.* (Cal.) 64 Pac. 1065. A horse railroad is not a railroad within the meaning of a statute which provides that every engine or train shall be brought to a full stop before crossing a railroad. Taft, J., in *Byrne v. Kansas City R. Co.*, 9 C. C. A. 666, 61 Fed. 605, 24 L. R. A. 693. A statute referring to any railroad corporation whose line is wholly or partly within Montana, or reaches the boundary thereof, and giving a judgment for injury to the person a lien superior to a mortgage on the property, evidently refers to lines extending for long distances, and does not include street railroads. *Mass. Loan & Trust Co. v. Hamilton*, 32 C. C. A. 46, 88 Fed. 588. The franchise to use the streets being granted by legislative or municipal authority, and the tracks being laid on established streets, and usually restricted to the bounds of the city, statutes providing for condemnation of rights of way have little or no reference to street railways using electricity or horse power. *Thompson, etc., Electric Co. v. Simon* (Or.) 25 Pac. 147, 10 L. R. A. 251, 23 Am. St. Rep. 86. Compare *South & North R. Co. v. Highland Ave. Co.* (Ala.) 24 South. 114. In Kentucky a street railroad is said to be, in a technical and popular sense, as different from an ordinary railroad as a road and a street, or as a bridge and a railroad bridge. *Louisville & P. R. Co. v. Louisville City R. Co.*, 2 Duv. 175. In *Riley v. Galveston City R. Co.*, 13 Tex. Civ. App. 247, 35 S. W. 826, it was held that the act of 1893 defining fellow servants, while applicable to any railroad company, does not include street railways, though the question had been expressly left open by the Supreme Court of Texas in *Austin Rapid Tr. Co. v. Grothe*, 88 Tex. 262, 31 S. W. 196. In *Funk v. St. Paul Ry.* (Minn.) 63 N. W. 1099, 29 L. R. A. 208, 52 Am. St. Rep. 608, it was said that a statute making every railroad company liable for injuries inflicted by reason of the negligence of a fellow servant did not include street railroads operated by cable, the court holding that it could recur to the history of the time when the statute was enacted, "and, when the words of a statute are not explicit, the intention is to be collected from the con-

Savannah, etc., Ry. v. Williams

text, from the occasion and necessity of the law, from the mischief felt, and the object and remedy in view." "It is a matter of common knowledge that street cars operated by cable or electricity are more readily managed than those operated by steam, where long passenger and freight trains, with their weight and momentum, are not so easily controlled. A street car is generally run separately, rarely with more than two or three coupled together. * * * They do not run so rapidly; their movements are easily and quickly checked. * * * Nor do street railways carry freight. * * * Especially is the danger in coupling their cars entirely absent. * * * The words in the law of 1887 make a railroad corporation operating the railroad in this state liable for damages 'when sustained within this state.' They undoubtedly aim at the railroads operated by steam, where their lines extend beyond the jurisdiction of the state. It is true these restrictive words would include railroads operated by steam wholly within the state, but they were inserted to prevent the bringing of suit where the injury was sustained upon railroads out of this state, but where the lines of the same railroad came within the boundary of our own state. Hence the words 'when sustained within this state' evidently referred to railroads operated by locomotives, and it was such railroads the Legislature had in contemplation when this term was used. * * * Through our territorial and state legislation the term 'railroad' has acquired a definite and well-understood meaning, and it has never been understood to include street railroads." In the concurring opinion of Mitchell, J., he concludes that "railroads" mean steam railroads only, because "in all legislation of this state I have found no act which has reference to street railroads in which the word 'street' was not prefixed." See, also, *State v. Duluth St. Ry. Co.* (Minn.) 78 N. W. 1032, 57 L. R. A. 63. This reasoning is not applicable here, because in Georgia the contrary is true. The word "railroad" includes street railroad, unless the context shows that a particular kind of railroad was intended.

The foregoing citations are the strongest we find in support of the contention of the plaintiff in error. Opposed to them are cases from New York, Pennsylvania, Massachusetts, Tennessee, Alabama, and Kentucky. The New York general railroad law of 1850 was held to include horse railroads, though the act referred to other motive power. *In re Washington Street Ry.*, 115 N. Y. 442, 22 N. E. 356. A street railroad using dummy engines is a railroad within the meaning of the Alabama statute requiring trains to stop within 100 feet of a track crossing. *Birmingham Ry. Co. v. Jacobs*, 92 Ala. 202, 9 South. 320, 12 L. R. A. 830 (Stone and Clopton, JJ., dissenting). A dummy line, whether operated within or without the limits of a municipality, and although exclusively engaged in carrying passengers, is a railroad within the meaning of the statutes prescribing certain precautions for the preven-

tion of accidents on railroads. Lurton, J., in *Katzenberger v. Lawo*, 90 Tenn. 235, 16 S. W. 611, 13 L. R. A. 185, 25 Am. St. Rep. 681. Street railroads are within the Pennsylvania act relating to merger. *Hestonville v. Philadelphia*, 89 Pa. 210. A horse railroad is within the exception of the Massachusetts statute providing that insolvent proceedings may be instituted against any corporation except railroad and banking companies, though at the time of the passage of that statute no company had been established in that state for the purpose of laying rails on the public highways and running horse cars thereon. *Central Bank v. Worcester Horse R. Co.*, 13 Allen, 105. The Kentucky statute making railroad companies liable for negligence is applicable to any kind of railroad, whether impelled by horse or steam power. *Johnson v. Louisville, etc., R. Co.*, 10 Bush, 231. The similarity of urban and interurban railroads to the ordinary steam railroad, the rapidity of their movements, the enlargement of their cars, the marvelous increase in their business, have compelled the courts to recognize, if not the identity, at least the close resemblance, between the two; and, while the reasoning may not in all respects support our contention, it was held in *Stillwater & M. Street Ry. v. Boston & Me. R. Co.* (N. Y.) 64 N. E. 511, that the act of 1850, re-enacted later in 1890, which conferred on a steam railroad company the right to cross or unite its railroad with any other railroad before constructed, and further providing that every railroad company whose road was intersected by any new railroad should unite with such in having the necessary connections with the requisite facilities, applied to the intersection and connection of a street railroad operated by electricity with a railroad operated by steam. This decision was put on the language of the act, but it refers to the ruling of the lower court, which was somewhat similar to the contention of the plaintiff in error here, denying that street-surface railways could be recognized as an integral part of the great system of steam railroads.

After this citation of foreign authorities, it will be proper to examine the state of our own decisions on the subject.

We think the Constitution, statutes, and decisions of this state recognize that the word "railroad" is generic, and includes street railroads, narrow-gauge roads, horse car companies, dummy lines, and street railroads operated by electricity. Whether a particular statute applies to any one of these various forms of railroads is to be determined from the language of the statute, from the context, or from the intent of the lawmakers. See *Gyger v. Phil. City Ry.*, 136 Pa. 96, 20 Atl. 399. Street railroads were not within the general corporation act of 1881 (*Dieter v. Estill*, 95 Ga. 370, 22 S. E. 622), because the provisions requiring the articles of association to state the places and the counties to and through which it was to run, fixing the right of way at 200 feet, and authorizing the maintenance and construction of docks, sta-

Savannah, etc., Ry. v. Williams

tions, etc., indicate that the Legislature was dealing with railroads other than street railroads. So, in *Savannah Ry. v. Savannah*, 112 Ga. 164, 37 S. E. 393, a street railway company doing a city business was held to be as much subject to city taxation as an omnibus company, though an ordinary steam railroad operating between different places would not be subject to such a tax. They were both railroads, though one could be taxed on infra-city business, while the other was exempt from municipal tax on inter-city business. The terms of the act providing for county taxation of railroads show that it was evidently intended to apply to those roads running from one county to another, and not to those doing business in and near a single city. Pol. Code 1895, §§ 784-789. Civ. Code 1895, § 2199, recognizes that street railroad companies would have been subject to the jurisdiction of the railroad commission had they not been expressly excepted from the operation of that law; and Civ. Code 1895, § 2180, providing how street railroads may be incorporated, treats them as in most respects identical with ordinary railroads, by conferring on them all of the powers of the ordinary railroad except such as are not necessary and proper for companies whose tracks are laid on the streets of a city. If they are not railroads, then there are few, if any, that have been duly chartered, for not only under the Constitution of 1877, but prior thereto, while the Legislature could incorporate railroads, their charters ought to have been granted by the courts if these companies are not railroads. Civ. Code 1895, § 5780; Const. 1868; Code 1873, § 5068; Cobb's Digest, 424, 431, 542. In Civ. Code 1895, § 5782, the convention was protecting municipalities, not defining the differences between various species of railroads. Civ. Code 1895, § 2334, provides that all railroad companies shall be sued in the county where the cause of action originated, and, while the point does not appear to have been distinctly made, its provisions were, in *Devereux v. Atlanta Railway & Power Co.*, 111 Ga. 855, 36 S. E. 939, held to apply to the case of a street railroad. In *Price v. State*, 74 Ga. 378, the act of 1837 (Acts 1837, p. 203) codified in section 520 of the Penal Code, providing a penalty for obstructing a railroad, was held to apply to a street railroad operated by horse power, though no such species of railroad existed when the act was passed. In *Perry v. Macon Consolidated Street Railroad Co.*, 101 Ga. 407, 29 S. E. 304, a minor, not a passenger, was injured, and the court applied the statutory presumption against railroad companies, citing Civ. Code 1895, § 2321. "The presumption against a railroad company where an injury is shown to have been occasioned by the running of its cars applies as well to street railroad companies as to others." *Electric Ry. Co. v. Carson*, 98 Ga. 654, 27 S. E. 156; *Augusta R. Co. v. Renz*, 55 Ga. 126, citing Civ. Code 1895, § 2321. Compare *City Street Ry. v. Findley*, 76 Ga. 311; *Augusta R.*

Savannah, etc., Ry. v. Williams

Co. v. Randall, 79 Ga. 305, 4 S. E. 674; Holly v. Atlanta Street R., 61 Ga. 215, 34 Am. Rep. 97—where the persons injured were passengers, and the plaintiffs in error claimed that the presumption was from common law, and not from the act of 1856. But, even if that were so, it could by re-enactment have been made a statutory presumption. Certainly, even as to passengers, it is more extensive than it was at common law. But the point is that the court applied such statutory presumption to street railroads, and cited a section which on its face only refers to railroads.

The contention of the plaintiff in error is that, if "railroad" can mean "street railroad," section 2297 of the Civil Code does not apply to street railroads, because the abrogation of the fellow-servant rule is therein shown to have been because railroad companies "necessarily have many employees who cannot possibly control those who should exercise care and diligence in the running of trains." It claims that this language shows that the Legislature was considering a state of affairs applicable only to steam lines. This reason, given in section 2297, does not appear in the act of 1856, but was apparently codified from Judge Stephens' opinion in Cooper v. Mullins, 30 Ga. 146, 76 Am. Dec. 638. The rule and the act were codified in somewhat different language, and without any reason therefor being stated, in Civ. Code 1895, § 2323. But even if the act of 1856 had stated a specific cause for its adoption, the operation of the statute need not have been coextensive with the reason given. The maxim, "*Cessante ratione cessat ipsa lex*," is of great assistance in construing doubtful, impossible, and unreasonable provisions. But it should not override the express language of a statute. An act may originate from a desire to remedy a particular evil, and yet the language may be so framed as to extend its provisions into a territory where the special evil does not exist. So, too, the language may be so framed as to prevent its application in a territory where the same evil does exist. This is well illustrated in this very section changing the doctrine of fellow servant, for this court, in holding that a "receiver" was not a "railroad company," and therefore not within the language of section 2323 (3036), said, "It would be uncandid to deny that to a certain extent the same reasons of public policy and private justice which call for the protection of operatives on a railroad when the owners or lessees are in possession apply when receivers are in possession," etc. Henderson v. Walker, 55 Ga. 483; Robinson v. Huidekoper, 98 Ga. 306, 25 S. E. 440; Ellington v. Beaver Dam Co., 93 Ga. 53, 19 S. E. 21. Conversely, the section has been construed to apply to those working on bridges and in railroad machine shops, though these cases were not within the evil sought to be corrected. Thompson v. Central R. Co., 54 Ga. 509; Central R. Co. v. Gleason, 69 Ga. 203; Georgia R. Co. v. Ivey, 73 Ga. 499; Georgia R. Co. v. Brown, 86 Ga. 320, 12 S. E. 812; Georgia

R. Co. v. Miller, 90 Ga. 571, 16 S. E. 939; Georgia R. Co. v. Hicks, 95 Ga. 301, 22 S. E. 613. But these plaintiffs were servants of a railroad company, and within the letter of the law, and therefore entitled to its provisions. The same literalism that denied the benefit of the statute to the employees of a receiver when the reason, and not the letter, applied, gave it to bridge and planing machine employees of a railroad when the reason did not apply, but the letter did. These bridge and planing machine cases are within the letter of the statute, though beyond the evil that may have prompted the adoption of the act. So, while street railroads may not then have been so dangerous, they were still railroad companies, and within the purview of the law. They are not outside of the policy underlying the statute. They had tracks, and had or might have had bridges. The utmost diligence on the part of the driver might not have enabled him to guard against the negligence of other fellow servants who were charged with the duty of keeping the track in repair. While there might not be as many injuries occasioned by the negligence of a fellow servant in street car service, yet the language of the statute was broad enough to take in these few instances as they arose. If the Legislature used language which was broad enough to include street railroads, and if, to some extent, they were within its spirit, even though not as much so as steam railroads, the courts have no right to pare down its meaning, and say that the law does not apply to the employees of a street railroad. The word "railroad," in 1856, was generic, as it is now, and broad enough to take in the new species as they arose from time to time. There may not have been any street railroads in Georgia in 1856, but the Legislature must have known that horse power had been the first motive power used in hauling cars on rails, and was even then being used either in this state or elsewhere in hauling single cars through the streets of cities. The fact that a reason was given by the codifiers in inserting the act of 1856 in section 2297 could not have been intended to announce a variable rule, which would make the company liable in cases where an employee separated from his fellow servants was injured, and not liable when he was on the same engine and injured; or apply where the injury occurred by the movement of a heavy train with great momentum, and not apply where only a single car was being slowly moved through a freight yard; or apply where the cars were pulled by steam, and not to the same companies whose cars were pulled by horses. While dangers incident to the operation of trains was the moving cause for the enactment of the law, it has frequently been held that the language applied to injuries inflicted by fellow servants whether connected with the running of trains or not. Georgia R. Co. v. Miller, 90 Ga. 571, 16 S. E. 939. But when we consider the development of the street railroad business; the fact that in many instances they use steam; that they use a motive power capable

Cordray v. Savannah, etc., Ry

of generating a speed greater than that of steam; that the act of 1856 was inserted in the Code of 1863 and in the Code of 1868; that this fellow-servant law was inadvertently repealed by the act of 1869 (Acts 1869, p. 157), and then re-enacted in 1873 (Acts 1873, p. 24); that at the time of such re-enactment there were street railroads, some using horse power and others using horse and steam power; and when we further recall that these Code sections were again re-enacted in 1895, at a time when there were very many horse railroads, narrow-gauge roads, and electric roads, and that in 1885, before the adoption of the Code of 1895, this court had held that a street railroad was within the meaning of the word "railroad" as used in the act of 1837, Pen. Code, § 520, and in 1875, in *Augusta R. Co. v. Renz*, 55 Ga. 127, applied to them the law as to presumptions against railroads—the conclusion is irresistible that the Legislature was satisfied with the construction which had been placed on the meaning of this word by the courts, and willing to re-enact these sections in the light of the express or implied definition of the word "railroad." Not only the language of the Code, but the principle of *stare decisis*, requires us to hold that a street railroad is liable for injuries inflicted upon an employee by reason of the negligence of a fellow servant.

Judgment affirmed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

CORDRAY *v.* SAVANNAH, T. & I. OF H. Ry.SAVANNAH, T. & I. OF H. RY. *v.* CORDRAY.

(*Supreme Court of Georgia, March 18, 1903.*)

[43 S. E. Rep. 755.]

Appeal—New Trial.

If the law and the facts do not require the verdict, this court will not disturb the first grant of a new trial, although it was put upon a single ground; nor will it determine whether the court below was right in granting the motion for such special reason.

Street Railways as "Railroads."*

A chartered street railroad company is a railroad company within the meaning of the Civil Code of 1895, § 2321, and the presumption is against such company where damage was done to person or property by the running of the cars or machinery thereof.

(Syllabus by the Court.)

Error from City Court of Savannah; T. M. Norwood, Judge.

Action by J. P. Cordray against the Savannah, Thunderbolt & Isle of Hope Railway. From a judgment for plaintiff, and from an order granting a new trial, both parties bring error. Affirmed.

Twigg & Oliver, for plaintiff in error.

Osborne & Lawrence, for defendant in error.

LAMAR, J. The plaintiff, while driving his wagon across

*See preceding case and foot-note.

Cordray v. Savannah, etc., Ry

the tracks of the railroad company, suffered damage, and he obtained a verdict. The court granted a new trial. The plaintiff excepted, but does not bring the case within the exception of Civ. Code 1895, § 5585. We are not, therefore, authorized to disturb the finding by the lower court, even though the motion was granted for a specific reason, which may or may not have required a new trial. *Brunswick & W. R. Co. v. Weinkle*, 107 Ga. 367, 33 S. E. 471 (1).

The railroad company, by cross-bill of exceptions, raises the question as to whether, as a street railroad company, it is within the purview of the Civil Code of 1895, § 2321, "making railroad companies liable for damages done by the running of the locomotives or cars or other machinery of such company, the presumption in all cases being against the company." It argues that the decisions in *Augusta & Summerville R. Co. v. Renz*, 55 Ga. 126, and *Electric Railway Co. v. Carson*, 98 Ga. 652, 27 S. E. 156, holding that the presumption arose against street railroad companies, is not conclusive, inasmuch as the persons there injured were passengers. It claims that at common law a presumption arose in favor of the passenger against the carrier where said injury occurred, and that in *Augusta & Summerville R. Co. v. Randall*, 79 Ga. 314, 4 S. E. 674, and in *Central R. Co. v. Brinson*, 70 Ga. 223, 224, the court had held that the presumption set out in section 2321 was of common-law origin, and did not come from the act of 1856 (Acts 1855-56, p. 154). Wherever a passenger was injured by a derailment, a collision, or as a result of any defect in the means of transportation, or as a result of the operation thereof, a presumption did arise, at common law, against the carrier. "*Res ipsa loquitur*." But it is not true that in every case where a passenger was injured a presumption arose, at common law, that the company was at fault. *Holbrook v. Utica Ry. Co.*, 12 N. Y. 236, 64 Am. Dec. 502; *Herstine v. Lehigh Valley*, 151 Pa. 244, 25 Atl. 104. Even if it were a common-law presumption, it might still be made statutory, and extend beyond the limits fixed at common law. The decisions in the *Renz* and *Carson* Cases are important as showing that in both the court treated a street railroad as within the section, and applied the statutory presumption applicable to railroads. It was as much as to say that they were railroad companies; and in the *Carson* Case the court cited the statute as applicable to a street railroad in a case where the injured person was not a passenger, and where the presumption in favor of the plaintiff would not have arisen at common law. There is as much reason for making this presumption apply to companies whose tracks are laid in the streets of populous cities as to those whose rails are laid in country districts. The case is controlled by the ruling in *Savannah, etc., Ry. v. Williams*, 117 Ga. —, 43 S. E. 751.

Judgment on the main and cross bills of exceptions affirmed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

MCDONALD v. MICHIGAN CENT. R. CO.*(Supreme Court of Michigan, March 6, 1903.)*

[93 N. W. Rep. 1041.]

Fellow Servants.*

Car inspectors and repairers are not fellow servants of a conductor of a train, who was injured by reason of their negligence in repairing a brake chain, but represent the railroad company in the performance of its duty to furnish and maintain its cars in a reasonably safe condition.

Injury to Brakeman—Contributory Negligence—Inspection.

Plaintiff, a freight conductor, testified that before he started his train he tried the brakes at each end of the rear car in the usual manner, and that they worked properly. The brake chain, however, below the platform of the car had been broken and bound together with hay wire, and as plaintiff attempted to set the brake after the train had passed the station at which defendant maintained car inspectors and repairers, who inspected the car, the wire gave way, and plaintiff was thrown under the wheels of the train: *held*, that a rule requiring conductors to know that their trains are provided with everything necessary to enable them to comply with the regulations of the road, and that there is a reliable brake on the rear car, did not require of plaintiff a more minute inspection than he had given the brake in question.

Error to Circuit Court, Gladwin County; Nelson Sharpe, Judge.

Action by Joseph D. McDonald against the Michigan Central Railroad Company. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

O. E. Butterfield (Henry Russel, of counsel), for appellant.
De Vere Hall, for appellee, cited the following cases:

Georgia Railroad Co. v. Ellison, 87 Ga. 700, 13 S. E. 809; Sadowski v. Car Co., 84 Mich. 100, 47 N. W. 598; Ashman v. Railroad Co., 90 Mich. 571, 51 N. W. 645; Roux v. Lumber Co., 94 Mich. 615, 54 N. W. 492; Balhoff v. Railroad Co., 106 Mich. 613, 65 N. W. 592; Gardner v. Railroad Co., 150 U. S. 360, 14 Sup. Ct. 140, 37 L. Ed. 1107; Quincy Mining Co. v. Kitts, 42 Mich. 39, 3 N. W. 240; Maltibe v. Belden (N. Y.) 60 N. E. 645, 54 L. R. A. 56-59; Murray v. Railroad Co., 1 McM. 385, 36 Am. Dec. 268; Farwell v. Railroad Co., 4 Metc. (Mass.) 49, 38 Am. Dec. 339; Holden v. Railroad Co., 129 Mass. 269, 37 Am. Rep. 343; King v. Railroad Corp., 9 Cush. 112; Holden v. Fitchburg, 129 Mass. 268, 37 Am. Rep. 343; Ford v. Fitchburg Railroad Co., 110 Mass. 240, 14 Am. Rep. 598; Hough v. Railway Co., 100 U. S. 213, 25 L. Ed. 612; Flike v. Boston & Baltimore R. R. Co., 53 N. Y. 549, 13 Am. Rep. 545; Johnson v. Boston Tow-Boat Co., 135 Mass. 215, 46 Am. Rep. 458; Northern P. R. R. Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755; New England R. R. Co. v. Conroy, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181;

*See foot-note appended to *Fulton v. Bullard* (C. C. A.), 14 Am. & Eng. R. Cas., N. S., 547.

McDonald v. Michigan Cent. R. Co

Morton v. Railroad Co., 81 Mich. 431, 46 N. W. 111; Railroad Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787; Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; McDonald v. The Michigan Central R. Co., 108 Mich. 11, 65 N. W. 597; Swoboda v. Ward, 40 Mich. 420; Railroad Co. v. Gildersleeve, 33 Mich. 133; Smith v. Potter, 46 Mich. 258, 9 N. W. 273, 41 Am. Rep. 161; Samuelson v. Iron Mining Co., 49 Mich. 172, 13 N. W. 499, 43 Am. Rep. 456; Brewer v. F. & P. Ry. Co., 56 Mich. 627, 23 N. W. 440; Smith v. Car Works, 60 Mich. 501, 27 N. W. 662, 1 Am. St. Rep. 542; Hewitt v. F. & P. M. R. Co., 67 Mich. 66, 34 N. W. 659; Peterson v. C. & N. W. R. Co., 67 Mich. 109, 34 N. W. 360, 11 Am. St. Rep. 564; Illick v. F. & P. M. R. Co., 67 Mich. 638, 35 N. W. 708; Adams v. Iron Cliffs Co., 78 Mich. 289, 44 N. W. 270, 18 Am. St. Rep. 441; Van Dusen v. Letellier, 78 Mich. 504, 44 N. W. 572; Hunn v. Railroad Co., 78 Mich. 517, 44 N. W. 502, 7 L. R. A. 500; Morton v. B. D. C. & A. R. R. Co., 81 Mich. 423, 46 N. W. 111; Roux v. Lumber Co., 85 Mich. 525, 48 N. W. 1092, 13 L. R. A. 728, 24 Am. St. Rep. 102; Lee v. M. C. R. R. Co., 87 Mich. 574, 49 N. W. 909; Irvine v. F. & P. M. R. R. Co., 89 Mich. 416, 50 N. W. 1008; Dewey v. D. G. T. & M. R. R. Co., 97 Mich. 343, 52 N. W. 942, 56 N. W. 756, 16 L. R. A. 342, 22 L. R. A. 292, 37 Am. St. Rep. 348; Jarman v. C. & G. T. R. R. Co., 98 Mich. 138, 57 N. W. 32; Balhoff v. M. C. R. R. Co., 106 Mich. 612, 65 N. W. 592; Anderson v. M. C. R. R. Co., 107 Mich. 591, 65 N. W. 585; McDonald v. M. C. R. R. Co., 108 Mich. 11, 65 N. W. 597; Woods v. C. & G. T. R. Co., 108 Mich. 396, 66 N. W. 328; Shadford v. A. A. Street Ry. Co., 111 Mich. 394, 69 N. W. 661; Lellis v. M. C. R. R. Co. and A. A. R. R. Co., 124 Mich. 39, 82 N. W. 828; Mann v. L. S. & M. S. R. Co., 124 Mich. 644, 83 N. W. 596; Johnson v. Spear, 76 Mich. 139; Tangle v. Wilson, 87 Mich. 453; Rowley v. Calliau, 90 Mich. 31, 42 N. W. 1092, 15 Am. St. Rep. 298; Wachsmuth v. Electric Co., 118 Mich. 275, 76 N. W. 497; Noble v. Bessemer Co. (Mich.) 86 N. W. 520, 54 L. R. A. 456; Miller v. C. & G. T. Railway Co., 90 Mich. 230, 51 N. W. 370; Miller v. M. C. Railroad Co., 123 Mich. 374, 82 N. W. 58; Fones v. Phillips, 39 Ark. 17, 43 Am. Rep. 264; Daves v. Southern Pac. R. R. Co., 98 Cal. 20, 32 Pac. 708, 35 Am. St. Rep. 133; Denver T. Co. v. Crumbaugh, 23 Colo. 363, 48 Pac. 503; McElligott v. Randolph, 61 Conn. 157, 22 Atl. 1094, 29 Am. St. Rep. 181; B. & P. R. R. Co. v. Elliott, 9 App. D. C. 341; C. & E. I. R. R. Co. v. Kneirim, 152 Ill. 458, 39 N. E. 324, 43 Am. St. Rep. 259; C. H. & D. R. R. Co. v. McMullen, 117 Ind. 439, 20 N. E. 287, 10 Am. St. Rep. 67; Brann v. C. R. I. & P. R. R. Co., 53 Iowa, 595, 6 N. W. 5, 36 Am. Rep. 243; A. T. & S. F. R. Co. v. Moore, 29 Kan. 644; Shanny v. Androscoggin Mills, 66 Me. 420; Tierney v. M. & St. L. R. Co., 33 Minn. 311, 23 N. W. 229, 53 Am. Rep. 35; Coontz v. M. P. R. Co., 121 Mo. 652, 26 S. W. 661; C.

McDonald v. Michigan Cent. R. Co

B. & Q. v. Kellogg, 54 Neb. 127, 74 N. W. 454; *Jaques v. Manufacturing Co.*, 66 N. H. 482, 22 Atl. 552, 13 L. R. A. 824; *Flike v. B. & A. R. Co.*, 53 N. Y. 549, 13 Am. Rep. 545; *Chesson v. Lumber Co.*, 118 N. C. 59, 23 S. E. 925; *Cameron v. G. N. R. Co.*, 8 N. D. 124, 77 N. W. 1016; *Anderson v. Bennett*, 16 Or. 515, 19 Pac. 765, 8 Am. St. Rep. 311; *Mulvey v. Locomotive Works*, 14 R. I. 204; *Carter v. Oliver Oil Co.*, 34 S. C. 211, 133 S. E. 419, 27 Am. St. Rep. 815; *H. & T. C. R. R. Co. v. Marcellus*, 59 Tex. 334; *Davis v. R. R. Co.*, 55 Vt. 84, 45 Am. Rep. 590; *Moon's Adm'r v. A. R. R. Co.*, 78 Va. 745, 49 Am. Rep. 401; *Ogle v. Jones*, 16 Wash. 319, 47 Pac. 747; *Cooper v. P., C. & St. L. R. Co.*, 24 W. Va. 37; *Brabbits v. C. & N. W. R. Co.*, 38 Wis. 289.

MOORE, J. The plaintiff recovered a judgment against the defendant for injuries received by him while in its employ. The case is brought here by writ of error.

The plaintiff was in charge of a freight train running from Grayling to Mackinaw City. Grayling is about half way between Bay City and Mackinaw City. The defendant maintains a car repair shop at Bay City. At Grayling it has a train master and four inspectors or repairers. At Mackinaw City it has one car inspector or repairer. The inspectors or repairers at Mackinaw City and Grayling inspect the cars, and repair such broken or defective parts as they are able to with the appliances at hand, which are not sufficient to enable them to do any welding. If the repairs are of such a character as to require it the cars are sent to the shop at Bay City. While in charge of his train in September, 1901, as it approached the third or fourth station north from Grayling, the plaintiff attempted to set the brake upon the way car. Something gave way. The plaintiff was thrown between the way car and the car next front of it. The wheels of the way car passed over him, injuring him severely. An examination after the injury showed that the chain attached to the lower part of the brake mast had before that parted and been repaired by using a wire which was supposed to have been hay wire. This wire gave way under the strain, and hence the accident. This accident occurred upon the second round trip of the way car after it left the repair shop at Bay City. It does not appear when or by whom the hay wire was used to repair the chain. It is claimed by defendant the car was in good repair when it left the shop at Bay City. This is not admitted by plaintiff. Mr. Trumley, the inspector at Grayling, who claims he inspected the car at that place, was a witness on the part of the defendant, and disclaimed all knowledge of the wire. The inspector from Mackinaw City was not produced as a witness.

Counsel for defendant says there are two questions presented by the record: (1) The liability of a railroad company to a freight conductor injured by the negligence of a car inspector, whose duty it was to inspect and repair the way car. (2) The

McDonald v. Michigan Cent. R. Co

right of such a conductor to recover for injuries resulting from an unreliable brake upon a way car, when, by a rule of the company, he was "required to know that there was a reliable brake" on the car before making use of it. As to the first of these questions, the position of the defendant is shown by the following statements taken from the brief of counsel: "The duty of the company is: (1) To provide a reasonably safe place and reasonably safe appliances. (2) To use reasonable care to maintain place and appliances in a reasonably safe condition."

It is said the car was reasonably safe when it left the shop at Bay City. In regard to the duty of the company to maintain it in a reasonably safe condition, it is said: "It performs the duty by employing a competent servant to inspect and repair defects when they appear; and, before it can be held liable for injuries resulting from defects arising in the course of operation, it must have notice, either actual or constructive, that the defect exists, or that the servant is not performing the work assigned to him with reasonable care. In other words, there must be evidence that the master is not exercising reasonable supervision over his servants to see that they perform their work with reasonable care. There is no delegation of duty. It is performance. It is an exercise of reasonable care to maintain the appliance in a reasonably safe condition."

Again, "The company furnishes this way car to its Grayling-Mackinaw division. It has a number of employees who are to make use of the car, some to inspect it, some to ride upon it, and some to set its brakes. The man who is to inspect it fails in his work. The company has no means of knowing what moment an employee, hitherto trustworthy and reliable, will prove deficient. But it has exercised reasonable care to preserve the reasonably safe condition of this way car while it is in use by the employees of that division, by employing competent men to inspect the car at the end of every trip. Unless the plaintiff is able to show that the company knew of the existence of the defect, or that it had existed for a sufficient length of time to impose upon the company the duty to know, he cannot recover. This is the full measure of the defendant's duty to the plaintiff in this case, and we submit it is not shown to have neglected that duty." Counsel cite cases which it is claimed sustain this contention.

It is the claim of plaintiff the duty resting on defendant is not discharged by furnishing safe cars in the first instance; that such duty of maintenance is a continuing one, which it discharges through the employment of inspectors and repairers, and that the latter must exercise reasonable watchfulness and care to maintain such cars in a reasonably safe condition; and that defendant is liable for any omission of duty in that regard on the part of such inspectors or repairers, where, as a proximate cause of such omission, injury results

McDonald v. Michigan Cent. R. Co

to plaintiff, as one using such car. It must be conceded the authorities are not agreed, but the principles involved are not new in this state. The difficulty lies in the application of them to a given case. In *Morton v. Railroad Company*, 81 Mich. 423, 46 N. W. 111, Justice Cahill, speaking for the court, said: "The rule may now be considered settled in this state, as well as in most of the states, not only that a master is bound to use all reasonable care in providing safe tools and appliances for the use of workmen in his employ, but that this is a duty which cannot be delegated to another so as to relieve him from personal responsibility. *Johnson v. Spear*, 76 Mich. 139 [42 N. W. 1092, 15 Am. St. Rep. 298]; *Van Dusen v. Letellier*, 78 Mich. 492 [44 N. W. 572]; *Brown v. Gilchrist*, 80 Mich. 56 [45 N. W. 82, 20 Am. St. Rep. 496]. The duty of the master to his employee in this respect is clearly and well stated by Mr. Justice Morse in *Van Dusen v. Letellier*, just cited, at page 502, 78 Mich. [and page 575, 44 N. W.]: 'It is well settled by all the authorities that the master must provide his servant with a safe place to work in, and furnish him with suitable machinery and appliances with which to perform such work, and it is his duty to keep such machinery and appliances in good repair. If he cannot do this himself personally, he must provide some other person to take his place in this respect; and the person to whom the master's duty is thus delegated—no matter what his rank or grade; no matter by what name he be designated—cannot be a servant in the sense or under the rule applicable to injuries occasioned by fellow servants. Such person is an agent, and the rules of law applicable to principal and agent must apply.' This doctrine is also clearly stated by Justice Field in *Railroad Co. v. Herbert*, 116 U. S. 650 [6 Sup. Ct. 594, 29 L. Ed. 755], where the whole question is carefully discussed, and numerous authorities in New York, Massachusetts, Maine, and other states to the same effect discussed and approved. Four of the judges dissented from his opinion, upon the ground that the case was governed by a special statute in Dakota, but expressed no opinion as to the common-law liability of the defendant under the circumstances of that case. In *Shear. & R. Neg.* (4th Ed.) §§ 194, 204, this question is discussed and stated as follows: 'Sec. 194. The master also personally owes to his servants the duty of using ordinary care and diligence to provide for their use in his service sound and safe materials, instruments, and accommodations, and such appliances as are reasonably calculated to insure their safety. He is also personally bound to inspect and examine all these things from time to time, and to use ordinary care and skill to discover and repair defects in them.' 'Sec. 204. None of the duties which have been previously stated as devolving upon the master personally can be by him delegated to any agent, so as to relieve him from personal responsibility. He may, and often must, delegate the per-

McDonald v. Michigan Cent. R. Co

formance of such duties to subordinates; but he remains responsible to all his servants for the acts of these subordinates in that particular capacity, to the same extent as if those acts were literally his own.' The doctrine of the text is ably supported by the citation of authorities."

This case is cited with approval in *Sadowski v. Car Co.*, 84 Mich. 100, 47 N. W. 598. After quoting from the case cited and from the argument of counsel the learned justice said: "But the ingenious reasoning of counsel fails to take account of an important limitation upon the rule which relieves a master from liability when a servant is injured through the fault of another. That doctrine was never applied unless the one injured and the one at fault were engaged in the same general employment. Whatever conflict has arisen in cases has been as to what should be considered the same general employment. The rule adopted by the federal courts, and in most of the states, and which seems to us most in consonance with reason and humanity, is that those employed by the master to provide or to keep in repair the place, or to supply the machinery and tools for labor, are engaged in a different employment from those who are to use the place or appliances, when provided, and they are not, therefore, as to each other, fellow servants. In such case, the one whose duty it is to provide and look after the safety of the place where the work is to be done represents the master in such a sense that the latter is liable for his negligence." In *Ford v. Railroad Co.*, 110 Mass. 240, 14 Am. Rep. 598, it was said: "The agents who are charged with the duty of supplying safe machinery are not, in a true sense of the rule relied upon, to be regarded as fellow servants of those who are engaged in operating it. They are charged with a master's duty to his servant. They are employed in distinct and separate departments of service, and there is no difficulty in distinguishing them, even when the same person renders service by turns in each, as the convenience of the employer may require."

In *Railroad Co. v. Herbert*, 116 U. S. 653, 6 Sup. Ct. 596, 29 L. Ed. 755, Mr. Justice Field, speaking of the distinction that he found to exist between the providing of safe machinery and the business of handling and moving it, said: "The two kinds of business are as distinct as the making and repairing of a carriage is from the running of it." The case of *Sadowski v. Car Co.* was cited and quoted from in *Roux v. Lumber Co.*, 94 Mich. 607, 54 N. W. 492. The distinction is well recognized that there is a difference between the duty of furnishing a safe place or safe appliance to the employee and the duty of seeing that the place or appliance so furnished is properly used.

In *McDonald v. Railroad Co.*, 108 Mich. 7, 65 N. W. 597, Justice Montgomery, speaking for the majority of the court, said: "The duty which the master owes to provide a reasonably safe place to work, and machinery in a reasonably safe

McDonald v. Michigan Cent. R. Co

condition, is not discharged for all time by providing machinery or premises safe in the first instance. *Van Dusen v. Letellier*, 78 Mich. 492, 44 N. W. 572. This duty cannot be discharged by providing for an inspection by a fellow servant, for wherever the duty of inspection, or the purpose of ascertaining whether there be necessity to repair, or whether the machinery is in a safe condition, exists, it is the master's duty. The duty of diligence in maintaining the machinery in a reasonably safe condition necessarily involves the duty of the master to take such reasonable measures to inform himself from time to time of the condition of the machinery as common prudence dictates." And such we understand is the law. See the many cases cited in the brief of counsel for the plaintiff.

We now come to the consideration of the second question: Does the enactment of rule 50 relieve the defendant of liability? The material parts of the rule read as follows: "Conductors must know at all times that their train is provided with every thing necessary to enable them to comply with the regulations of the road. They are required to know that there is a reliable brake on the rear car, and that a proper man is kept at it while the train is in motion."

It is the claim of defendant that the rule imposed upon the plaintiff the risk of all dangers discernible by a prudent inspection, and that the defect was easily discernible, counsel citing *Brennan v. R. R. Co.*, 93 Mich. 156, 53 N. W. 358; *Enright v. R. R. Co.*, 93 Mich. 412, 53 N. W. 536; *Whalen v. M. C. R. R. Co.*, 114 Mich. 524, 72 N. W. 323; *Peppett v. M. C. R. R.*, 119 Mich. 641, 78 N. W. 900. An examination of these cases will show they are easily distinguishable from the one at bar. In the first case plaintiff knew of the dangers which it was claimed constituted negligence, and he also violated a rule of the company of which he had notice, which forbade him to do the thing he did. In the second case the plaintiff was hurt because of the negligence of a fellow servant who was violating the positive requirements of a rule. In the third case the plaintiff was violating the requirements of a positive rule. In the last case cited, the following is stated in the opinion of the court: "The following facts are established by the evidence: (1) That the engine was properly constructed. (2) That the defendant had performed its full duty as to inspection. (3) It was the duty of the decedent both after coming in and before going out to inspect the engine, and after coming in, to minute in a book, kept for that purpose, any repair needed. He did make such inspection, but reported nothing wrong. The wearing, if any there was, was easily discernible. He therefore assumed the risk of such defect."

It is hardly believeable that if the inspector at Grayling had made the inspection which it was his duty to make that the defect in the chain would have escaped his observation. It

Murphy v. Baltimore & O. S. W. R. Co

would have been easy for the framer of the rule to have said in so many words that the conductor should inspect the brake if the company intended to impose that duty upon him. The plaintiff testified that, before he started his train out in the morning, he tried the brakes at each end of the car in the usual and customary way, by setting them up and releasing them, and that they worked properly. It is manifest this was not such a severe test as the chain would be subjected to in an effort to stop a running train on a down grade. It also appears that portion of the brake mast, around which the chain winds, was below the platform of the car, and as the chain wound around it the wire would be concealed. There is nothing in the record to show that plaintiff neglected any duty imposed upon him by the rule. See *R. R. Co. v. Parker*, 131 Ill. 557, 23 N. E. 237. The case was carefully tried and properly submitted to the jury.

Judgment is affirmed.

GRANT, J., took no part in the decision. The other Justices concurred.

MURPHY v. BALTIMORE & O. S. W. R. Co.

(*Court of Appeals of Kentucky, Feb. 3, 1903.*)

[71 S. W. Rep. 886.]

Railroads—Injuries to Servant—Coupling Cars—Defective Coupling—Contributory Negligence.

Plaintiff, a brakeman, was directed to couple certain cars equipped with a Buckeye automatic coupler, which, when in good condition, is operated by the brakeman, standing outside the track, by a lever running across the end of the car. The coupler in question was broken, to the knowledge of the railroad company's servants, but its condition was not ascertained by plaintiff until he attempted to use it, when it was necessary to raise the pin by hand. The train was about 25 feet away, backing down the grade; and, after discovering the condition of the coupler, plaintiff placed one foot inside the rail, raised the iron pin, in which position his arm was caught and crushed. Behind the car which was coupled were other cars, which were being loaded with live stock, on which persons were working; and, if the coupling had not been made, such persons and stock might have been injured, and plaintiff testified that it was partly to prevent this that he attempted to make the coupling: *held*, that plaintiff was not guilty of contributory negligence, as matter of law, sufficient to preclude his recovery.

Appeal from circuit court, Jefferson county, law and equity division.

"To be officially reported."

Action by John F. Murphy against the Baltimore & Ohio Southwestern Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Geo. Weissinger Smith and O'Neal & O'Neal, for appellant.

Barnett Gibson and Gibson, Marshall & Gibson, for appellee.

Murphy v. Baltimore & O. S. W. R. Co

SETTLE, J. The appellant, John F. Murphy, while in the service of the appellee, Baltimore & Ohio Southwestern Railroad, as a brakeman upon one of its freight trains, in attempting to make a coupling had his arm caught between two cars, wounding and mangling it to such an extent as to require amputation between the elbow and shoulder. The petition alleges, in substance, that his injuries were caused by the negligence of the appellee in providing a defective engine for pulling its train of cars, and in failing to provide a good and sufficient coupler for one of the two cars which he was attempting to couple; that is, that the coupler on one of the cars was defective, and the chain belonging thereto broken, which defect made it dangerous for use. It is further averred in the petition that the defective condition of the coupler was known to appellee, but unknown to appellant, at the time of the injury. The answer denies the negligence complained of in the petition, and pleads contributory negligence on the part of appellant, which is denied by the reply. Upon the conclusion of appellant's evidence, the jury, under a peremptory instruction from the special judge, found for appellee; and, appellant's motion and grounds for a new trial having been overruled, he prosecutes this appeal.

No effort was made in the trial court to show that the engine was defective, but appellant sought a recovery upon the sole ground that the coupler was defective and dangerous. The coupler complained of was what is known as a "Buckeye Automatic Coupler," which, when in good condition, is operated by a rod running across the end of the car, at right angles to the track. On the end of the rod a lever or crank is attached. A brakeman standing outside of the track may pull the lever, and thereby move the rod, which in turn draws a chain attached to an iron pin, which is raised by the use of the lever, and when so raised the only remaining duty is to open the knuckles on a plane with the earth's surface. If the coupler is in order, all this may be done in a moment, and the stationary car is thus made ready to automatically grasp the approaching car. It is manifest, therefore, that when the Buckeye coupler is in good order there can be little or no danger to the brakeman in making the coupling. Although the answer denies that the coupler was in a defective condition, in the brief of counsel for appellee it seems to be admitted that it was in fact defective, in that the chain attached to the pin was broken, and besides it is overwhelmingly shown by the evidence introduced in the court below that such was its condition. The proof also conduces to show that when in this defective condition the only practical way to make the coupler do its work is to insert the arm between the bumpers, take hold of the pin with the thumb and fingers, and lift it up, and at the same time pull the knuckles out with the hand; and it is further shown that, while attempting to operate the coupler in this way, appellant's arm was caught

between the irons of the two cars when they came in contact. It is, we think, also conclusively shown by the evidence that the defective condition of the coupler was known, or by the use of ordinary care could have been known, to appellee's agents and servants whose duty it was to give attention to such things, some time before appellant's injuries were received. Upon the other hand, the evidence also shows that its condition was not known to the appellant until in the act of making the coupling. The coupling was done at Flora, Ill., under the following circumstances: At that point the conductor desired to take in his train some loaded cars standing on the side track. These cars were stationed behind a flat car loaded with lumber. By order of the conductor, appellant opened the switch and signaled the engineer to back the engine, to which was attached one freight car. The engine and car slowly backed down the grade, while appellant ran ahead, and he reached the lumber car when the backing train was about 25 feet away. He kept outside of the rails, and, when he reached the lumber car, pulled the lever out. As the chain was broken, the effort failed, of course, to draw the pin. This was the first warning that he received of the broken condition of the coupler. By this time the backing train had gotten in about 12 or 14 feet of him. It appears that about 20 feet behind the lumber car were two cars wholly or partly loaded with live stock, with one or more persons on them or at them, loading the stock. This fact was known to appellant, who doubtless also knew that if he failed to make the coupling the lumber car would probably be driven down grade against the cars upon which were the men and stock, by the collision with the backing train. Upon discovering the condition of the coupler, appellant placed one foot inside the rail, reached over the dead irons, and with his hand opened the knuckles and raised the iron pin, and in this position his arm was caught by the colliding cars and crushed as stated.

The lower court, in granting the peremptory instruction, seems to have proceeded upon the idea, not that appellant was guilty of negligence in the manner of operating the defective coupler, but that his injury resulted from his negligence in failing to get out of the way of the approaching train after he discovered that the coupler would not work by the action of the lever; and this conclusion seems to have been reached because of an answer made by appellant to a question upon cross-examination, to the effect that he might have stepped back after the discovery of the defect in the coupler before the cars met. We do not agree with this conclusion of the trial court, for, in our opinion, the question of whether the appellant was or not negligent should not be made to depend altogether upon whether it would have been possible for him to have escaped by stepping back from between the cars after he discovered the defect in the coupler, but whether, in the emergency presented, confronted as he was with the necessity

Murphy v. Baltimore & O. S. W. R. Co

for immediate action, and knowing of the danger to himself from attempting to make the coupling, and of the danger of injury to the men and stock in the cars a few feet beyond him from his failing to do so, he acted with ordinary care in the performance of his duty. On this point appellant testified as follows: "The whole thing didn't consume but a few seconds, the engine and cars were moving down on me, and I was trying to get the coupling open, because I was on the down hill side, and I knew the gentlemen below were loading the stock on the two stock cars to go with us; and a man braking as long as I had been (9 or 10 years) didn't want to miss a coupling. Q. What would have been the consequence of doing nothing? A. I was trying to do that because if I missed the coupling the cars would roll on down onto the stock cars, and cripple some one. A person has to look out for that. Q. Was that part of your duty? A. Yes, sir." It must be borne in mind in this connection that the entire transaction consumed, as appellant stated, "but a few seconds." At the time he went in to adjust the coupler, the backing car had gotten within 10 or 12 feet of him. The cars were moving very slowly,—not faster than two miles an hour. It cannot be said that, in reaching over the irons with his hand to open the knuckles or to release the iron pin, appellant was guilty of negligence, for, according to the evidence, this was the only way to open the coupler in its defective condition; and, besides, he doubtless believed that the coupler could be thus prepared for performing its office in time for him to avoid the backing train, if it continued the same slow movement until it got to the car to which it was to be coupled. But according to the evidence, when the backing train was only four or six feet off it gave a sudden lurch, as if something had let loose, thus attaining an increase of motion, which in all probability could not reasonably have been anticipated by appellant at the time he took hold of the coupler; and, but for this increased movement of the train, it may, without violence to the evidence, be assumed that he could have adjusted the defective coupler, and stepped back from between the cars before they came in contact, and thereby have escaped injury. So we think that in view of such an emergency as that in which the evidence shows appellant was required to act, with little time for thought or reflection, and having in view, as he doubtless did, the danger that threatened the men and stock in the cars beyond him, and the danger to himself as well, the lower court erred in assuming that the appellant was negligent in failing to step back from between the cars. The jury, under proper instructions from the court, should have been allowed to determine from the evidence whether he was or not guilty of negligence in attempting the coupling, and, if so, whether such negligence contributed to his injuries to such an extent that but for same they would not have been received. We find in *Goodrich v. Railroad Co.* (N. Y.) 22 N.

Murphy v. Baltimore & O. S. W. R. Co

E. 397, 5 L. R. A. 750, 15 Am. St. Rep. 410, a case not altogether unlike the one at bar. Goodrich, who was a brakeman, in attempting to couple some cars got his hand crushed. The train was slowly backing at the time, and, when the cars to be coupled were in a few feet of each other, he stepped between them for the purpose of inserting the link in the bumper or drawhead of the stationary car. When the cars were three or four feet apart he discovered that the bumper of the moving car was lower than the bumper of the stationary car. He testified that he thought that, by raising the link, it would enter the bumper of the stationary car, but found that it would not do so, and his hand was caught in the effort to raise the link. In discussing the cause of the accident, the court of appeals of New York said: "The defective bumper was thus shown to have been the proximate cause of the accident. It was literally the *causa causans*. Its immediate effect was to permit the deadwoods of the two cars to come together, and the plaintiff was from that cause exposed to a danger not within the ordinary risks of his employment. This result was traceable directly to the defendant's failure to provide the moving car with bumpers in good order, and, unless the proof showed (which it did not) that plaintiff himself was in some way responsible for the condition of the car, the negligence of the defendant was established. The question as to the plaintiff's contributory negligence was, I think, one of fact for the jury. * * * He appears to have thought that the coupling could be made with the straight link that was in the drawhead. He had the right to assume that fact, and that the coupling appliances were in good order. It was only at the moment that the cars were about to collide that he discovered his error. The court cannot affirm that for such an error of judgment, induced, as it was, to some extent, by defendant's neglect, he is to be held to have been careless. Under such circumstances, when the whole transaction is the occurrence of a moment, a man is not to be held responsible if he errs as to the estimate of danger that confronts him. If he acts the part of a prudent man, willing to and intending to perform the duty to which he has been assigned, he has done all that the law demands of him, and whether he acted such a part under the circumstances of this case was for the jury to determine." The supreme court of Iowa, in *Fox v. Railroad Co.*, 53 N. W. 259, 17 L. R. A. 289, in discussing the question of whether a brakeman was guilty of contributory negligence in attempting to climb a car to set a brake when the train was in motion, in doing which he fell and his foot was crushed, said: "It is contended that the plaintiff cannot recover, on account of the dangerous speed of the train, because he testified that he knew of its speed before he caught hold of the ladder. But he was required to mount the car. It is true, he might have refused to have done so, because it was running too fast, or because his lantern was out, or because

Erickson v. Kansas City, etc., Ry. Co

when he approached the car he discovered that the ground sloped away from the track, so that he could not readily seize the ladder and place his foot on the stirrup. But he was acting under orders, and in an emergency which gave no time for reflection, and the jury might well find, as they did, that he was not chargeable with contributory negligence." We find nothing in the foregoing authorities that conflicts with any rule of law announced by this court in respect to cases of this character, and an examination of the authorities cited by counsel for appellee will, we think, show that none of them discusses the law in regard to the sudden discovery of dangerous defects, or the duty of a brakeman, in an emergency such as confronted appellant, to protect property or the lives of others thereby imperiled. With reference to the danger that might and doubtless would have resulted to the stock and stockmen near appellant in the event he failed to effect the coupling of the cars, we find the rule thus stated in 7 Am. & Eng. Enc. Law (2d Ed.) §§ 2, 3, p. 396: "He whose duty it is to care for the safety of others may do so, even though his duty leads him into great and visible danger, and not be chargeable with contributory negligence. But the injured person must not have created the danger, or been guilty of negligence from the consequences of which he tried to save others, or his recovery will be barred; and it must appear that he was in the discharge of duty, and could by the exercise of ordinary care have performed his whole duty, and yet escaped the danger." The rule stated is manifestly sound in principle and consonant with reason, and by it the conduct of appellant on the occasion of receiving his injuries should be measured.

We find no error in the rulings of the lower court in excluding certain questions and answers in the depositions, excepted to.

For the reasons herein indicated, the judgment of the lower court is reversed, and the case remanded, with directions to set aside the verdict and judgment and grant appellant a new trial.

ERICKSON v. KANSAS CITY, O. & S. RY. CO.

(Supreme Court of Missouri, Feb. 6, 1903.)

[71 S. W. Rep. 1022.]

Injury to Flagman at Crossing—Absence of Light and Signals.

In a personal injury action against a railroad company by a flagman at a crossing, who alleged that he was injured because of defendant's negligent failure to carry a proper headlight on its engine, or to give warning of its approach, evidence *held* sufficient to justify the submission of the issue of defendant's negligence to the jury.

Same—Fellow Servants—Employees of Other Companies Using Track.

A flagman employed by a railroad company—whose tracks in a city were used by other companies—to give signals at a crossing for the convenience of the trains of all companies so using the track is not a fellow servant of an engineer operating a train for one of the various

Erickson v. Kansas City, etc., Ry. Co

companies using the tracks of the flagman's employer, since the necessary element of a common master is lacking.

Instructions.

In an action by an employee for personal injuries, where plaintiff's allegation that defendant was negligent in failing to sound the whistle was stricken out on defendant's motion, defendant was not entitled to an instruction that plaintiff could not recover if the whistle was sounded.

Same—Care Required for Self-Protection—Instructions.

In a personal injury action against a railroad company by a flagman stationed at a street crossing defendant requested an instruction that it was the duty of the plaintiff at the approach of trains to exercise all reasonable care to avoid being struck, and if, before being struck, he could have known of the approach of defendant's train in time to have avoided the accident, he was not entitled to recover. The court had already charged that it was the duty of plaintiff to exercise the degree of care that an ordinarily prudent man engaged in that business, and under like circumstances, would have exercised: *held* that, as the jury had been sufficiently instructed as to the measure of care required of plaintiff, and as the requested instruction was susceptible of meaning that it was plaintiff's duty to disregard the trains under his control at the time of the accident in order to care for his own safety, it was properly refused.

Negligence—Necessity of Proving All Allegations—Instructions.

In an action against a railroad company by a flagman stationed at a street crossing for the purpose of signaling trains, in which it was alleged that the engine which injured plaintiff crossed without having received any signal to do so, that it was run at a rate of speed exceeding that permitted by a city ordinance, was without a headlight, and did not give warning by the ringing of the bell, an instruction requiring all these allegations of negligence to be concurrently proved in order to justify recovery was properly refused.

Appeal—Review—Directing Verdict—Harmless Error.

In an action against a railroad company, in which the evidence of negligence was sufficient to authorize the submission of that issue to the jury, the court gave instructions which in fact directed a verdict for defendant. A number of other instructions, however, were given, correctly submitting the case to the jury, who found a verdict for plaintiff: *held* that, though the verdict was contrary to the law as contained in the two instructions, which practically directed a verdict for defendant, yet, under Rev. St. 1899, § 865, providing that on appeal the supreme court shall not reverse unless error was committed materially affecting the merits, the court would not reverse because of the jury's failure to follow the two erroneous instructions.

Same—Same.

Where certain ordinances were admitted in evidence without objection, and no exception was afterwards taken to the overruling of a motion to strike them out, an objection that the defendant railroad had not accepted the ordinances cannot be raised for the first time on appeal.

Robertson, C. J., and Marshall, J., dissenting.

In banc. Appeal from circuit court, Jackson county; E. P. Gates, Judge.

Action by Frederick Erickson against the Kansas City, Osceola & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The following is the opinion in division No. 1:

VALLIANT, J. Plaintiff recovered judgment for \$6,000 as damages for personal injuries suffered through the alleged

Erickson v. Kansas City, etc., Ry. Co

negligence of the servants of defendant in operating a locomotive engine, from which judgment defendant appeals.

The petition is to the following effect: The defendant is a railroad corporation running its engines and cars in Kansas City on tracks of the Kansas City Suburban Belt Railway Company, called the "Belt Road," from a point in the intersection of Wyandotte and Second streets along Second street eastwardly crossing Main and Walnut streets and Grand avenue. Other railroad companies besides the defendant operate their trains over this Belt road. The Metropolitan Street Railway Company owns and operates a single-track cable road crossing the tracks of the Belt road on Grand avenue at right angles. On November 17, 1896, plaintiff was in the employ of the Belt Company as flagman, stationed at this crossing, his duties were to flag all trains passing there. At that time there was in force an ordinance of the city which provided that no railroad engine should be run within the city limits at a greater rate of speed than six miles an hour, and that no one in charge of such locomotives should allow it to be run between sunset and sunrise without having a large lamp or headlight or lantern conspicuously placed in front in the direction in which it is running, whether forward or backward. About 10 o'clock at night on the date above mentioned plaintiff was in his place of duty at the crossing, engaged in flagging two trains going west on the north track of the Belt road, when he was struck by an engine of the defendant going east on the south track, knocked down, run over, permanently injured and disabled for life. The injuries were the result of the negligence of the defendant's servants in charge of the engine in this: running the engine at a greater rate of speed than six miles an hour without having any large lamp, headlight, or lantern conspicuously displayed in front in the direction in which the engine was going, and without ringing a bell. The averment in the original petition as to his last point was that the engine was being run "without ringing any bell or sounding any whistle on approaching said street crossing, as was its duty to do." But on motion of the defendant all of that averment after the word "bell" was stricken out. The answer was a general denial, and a plea that the plaintiff was himself guilty of the negligence which wholly occasioned his injuries by attempting, without any necessity for doing so, to cross the railroad tracks in front of a moving train, with full knowledge of the danger of the situation. The reply was a general denial.

The evidence for the plaintiff tended to prove as follows: The plaintiff was the employee of the Belt Company. His duty was to flag all trains at that crossing. On the night in question, about 10 o'clock, he was standing in the street car track south of and near the south track of the Belt road. He had just flagged a street car to stop, and had flagged a passenger train of the Chicago & Great Western (called the "Maple

Erickson v. Kansas City, etc., Ry. Co

Leaf") road to come on. This Maple Leaf train was coming east. It had to cross on the north track to the east of Grand avenue, and then switch back west, to reach its station at Second and Wyandotte streets. Under the rules governing the operation of the trains, this train at that time had the right of way, and no freight train or switch engine could come in on the south track without interfering with its movement. The Maple Leaf train passed east over the crossing. Then the plaintiff stepped out of the street car track, and flagged the street car to cross to the north, which it did. There was another street car behind that one, which the flagman held for the time, and, as soon as the first street car passed over the crossing, he stepped back on the street car track, very close to the south track, turned to the east, and gave the signal to the Maple Leaf train to come back, which it did. There was another train, belonging to what they called the "Air Line," behind the Maple Leaf train, going in the same direction, to which the plaintiff also signaled to come on, and while he was in the act of giving that signal a switch engine of the defendant, coming from the west on the south track, struck him, knocked him down, and inflicted serious injuries. The plaintiff's position, when he stopped the first street car, and flagged the Maple Leaf train to come east over the crossing, was in the street car track near the south rail of the south track of the Belt road, facing west. From that position he looked, and would have seen the defendant's engine coming on the south track if there had been a headlight on it; but there was none. From the time he turned his face east to signal the Maple Leaf train to come back until he was struck was, according to his testimony, not more than half a minute, though one of plaintiff's witnesses on cross-examination said, "Well, as near as I can tell, it was between one and two minutes." The engine that struck the plaintiff was running backward, with tender in front, and the headlight was at the front end of the engine. It was downgrade. The engine was running fast. The witnesses varied in their estimates from 10 to 30 miles an hour. It came down the grade without making any noise, and no bell was rung. The night was dark, and there was no street light at the crossing. On the part of the defendant the evidence as to rate of speed, absence of headlight, and failure to ring the bell was contradictory to that of the plaintiff. After the city ordinances referred to in the petition had been read in evidence by the plaintiff, the defendant moved to strike them out "for the reason that they are not made, by their terms, applicable to anybody but to the employees of the road." The motion was overruled. At the close of the plaintiff's evidence, and again at the close of all the evidence, the defendant asked an instruction to the effect that the verdict should be for the defendant, which instruction the court refused, and defendant excepted.

Appellant, in its assignment of errors and brief, insists that

Erickson v. Kansas City, etc., Ry. Co

the judgment should be reversed on the following grounds: First. That the court erred in refusing the instruction in the nature of a demurrer to the evidence. Second. That plaintiff cannot recover, because he and the engineer in charge of the defendant's locomotive were fellow servants. Third. That the court erred in refusing instructions 1 and 2 asked by defendant, which were "to the effect that, although the bell was not rung, yet, if the whistle was sounded, that was sufficient." Fourth. That instructions 6 and 7 asked by defendant should have been given. (These instructions will be set out hereafter.) Fifth. That the motion for a new trial should have been sustained, because the verdict was against the law as declared by the court.

1. In support of the first assignment of error the learned counsel, in their brief, say: "Defendant's first contention being that, even admitting excessive speed, absence of headlights, and failure to ring bell, under the evidence plaintiff cannot recover. Had he stood six inches from where the accident occurred, he would not have been struck." We do not understand the counsel, in their brief, to claim that the evidence did not tend to show negligence on the part of defendant's servants in charge of the engine, but for their demurrer to the evidence they rely on the fact that the plaintiff's position was one of danger, into which he had unnecessarily put himself, and was, therefore, guilty of contributory negligence. It may be doubted if the answer on this point amounts to a plea of contributory negligence. The averment is that, if the plaintiff sustained injuries, "it was occasioned wholly on account of his negligence, etc." If that is so, it disproves the statements in the petition that the defendant was guilty of negligence, and, if the rule of code pleading that any fact which goes to disprove an essential statement in the plaintiff's petition may be proven under the general denial (Pattison, Mo. Code Pl. 551-556; Pomeroy, Code Rem. § 657 et seq.) applies in a case like this, then this plea, following as it does a general denial, presents no new issue. The case does not require a decision on that point, however. The statement in the plea as constituting the plaintiff's negligence is that the plaintiff attempted to cross the railroad in front of a moving train, with full knowledge of the danger. If that is to be taken as a plea of contributory negligence, the burden was on the defendant to prove it; and there was no such evidence. But, if the defendant's view of this part of the case is correct, the demurrer to the evidence should have been sustained, even if there had been no plea of contributory negligence, because that which the defendant really relies on as constituting contributory negligence arises out of the plaintiff's own evidence; that is, that the plaintiff stood near enough to the track to be struck, with his back to the west, from which direction trains were liable to come. The fact that the plaintiff was in a position of danger is manifest from the result,

Erickson v. Kansas City, etc., Ry. Co

and the fact that he would not have been struck by the engine if he had been a few feet further south of the track is also self-evident. But the question is, was it negligence in him to be where he was under the circumstances? He testified that when a train was coming from the east he usually stood on the north side of the tracks, because the engineer was on that side, and could better see the signals; but when a train was coming from the west his proper position was on the south of the tracks, for the same reason; and also, as the street cars passed in only one direction there,—north,—he could then better govern their movements by standing in the cable track south of the crossing. He also testified that when he was struck he was standing where he could best signal the trains, and from which point his signal could best be seen. He also said that looking west, as he did, from where he stood before he turned, he would have seen the train if it had had a headlight, as far off as Delaware street. As to his duties he said: "My duties were to protect everything passing by that crossing, trains and street cars and the public, pedestrians going back and forth. I was to watch out for them all." He certainly was, at the moment of the accident, doing his full duty in regard to the three trains in sight seeking to cross,—the Maple Leaf, the Air Line, and the cable train. Whether in so doing he was as mindful as the law required him to be of his own safety is the question the defendant raises. His was necessarily a position of danger, as well as of great responsibility. If the risk he took of his own safety was only such as a faithful discharge of his duties required, then he was not, in the eyes of the law, negligent; and, on the other hand, if the accident was the result of that risk only, he cannot recover, because it was a risk incident to his employment, which he assumed when he entered the service. But if, under those circumstances, the negligence of the defendant became the proximate cause of the accident, the fact that the plaintiff was in a position of danger cannot be ascribed to him as negligence contributing to the injury. His conduct, in order to come under the condemnation of the law of negligence, must have been something more than taking a risk which a faithful discharge of his duties required. The question of whether a plaintiff's conduct amounts to contributory negligence is sometimes a question for the court and sometimes a question for the jury. If, in the presentation of the plaintiff's case, his conduct is shown to have been negligent to such a degree as that there can be no two opinions about it among reasonable men, it is a question for the court. But if it is such as that reasonable men may differ about it, it is a question for the jury. The defendant says the plaintiff was standing unnecessarily near the south track, with his back to the west, from which point a train was liable to come. The plaintiff's testimony tends to contradict that statement in two particulars,—that his position was where he

Erickson v. Kansas City, etc., Ry. Co

could best see and his signals be best seen, that under the rules governing the movements of trains then and there no switch engine had a right to come on the south track until the Maple Leaf train had reached the Wyandotte station. But, taking the defendant's statement of the situation, it still leaves it an open question of fact whether the plaintiff was failing to observe ordinary care. If the engine which did the mischief had come down the track at the rate of only six miles an hour, with headlight conspicuously displayed, the stream of light would doubtless have flashed down the track past where the plaintiff was standing, and he might have seen it in time to have stepped aside, though his face was to the east. Was it unreasonable for the plaintiff, after he had looked to the west, and had seen no headlight, to take the position he did trusting that the switch engine would not come when, under the rules, it had no right to come, or that, if it should come, it would not come swiftly, silently, and in darkness? The plaintiff said that from the time he turned his face east it was not over a half minute until he was struck. One of his witnesses on cross-examination said it was one or two minutes. When it comes down to the point of estimating duration of time by one or two minutes, or the fraction of a minute, under exciting circumstances, the testimony of the average witness as to accuracy is of little value. Under the circumstances of this case we are of the opinion that the most that can be said on this point in favor of the defendant is that it was a question of fact for the jury, and, since the court submitted it to the jury under unobjectionable instructions, and the jury have rendered their verdict, that is the end of it.

2. The point is presented that the plaintiff and the engineer were fellow servants. There is, however, one essential to the relation of fellow servants that is missing,—there was no common master. The plaintiff was the servant of the Belt Company, from whom he received his orders, and to whom he was answerable. The engineer, on the other hand, was the servant of the Kansas City, Osceola & Southern Company, from whom he received his orders, and to whom he was answerable. Under such circumstances they were not fellow servants. *Beach on Contrib. Neg.* (3d Ed.) §§ 338, 341; *Sherman & Redf. on Neg.* (5th Ed.) §§ 224, 225.

3. The third point of appellant is thus stated in its brief: "The court erred in refusing to give instructions numbered 1 and 2 as prayed by defendant. These instructions were to the effect that, although the bell was not rung, yet, if the whistle was sounded, it was sufficient." The instructions, as asked, were as follows: "(1) The court instructs the jury that it devolves on the plaintiff to make out his case by a preponderance of the evidence, and before he can recover herein you must believe from the evidence that at the time of being injured he was in the exercise of ordinary care,—that

is, such care as a person of ordinary and reasonable prudence would exercise under like circumstances,—and that, while in the exercise of such care, he was run upon and struck by an engine of the defendant, and at the time thereof the same was being run at a rate of speed in excess of six miles per hour, or that said engine had no headlight nor large lantern conspicuously placed in front of same facing the direction in which the same was moving, or that defendant's servants in charge of said train did not ring the bell on said locomotive or sound the whistle thereof to notify the plaintiff of its approach; and unless you so believe you will find for the defendant. (2) If you shall believe from the evidence that at the time of the injury to the plaintiff there was a headlight facing plaintiff on said engine, conspicuously placed in front of the same facing the direction in which the same was moving, and that the bell was rung or whistle sounded, and that the train was not running at a rate of speed to exceed six miles an hour, your finding must be for the defendant." These instructions were given as asked, except the words "or sound the whistle" in the first and "or whistle sounded" in the second were stricken out. The plaintiff had alleged in his petition, in the beginning, four acts of the defendant as negligence,—speed in excess of six miles an hour, no headlight, failure to ring the bell, or sound the whistle. On motion of the defendant the allegation as to failure to sound the whistle was stricken out. The instructions, as given, required the plaintiff to prove one or the other of the three acts alleged as negligence, and that it was the proximate cause of the accident; else the verdict should be for the defendant. But as the averment in the petition that the whistle was not sounded was stricken out on the defendant's motion, it had no right to an instruction indicating that the duty devolved on the plaintiff to prove that averment. The second instruction was to the effect that, if the whistle was sounded, the plaintiff could not recover. In their brief the learned counsel argue that, if the plaintiff knew of the approach of the train, whether by the ringing of the bell or the sounding of the whistle, it was all the same in effect; and that is so. But that is not the effect of the instruction. It was, if the whistle was sounded, the plaintiff could not recover. Of course, if the plaintiff knew the train was coming, it is immaterial from what source he derived the knowledge. To say that the whistle was sounded is not the same as to say the plaintiff knew the train was coming. It would be difficult to believe that this plaintiff knew that that train was coming. The court did not err in modifying the instructions as asked.

4. The sixth instruction refused is as follows: "(6) It was the duty of the plaintiff to look both ways for the approach of trains, and to exercise all reasonable and ordinary care to avoid being struck by the same; and if, at any time before

Erickson v. Kansas City, etc., Ry. Co

being struck, he could, either by looking or listening, have known of the approach of the defendant's train in time to have avoided the accident complained of, or occupied a place of safety in the discharge of his duties, then he is not entitled to recover in this cause, and your verdict should be for the defendant." The jury had already been instructed that it was the duty of the plaintiff to have exercised the degree of care that an ordinarily prudent man engaged in that business and under like circumstances would have exercised, and that he could not recover if he failed to do so, and if such failure contributed to the accident. Now, when this instruction says, "It was the duty of the plaintiff to look both ways for the approach of trains, and to exercise all reasonable and ordinary care to avoid being struck by the same," if it means more than the jury had already been instructed on that point, or if it means that he must use all reasonable care to protect himself, regardless of his duty to protect the lives of other persons whose safety was in his hands, it means more than the law approves. The instruction in that connection goes on to say, "And if at any time before being struck he could, either by looking or listening, have known of the approach of defendant's train in time to have avoided the accident," he cannot recover. That is to say, if, by turning his back on the three trains that were watching to move on his signal, and looking to the west, he might have seen this engine of the defendant in time to have jumped out of the way before it struck him, he cannot recover. The instruction is susceptible of that interpretation, and was, therefore, properly refused. This man's office was one of peril, and the lives of many persons depended daily on the faithful performance of his duty under dangerous conditions; and, whilst he was bound to observe the care that an ordinarily prudent man under the same conditions would observe for his own protection, yet his own protection was not the only or the chief obligation that rested upon him, and if, in the faithful discharge of his duties, he put the welfare of others before that of his own, the law will not condemn him.

5. The seventh instruction refused was as follows: "(7) Although you may believe that the plaintiff did not signal the defendant's train, and that defendant crossed Grand avenue and struck plaintiff without having received any signal to cross the same, this fact alone will not authorize you to find a verdict for the plaintiff. Before he can recover, he must have been in the exercise of ordinary care, and defendants' train must have been run at a rate of speed exceeding six miles an hour, without a headlight facing the plaintiff, and without warning given by defendant of the coming of the train either by blowing the whistle or ringing the bell. If either warning was given of the coming of the train, the plaintiff cannot recover; and in no event can he recover if his position at the time contributed in any wise to his injury." Under that

Erickson v. Kansas City, etc., Ry. Co

instruction the plaintiff could not recover unless he proved all the acts of negligence charged, and also that, if the whistle was sounded, he could not recover. What is said above in discussing the first and second instructions refused is applicable to this instruction.

6. The contention that the motion for a new trial should have been sustained on the ground that the verdict is against the law as declared by the court is founded on the following: Among the instructions asked by the defendant were these two: "(3) The plaintiff, under the law, was charged with the exercise of ordinary care; and if you shall believe from the evidence that he stood on, or so near to, the south track of the railroad that a passing train struck him, and that a careful and prudent flagman would not, under like circumstances, have stood at said place, then your finding must be for the defendant. (4) Although the plaintiff may have been instructed to signal trains from the south side of the track, such instructions would not justify him in assuming, if he did assume, a dangerous position to flag the trains at the time of his injury; and if you believe that at the time he was struck by the train he was occupying a dangerous position, and that such position contributed in any manner to his injury, and that a careful and prudent flagman would not, under like circumstances, have occupied such a position, you will find for the defendant." The court struck out of instruction 3 the words, "and that a careful and prudent flagman would not, under like circumstances, have stood at said place," and struck out of instruction 4 the words, "and that a careful and prudent flagman would not, under like circumstances, have occupied such a position," and gave the two instructions. The striking out of those words rendered the instructions equivalent to a peremptory direction to find for the defendant. They amounted to a declaration that, if the plaintiff was standing near enough to the track to be struck by the passing train, he was not entitled to recover. Counsel for appellant may well say the verdict of the jury is against the law as there declared by the court. In view of the other instructions given and those refused, and of the ruling of the court all through the trial, we are inclined to think there must have been some accident or oversight that left these two instructions in that form. But, however that may be, the instructions as given were erroneous, and in conflict with the other instructions given. It is the duty of a jury to obey the instructions of the court, even though they may be erroneous. If instructions happen to be in conflict with each other, the jury is not to blame if it follows the direction of either. In such case, if a new trial should be granted, it would be not on the ground of misconduct of the jury, but of error in the instructions. The defendant was not entitled to a peremptory instruction for a verdict in its favor, and we are satisfied from the whole record in this case that the jury did

Goe v. Northern Pac. Ry. Co

not understand that they were so directed. There were other instructions defining the issues, and directing the jury as to the law, and the case appears to have been tried in conformity to those instructions. The point presented that the verdict is against those two instructions is very technical, and does not reach the merits of the case. This court is forbidden by law to reverse the judgment of any court, "unless it shall believe that error was committed by such court against the appellant or plaintiff in error, and materially affecting the merits of the action." Section 865, Rev. St. 1899.

7. Lastly, it is said in the brief for appellant, though it is not assigned for error, that the motion for new trial should have been sustained, because there was no evidence that the defendant ever accepted or agreed to be bound by any of the ordinances in evidence. This point was not made in the circuit court. The ordinances were read in evidence without objection, and, after they were in, the defendant moved to strike them out on the ground that they are not made, by their terms, applicable to anybody but to the employees of the road. The motion was overruled, and no exception was taken to the ruling.

We find no error in the record affecting the merits of the case, and therefore the judgment is affirmed.

BRACE, P. J., concurs. MARSHALL and ROBINSON, JJ., dissent. The cause is therefore transferred to court in banc.

Johnson & Lucas, for appellant.

I. N. Watson, for respondent.

PER CURIAM. The foregoing opinion by VALLIANT, J., in division No. 1 is adopted as the opinion of the court in banc. BRACE, GANTT, BURGESS, FOX, and VALLIANT, JJ., concurring. ROBINSON, C. J., and MARSHALL, J., dissenting.

GOE v. NORTHERN PAC. RY. CO.

(*Supreme Court of Washington, Jan. 7, 1903*)

[71 Pac. Rep. 182.]

Injury to Servant—Proximate Cause Where Servant in Trying to Break His Fall Was Injured by Unguarded Machinery.

A servant employed about machinery slipped, and in falling struck an unguarded lever, which set the machinery in motion. In endeavoring to catch himself, he threw his hand against a cogwheel, which caught and ground it: *held* that, if the act of the master in leaving the unguarded machinery ready to be set in motion was negligent, such negligence would be the proximate cause of the injury.

Same—Negligence—Question for Jury.

Whether a master was guilty of negligence in leaving unguarded machinery about which a servant was required to work, and which only needed a movement of a lever to be set in motion, *held*, under the evidence, to be a question for the jury.

*Goe v. Northern Pac. Ry. Co***Fellow Servants—Workman Injured by Machinery Left Unguarded by Foremen.**

Where an engineer, under the direction of his foreman, left his engine, and, while it was so unguarded, another servant, also under the direction of the foreman, went to work about it, and was injured by reason of its having been left unguarded, the injury was not caused by the act of a fellow servant.

Anders, J., dissenting.

Appeal from superior court, Lewis county; A. E. Rice, Judge.

Action by Arthur Goe against the Northern Pacific Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

B. S. Grosscup and Jas. F. McElroy, for appellant.

Maurice A. Langhorne and C. H. Forney, for respondent.

DUNBAR, J. This is an appeal from the judgment of the superior court of Lewis county in favor of respondent for the sum of \$1,500 and costs. Respondent was employed by appellant as a common laborer. His duties were to assist as such laborer in the operation of a steam shovel at Skookum Chuck gravel pit, near Centralia, in Lewis county. He had been working at such employment for five days at the time of his injury, assisting in leveling the track, setting jack blocks, and other such work. Foster was foreman of the work, and had supervision over all the men. Shortly prior to the injury to the respondent, the steam shovel had tipped over, and the men, under the supervision of Foster, were engaged in righting the machinery to resume the work. The machine consists of a boom, a crane, and a dipper arm, to which is attached the dipper or shovel. The boom is a stand mounted on wheels running on a track out into the gravel pit. The crane is a movable arm attached to the boom. The boom is run by a main engine inclosed in a car. The crane is worked by a smaller engine, called the "crane engine," stationed at the foot of the boom. Power is furnished to the crane engine by a steam pipe running from the larger engine, and is controlled by a globe valve or shut-off directly over the head of the crane engineer. The crane engine is manipulated by a throttle lever at the cranesman's hand. The steam may be shut off from the crane engine alone, or it may be shut off back of the crane engine between there and the main engine. At the time of the accident to the machinery, under the order of Foster, the superintendent, the cranesman was sent from his particular post of duty to assist in putting things in order above, leaving the lever unguarded and unlocked. The steam was not shut off at the valve, being shut off from the crane engine only. The respondent was called by the superintendent, Foster, from his place of work in the gravel pit, and ordered to ascend the boom, and assist there in replacing some machinery that had slipped out of place. In attempting to obey the order, he stepped on the lower part of the

Goe v. Northern Pac. Ry. Co

boom, which was wet from rain, slipped and fell,—he having on rubber boots at the time,—struck against the unguarded lever, and set the machinery in motion. In attempting to save himself, his hand came in contact with the cogwheel which, proceeding to revolve, ground off his thumb.

It is not contended by the appellant that the respondent was guilty of contributory negligence, and there is none shown by the record; but it is strenuously insisted that there was no proof of negligence on the part of the appellant, and that the injury sustained was the result of an accident for which no one is responsible. It is not necessary to enter into a discussion of the familiar principles, so often and so uniformly asserted by this court, that it is the duty of the master to furnish the servant a reasonably safe place in which to work, that the servant assumes the risks of apparent dangers of the employment, that the employer is not an insurer of the safety of the servant, and that the servant is bound to use his faculties and exercise his common sense to avoid dangers. These may all be conceded as the accepted doctrines of this court, and, if it appeared in this case, as it did in *Bullivant v. City of Spokane*, 14 Wash. 577, 45 Pac. 42, cited by appellant, that the injured employee could have seen and appreciated the perils to which he was exposed in his employment, the judgment would have to be reversed. But the record does not show that the respondent was aware of the danger which beset him, and which was the cause of his injury, for he testified that he was not acquainted with the machinery of the crane; that he had not been on it before, and had not paid any attention to its working, his attention having been absorbed by his own duties; and that he had not been notified of the danger when he was sent upon the crane to work.

So that the questions of apparent dangers and prudent actions on the part of respondent are eliminated from the case on appeal, the jury having passed upon those questions under competent testimony and legal instructions. The main insistence is that the injury was caused by an accident, for which the appellant was in no way responsible; and it is argued that, if it had not been for the accident of falling, supplemented by the accident of striking the lever, still further supplemented by the fact of the respondent throwing his hand on to the cogs, no injury would have been sustained. This may be conceded without settling the question of proximate cause, for it is well established that, where the primary cause of an injury is a pure accident, occasioned without fault of the injured party, if the negligent act of the defendant is a co-operating or culminating cause of the injury, or if the accident would not have resulted in the injury excepting for the negligent act, the negligence is the proximate cause of the injury for which damages may be recovered. That doctrine does not conflict with the rule requiring the plaintiff to use ordinary care and diligence. This rule was followed by

Goe v. Northern Pac. Ry. Co

this court in *Gray v. Water Power Co.*, 27 Wash. 713, 68 Pac. 360, and has been announced in later decisions. So that the ultimate and controlling question in this case is not the question of the accident, but the question of whether or not it was negligence on the part of the appellant to send the respondent to work upon the crane without shutting the steam off from the main engine, and without notifying him of the mechanism of the crane, or warning him of the danger from striking the lever. In *Doyle v. Railroad Co.* (Iowa) 42 N. W. 555, 4 L. R. A. 420, where a coupling pin had been left by the company's employees on the track, and was hurled from the track by a passing train, and injured the plaintiff, a judgment for damages was sustained; the court saying the fact that the accident was an unusual one would not relieve the defendants from responsibility for the negligent act which might result in danger in many ways.

The decision of this case is not without difficulty, but, considering the fact that the respondent, who did not know the mechanical structure of the crane, was sent upon it without warning; that a lever of 2½ feet was left unprotected and unguarded, the engineer, whose duty it was to operate and control it, having been called away from it; and that the mere touching of this lever would start in motion machinery which was dangerous to those working around,—it does not seem to us that this court can say as a matter of law that there was no negligence, or that, conceding the truthfulness of respondent's testimony, there could be no difference of opinion in honest minds as to whether negligence could be inferred. The case would not have been any more favorable to appellant, it seems to us, if some one else, who had been ordered or permitted by the superintendent to go there, had, by accident or mismanagement, struck the lever and set the machinery in motion, thereby causing the same injury to respondent. In such case, the respondent being rightfully where he was sent, and his action in falling eliminated, it would seem to us that the question of negligence would properly be submitted to the jury. There certainly was a perfectly safe way to do this work, viz., by cutting off the steam between the crane engine and the main engine. It might possibly have taken a few minutes longer, but brief time is not to weigh against the safety of the workmen. On the question of the necessity of having the steam from the main engine on, the testimony of both the plaintiff and defendant was exceedingly evasive and unsatisfactory, and the question was a proper one to be submitted to the jury. On the whole we are inclined to think, under the rules we have so often announced, and under the rule announced by the supreme court of the United States in *Railway Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256, viz., that what is the proximate cause of an injury is ordinarily a question for the jury; that it is not a question of science or of legal knowledge, but is to be determined as a

Wright v. Chicago, I. & L. Ry. Co

fact, in view of the circumstances of fact attending it,—that there was sufficient testimony on the question of negligence to be submitted to the jury.

We do not think, under the uniform rulings of this court, that the question of fellow servant is involved. According to the testimony of Foster, which was uncontradicted, he was the superintendent of the appellant, and every one, including both engineers, worked under his orders.

The judgment is affirmed.

REAVIS, C. J., and FULLERTON and MOUNT, JJ., concur.

ANDERS, J. I am constrained to dissent from the conclusion announced by my associates in this case for the reason that upon the facts disclosed by the record and clearly stated in the opinion of the majority of the court I am unable to see wherein the appellant was guilty of any negligence whatever. It does not appear that the engine was defective in any of its parts, or that it was not being used with ordinary care. It is evident that the respondent would not have been injured as he was if the engine had not been put in motion by the application of external force to the throttle lever, which was designed and used to start and to stop it. And I think it may be said as matter of law, under the circumstances revealed by the record, that it was not incumbent on the appellant to anticipate or provide against the possibility that the respondent might voluntarily or involuntarily move the lever, and thus set the machinery in motion. He was not called upon to do anything involving the use of the lever, or even the engine, and hence there was no occasion or duty to warn him not to meddle therewith. In short, it seems to me that respondent's injury was the result of a mere accident, for which appellant ought not to be held responsible; and, if I am correct in this conclusion, it follows that this case does not fall within the rules announced in the cases cited in the majority opinion.

I think the judgment should be reversed.

WRIGHT v. CHICAGO, I. & L. RY. CO.

(Supreme Court of Indiana, Feb. 27, 1903.)

[66 N. E. Rep. 454.]

Special Interrogatories.

The answer to the special interrogatories, to override the general verdict, must be in irreconcilable conflict with it.

Same—General Verdict—Presumptions.

All reasonable presumptions will be indulged in support of the general verdict, and against the answers to the interrogatories.

Same—Injury to Brakeman—Proximity of Switch Stand—Presumptions.

In an action by a brakeman for injuries received while switching, owing to a switch target striking him as he was attempting to get on the cab of the engine, it would not be presumed, as against the gen-

Wright v. Chicago, I. & L. Ry. Co

eral verdict in favor of the plaintiff, that the switch was not placed dangerously near the railroad track, etc., as alleged in the complaint, where the answers to the special interrogatories did not expressly so find.

Injury to Brakeman—Proximity of Switch Stand—Assumption of Risk.*

A brakeman engaged in switching does not assume the risk of injury on account of the nearness to the track of a switch stand, though he knows how near it is, unless he knows and appreciates the danger created thereby.

Same—Same—Same.

The brakeman would not assume the risk, even though he knew and appreciated the danger, if he first saw the switch stand on the night of his injury, as he would not have had an opportunity for making objections.

Appeal from circuit court, Clark county; Jas. K. Marsh, Judge.

Action by William Wright against the Chicago, Indianapolis & Louisville Railway Company. Judgment for defendant, and plaintiff appeals. Transferred from the Appellate Court under section 1337u, Burns' Rev. St. 1901 (Acts 1901, p. 590). Reversed.

G. H. Voight, Farnsley Means, Carroll & Carroll, and W. B. Moody, for appellant.

E. C. Field, W. S. Kinnan, and M. Z. Stannard, for appellee.

MONKS, J. This was an action brought by the appellant to recover damages for personal injuries alleged to have resulted from the negligence of the appellee. A trial of the cause was had before a jury, a general verdict being returned in favor of the appellant. The jury, also returned answers to a number of interrogatories submitted by this court at the request of the appellee. On motion of appellee the court rendered judgment for appellee on the answers to the interrogatories, notwithstanding the general verdict. The assignment of errors calls in question only the action of the court in so rendering judgment for the appellee on the answers of the jury to the interrogatories. In determining the questions presented, we can look only to the complaint, answer, general verdict, and the answers to the interrogatories.

Omitting the merely formal allegations of the complaint, it is alleged that the plaintiff on the 2d day of July, 1898, was a brakeman on one of the defendant's freight trains known as a "circus train"; that about 12:30 o'clock on the morning of said day the said train was at the city of Greencastle, Indiana; that the plaintiff was one of the crew operating said train, and was subject to the order and direction of the conductor in charge thereof, and that it was his duty to obey the orders of said conductor; that the engine of said train was engaged in switching cars, and that the plaintiff was ordered by the

*See foot-note appended to Choctaw, O. & G. R. Co. v. McDade (C. A.), 1 R. R. R. 413, 24 Am. & Eng. R. Cas., N. S., 413.

Wright v. Chicago, I. & L. Ry. Co

conductor to assist in the switching, by coupling the cars and throwing the necessary switches, and that in discharging this duty it was customary and necessary, by the rules of the company, that the plaintiff should ride on the cab of the engine, in moving from one point on the track to another; that after having transferred the cars the plaintiff was ordered to throw the switch so that the engine could move to another track; that he threw the switch, signaled the engine to back, and as it moved back he attempted to get on the cab of the engine, as it was his duty to do; that he placed one foot on the lower step of the cab of the engine, and before he could place his other foot on the step the engine ran opposite to a switch target, striking the plaintiff's foot and leg against the fans thereof, without fault upon his part, thereby throwing him from said steps under the wheels of the engine, and before he could extricate himself he was run over by said engine, one foot being entirely severed, and other serious and painful injuries being inflicted upon his person, from which he has suffered great physical pain and anguish, has been put to great expense in buying medicines and in securing proper medical aid, and has been permanently injured and disabled, and rendered incapable of performing any manual labor; that said target which plaintiff was run against was negligently and carelessly constructed, and placed by defendant dangerously and unnecessarily near the track, "and closer to the track than such targets are usually placed," and was negligently and carelessly permitted to remain in that position and condition; that the night was dark, no light was placed on the target, or in or about it, and the plaintiff could not see it; and that he did not know of the facts which rendered the same dangerous, nor could he have known of them by the exercise of ordinary care and diligence. Knowledge by the defendant of the defective condition is alleged, and that said injury resulted wholly from the negligence of the defendant, and without any fault upon the part of the plaintiff. Appellee filed a general denial to the complaint.

The facts established by the findings of the jury may, in narrative form, be summarized as follows: Appellant, a man of mature years, had for 12 years been a brakeman on railroad trains, and had been employed by appellee in the capacity of brakeman about 2 years preceding the accident in question. The first year and a half of this time he worked on the division of appellee's road extending from New Albany to Bloomington, and during this time was frequently in the yards at New Albany and Bloomington, and at intermediate points on this division. The last 6 months before the accident he worked on the division between Bloomington and Lafayette, and during the months of May and June, 1898, he made 17 trips through Greencastle on local freight trains as brakeman, and on some occasions did switching in appellee's yards at Greencastle. At both the Bloomington and New

Wright v. Chicago, I. & L. Ry. Co

Albany railroad yards the appellee maintained switch stands or targets during the appellant's service of about a year and a half on said division of railroad. The switch stands in both said yards were of the same pattern as those in use by the appellee at the time of the accident in question. The appellee, at and before the date of the accident in question, maintained in its railroad yards at the different places on its railroad split switch stands substantially at the distance of 3 feet and 9 $\frac{1}{4}$ inches, and stub switch stands substantially at the distance of 4 feet, from the center of the stem of such stands to the nearest point of the ball of the rail next thereto; these being the standard distances on appellee's road for placing such switch stands. On July 2, 1898, well-regulated railroads maintained their split and stub switch stands in their railroad yards at substantially 3 feet 9 $\frac{1}{4}$ inches to 4 feet from the center of the stem of such stands to the nearest points of the ball of the rail next thereto. Appellant had opportunity on at least five or six occasions before the date of the accident in question to observe the distance between the track of the main line of railroad and the main line of the side track at or near the place where he was injured. On the night of his injury, and just before he was injured, appellant turned the switch in question, having at the time his lighted lantern in his hand or upon his arm, and, at the time of turning the same, he ascertained that there was no light on the switch stand. He was vested with authority to control the fireman and the movements of the engine at and before the time he was injured, but when the engine backed toward the westward the appellant had no opportunity, before he was injured, to give any signal to stop said engine. After receiving an order from his conductor to open the switch, switch two of the cars onto the main track, and come back to switch two more cars onto the main track, he, about 12:28 o'clock a. m., caused the work of switching to be begun; the conductor opening the switch the first time, and appellant assisting in the work of switching the cars from the main side track onto the main track, giving the necessary signals in so doing. Before the accident the appellant handled and adjusted the switch target, first closing and then opening the same, and while so doing had his lighted lantern in his hand or on his arm, and at the time ascertained that there was no light on the switch stand. After the first two cars were switched onto the main track, appellant and the fireman attempted to switch two more cars from the main side track to the main track. As the engine returned from the switching of the first two cars, appellant stepped off the engine a few feet west of the switch target to throw the switch, went to the switch, and, by operating the target, adjusted the switch in such a way as to connect the main track with the cross-over track. In so doing he saw and handled the switch target. He crossed from the north to the south side of the main track, and signaled

Wright v. Chicago, I. & L. Ry. Co

the fireman in charge of the engine, and crossed back to the north side of the main track, to a point about five feet east of the switch stand. In obedience to the signal the engine began moving along the main track westwardly, running at the rate of from six to eight miles an hour; and, as it passed the point where appellant stood, he attempted to board it, and, in his haste to get on the engine, failed to think about the switch target—the engine backing toward the west at the time—and in boarding the engine he was struck by the switch target and injured. There was no evidence that the headlight on the engine was burning, and it is found that under the circumstances the appellant could not, by the use of his lantern, have ascertained the location of the switch stand in question while the engine was backing toward the westward.

The general verdict necessarily determined all material issues in favor of appellant, and, unless said answers to the interrogatories are in irreconcilable conflict with the general verdict, the court erred in rendering judgment in favor of appellee on said answers. *Consolidated Stone Co. v. Summit*, 152 Ind. 297, 300, 53 N. E. 235, and cases cited. By the general verdict, therefore, the jury found that appellee was guilty of the negligence alleged; that appellant did not assume the risk of the negligent construction and placing of said switch, and the failure of appellee to place a light on the switch target; and that appellant was not guilty of contributory negligence.

It is insisted by appellee, however, that said answers of the jury to the interrogatories show (1) that appellee was not guilty of the negligence charged; (2) that appellant assumed the risk of the alleged defective construction and placing of the switch by which he was injured; (3) that he was guilty of negligence which directly contributed to his injury.

The rule is that all reasonable presumptions will be indulged in support of the general verdict, and against the answers to the interrogatories. *Consolidated Stone Co. v. Summit*, 152 Ind. 297, 307, 53 N. E. 235, and cases cited; *City of South Bend v. Turner*, 156 Ind. 418, 60 N. E. 271, 54 L. R. A. 396, 83 Am. St. Rep. 200; *Southern Indiana Railroad Co. v. Peyton*, 157 Ind. 690, 697, 698, 61 N. E. 722. The findings of the jury in answer to interrogatories override the general verdict only when both cannot stand, the conflict being such as to be beyond the possibility of being reconciled by any state of facts provable under the issues in the cause. *Consolidated Stone Co. v. Summit*, 152 Ind. 297, 301, 302, 53 N. E. 235, and cases cited; *City of South Bend v. Turner*, 156 Ind. 418, 423, 60 N. E. 271, 54 L. R. A. 396, 83 Am. St. Rep. 200; *Southern Indiana R. Co. v. Peyton*, 157 Ind. 690, 697, 698, 61 N. E. 722.

Under this rule, it is clear that the facts found by the jury in answer to the interrogatories were not in irreconcilable conflict with the general verdict. The answers do not show

Wright v. Chicago, I. & L. Ry. Co

that the switch stand at Greencastle by which appellant was injured was either a stub or a split switch stand, nor that the switch stand was not nearer than 3 feet 9 $\frac{1}{4}$ inches from the ball of the rail next thereto, nor that the same was not negligently placed and maintained dangerously near the railroad track, "and closer to the track than such switch stands are usually placed," as alleged in the complaint and found by the general verdict. We cannot presume, as against the general verdict, that appellee was not guilty of the negligence charged, nor that said switch stand at Greencastle was either a stub or split switch; nor can we presume that it was not negligently constructed and maintained by appellee dangerously and unnecessarily near the railroad track, as alleged in the complaint and found by the general verdict. Appellee may have had stub and split switches in use, at the time of appellant's injury, of the pattern of those at Bloomington and New Albany, as shown by said answers; but said answers do not show, as against the general verdict and the presumptions in its favor, that the switch stand at Greencastle which caused the injury was not of a different pattern, or, if of the same pattern, that it was not negligently placed and maintained dangerously near the railroad track, as alleged.

It is next insisted by appellee that the answers to the interrogatories show that appellant knew, or by the exercise of ordinary care could have known, how near to the railroad track said switch was placed at the Greencastle yards, and that therefore appellant assumed the risks and hazards thereof if it was placed dangerously near said track. The jury was not asked what distance the switch stand which caused the injury was from the railroad track, nor whether appellant knew, or could have known by the exercise of ordinary care, what the distance was from the railroad track. The answers do not show, as against the general verdict, and the presumptions indulged to support it, that appellant knew, or by the exercise of ordinary care could have known, the distance from said switch stand to the railroad track. But even if they showed that he had such knowledge, they do not show that he knew or appreciated the dangers and hazards thereof. Unless he knew and appreciated the dangers and hazards thereof, it cannot be said that he assumed the risks. Consolidated Stone Co. v. Summit, 152 Ind. 297, 302, 303, 53 N. E. 235, and cases cited; Chicago, etc., R. Co. v. Lee (Ind. App.) 64 N. E. 675, 679. As against the general verdict, it cannot be said that the answers show that appellant ever saw said switch stand before he opened and closed the switch on the night of his injury, or that in the exercise of ordinary care he could have seen it before that time. If appellant first saw it on that night, and even if he then knew, or could by the exercise of ordinary care have known, that it was dangerously near the track, and knew and appreciated the hazards and risks thereof—things not shown by the answers to the inter-

Bolin v. Southern Ry. Co

rogatories—it could not be said, as a matter of law, as against the general verdict, that appellant, by continuing to assist in switching the cars until his injury, assumed the risks and hazards of said switch stand's being dangerously near the railroad track, for the reason that the knowledge thereof came to him so recently that he may have had no opportunity before the injury to make objection or complaint to any one representing the master. *Louisville, etc., R. Co. v. Kelly*, 63 Fed. 407, 409, 11 C. C. A. 260, 263.

It is next insisted by appellee that the answers show that appellant's "own negligence contributed to the production of his injuries." After a careful examination of the answers to the interrogatories, we are constrained to hold that, as against the general verdict, they do not show that appellant was guilty of negligence which directly contributed to his injury.

It follows that the court erred in sustaining appellee's motion for a judgment on the answers to the interrogatories notwithstanding the general verdict. We are of the opinion, however, that justice requires that a new trial of the cause be ordered. Judgment reversed, with instructions to the trial court to award a new trial, and for further proceedings not inconsistent with this opinion.

BOLIN v. SOUTHERN RY. CO.

(Supreme Court of South Carolina, Feb. 16, 1903.)

[43 S. E. Rep. 665.]

Negligence—Pleading—Appealable Orders.

Acts 1898, p. 693, authorizes plaintiff to unite together all acts of negligence and other wrongs in one cause of action, and an order requiring him to separate them so as to allege what acts are negligent and what wanton is an order involving the merits, and appealable.

Injury to Employee—Collision—Willfulness or Recklessness in Backing Train

Where the complaint alleges that defendant ran a train backwards in a violent manner, without notice or warning or lights or signals, which fact constituted willfulness and recklessness, it sufficiently sets forth the character of defendant's negligence.

Negligence—Pleading—Necessity of Stating Name of Negligent Employee.*

An allegation in an action for injuries caused by the negligence of the employees of a railroad company is sufficiently definite though it does not give the names of the agents or servants.

Appeal from Common Pleas Circuit Court of Spartanburg County; Townsend, Judge.

Action by T. A. Bolin against Southern Railway Company. From an order on motion to make complaint more definite, both parties appeal. Modified.

*See *Rinard v. Omaha, etc., Ry. Co. (Mo.)*, 22 Am. & Eng. R. Cas., N. S., 34.

Bolin v. Southern Ry. Co

Evans & Finley, for plaintiff.

C. P. Sanders, for defendant.

GARY, A. J. The plaintiff and defendant are both appellants. The plaintiff appeals from that part of an order requiring him to make his complaint definite and certain in the particulars mentioned in the order. The defendant appeals because the circuit judge refused to require the plaintiff to make his complaint definite and certain in other particulars.

Paragraph 2 of the complaint alleges that the plaintiff was employed by the defendant as a locomotive engineer to operate a shifting engine in the yards of the defendant. The complaint, in its third paragraph, alleges: "That on the 26th day of February, A. D. 1902, at or about 10 o'clock in the nighttime, plaintiff was engaged about his duty, making up trains and shifting cars in the defendant's yard, and while so engaged, and without any fault on his part, the defendant, through its agents and servants, willfully and wantonly, recklessly, negligently, and in utter disregard of the rights of the plaintiff, caused a locomotive to push a line of freight cars with great force and violence, and without any notice whatever to plaintiff, onto the engine operated by plaintiff, in such a manner as to collide with the said engine occupied by plaintiff in the discharge of his duty, breaking the machinery thereon, and bursting steam pipes, etc., causing certain injuries to be inflicted upon plaintiff." The allegations of the fourth paragraph are as follows: "That by reason of the willful, wanton, reckless, and negligent acts of the defendant, its agents and servants, in causing its locomotive to push said line of freight cars onto the engine occupied by plaintiff, and the further failure of the defendant to provide a proper lookout to guard against such an accident, and to place the proper lights and signals on its said train, plaintiff had no notice whatever of its approach until his engine had been struck by the said line of freight cars, thereby breaking the steam pipes and machinery of the same," etc., and causing the plaintiff to be injured in particulars therein named.

The defendant made a motion for an order requiring the plaintiff to make his complaint definite and certain in the following particulars: "(1) By alleging and stating definitely and certainly what acts of the defendant or its agents were willful, what were wanton, what were reckless, and what were negligent. (2) By stating how and in what manner the defendant or its agents willfully, wantonly, recklessly, negligently, and in utter disregard of the rights of the plaintiff, caused a locomotive to push a line of freight cars with great force and violence, and without any notice whatever to plaintiff, onto the engine operated by plaintiff. (3) By stating and giving the name or names of the agents and servants of defendant who willfully, wantonly, recklessly, negligently, and in utter disregard of the rights of plaintiff, caused a locomotive to push a train of freight cars with great force and

Bolin v. Southern Ry. Co

violence, without any notice whatever to plaintiff, onto the engine operated by plaintiff. (4) By stating definitely and certainly in the fourth paragraph of the complaint in what manner the defendant failed to provide a proper lookout to guard against such an accident, and by alleging what kind of a lookout should have been provided, and how and in what manner the defendant failed to place proper lights and signals on its train, and what lights and signals have been so placed."

In his order, his honor the presiding judge says: "The motion is granted as to the first particular. The motion is refused as to the second and fourth, because I think the facts are stated sufficiently definite and certain. As to these the motion is refused. The motion is refused as to the third, for the reason that defendant is charged with knowledge of the name of the agent whom he employed to manage its engine on the alleged occasion."

When the case was called for hearing in this court, the defendant interposed the preliminary objection that the said order is not appealable. We will first dispose of that question. The act of 1898 (page 693) is as follows:

"That in all actions *ex delicto* in which vindictive, punitive or exemplary damages are claimed in the complaint, it shall be proper for the party to recover also his actual damages sustained, and no party shall be required to make any separate statement in the complaint in such action, nor shall any party be required to elect whether he will go to trial for actual or other damages, but shall be entitled to submit his whole case to the jury under the instruction of the court.

"Sec. 2. That in all cases where two or more acts of negligence or other wrongs, are set forth in the complaint, as causing or contributing to the injury for which such suit is brought, the party plaintiff in such suit shall not be required to state such several acts separately, nor shall such party be required to elect upon which he will go to trial, but shall be entitled to submit his whole case to the jury under the instructions of the court, and to recover such damages as he has sustained, whether such damages arose from one or another or all such acts or wrongs alleged in the complaint."

In *Proctor v. Ry. Co.*, 64 S. C. 491, 42 S. E. 427, it was held that this statute permits the jumbling together in one statement of all acts of negligence and other wrongs. In *Hawkins v. Woods*, 60 S. C. 521, 39 S. E. 9, the court uses this language: "Section 188 of the Code provides that the cause of action which may be united in one complaint must be separately stated. If a motion is made to require the plaintiff to make his complaint definite and certain by stating the cause of action separately when the allegations of the complaint are appropriate to one or more causes of action, the refusal of such motion necessarily involves the merits." It necessarily follows that, if the complaint contains but one cause of action, and the plaintiff is required to formulate his allegations so as

Bolin v. Southern Ry. Co

to set out two or more causes of action, such order would involve the merits, and would be appealable. In the case of *Blakely & Copeland v. Frazier*, 11 S. C. 122, the court says: "The term 'merits' is not very clearly defined. It certainly embraces more than the questions of law and fact constituting the cause of action or defense. As it regards the principles of construction, the necessary means of attaining an end stand upon the same ground of privilege as the end itself. If, then, a party is entitled to an appeal as a means of securing a proper judgment, he is presumably entitled to such appeal in order to secure that without which the judgment could not be rightfully had. The word 'merits' naturally bears the sense of including all that the party may claim of right in reference to his case. * * * It may be concluded from the foregoing that whenever a substantial right of the party to an action material to obtaining a judgment in such action is denied, a right of appeal lies to this court." The order deprived the plaintiff of the right conferred by the act of 1898 to jumble together in one statement all acts of negligence and other wrongs, and the practical effect of the order was to compel the plaintiff to formulate his allegations so as to set out two or more causes of action, although the complaint contained but one cause of action. *Griffin v. Ry. Co.*, 65 S. C. 122, 43 S. E. 445. The order was, therefore, appealable.

We will next consider the plaintiff's exception which assigns error as follows: "(1) In granting the motion of the defendant in the first paragraph, thereby holding that said complaint 'had not stated definitely and certainly enough what acts of the defendant or its agents were willful, wanton, reckless, and what were negligent.' As the complaint alleges that defendant, through its agents, ran a train of cars backwards in a violent manner, without notice or warning or lights or signals to apprise the plaintiff of his danger, which fact constitutes willfulness, wantonness, recklessness, etc., and that said notice of defendant to plaintiff does not confine its exceptions to any particular paragraph of said complaint; therefore, if said information is set forth in any of the allegations of said complaint, it is sufficient." This exception must be sustained for the reasons just stated.

The defendant's exceptions are as follows: "(1) In holding that it was sufficiently stated in the complaint how and in what manner the defendant or its agents willfully, wantonly, recklessly, negligently, and in utter disregard of the rights of plaintiff, caused a locomotive to push a line of freight cars with great force and violence, and without any notice whatever to plaintiff, on the engine operated by plaintiff; it being respectfully submitted that the allegations of the complaint are general, and not specific, and that conclusions of law, instead of facts, are alleged. (2) In ruling and holding that the allegations of the fourth para-

Bolin v. Southern Ry. Co

graph of the complaint were sufficiently definite and certain in alleging in what manner the defendant failed to provide a proper lookout or guard against such an accident, it being respectfully submitted that the allegations in this particular are too general to inform the defendant of the facts upon which the plaintiff intends to rely. (3) In not requiring the plaintiff to make his complaint more definite and certain by requiring him to allege what kind of a lookout should have been provided, and how and in what manner the defendant failed to place proper lights and signals on its train, and what lights and signals should have been so placed. (4) In not requiring the plaintiff to make his complaint more definite and certain by requiring him to give the name or names of the agents and servants of the defendant who willfully and wantonly, recklessly, negligently, and in utter disregard of the rights of the plaintiff, caused a locomotive to push a line of freight cars with great force and violence, without any notice whatever to plaintiff, on the engine operated by plaintiff; it being respectfully submitted that the complaint in this respect is too general, and does not sufficiently inform the defendant of the facts relied on by plaintiff."

The first, second, and third exceptions will be considered together. In Pom. Code Rem. § 517, it is said: "The fundamental and most important principle of the reformed pleading, the one from which all the others are deduced as necessary corollaries, is the following: The material facts which constitute the ground of relief * * * should be averred as they actually existed or took place, and not the legal effect or aspect of those facts, *and not the mere evidence or probative matter by which their existence is established.*" (Italics ours.) Section 526 of the same work shows that "those important and substantial facts should be alleged which either immediately form the basis of the primary right and duty or which directly make up the wrongful acts or missions of the defendant, *and not the details of the probative matter or particulars of evidence by which these material elements are to be established.*" (Italics ours.) See, also, Smith v. Smith, 50 S. C. 54, 27 S. E. 545. These authorities conclusively dispose of said exceptions.

The fourth exception should be overruled, not only for the reasons just stated, but likewise for the reasons assigned by the circuit judge in refusing the third ground of the motion before him, to require the plaintiff to make his complaint definite and certain.

It is the judgment of this court that the order of the circuit court be modified in the particulars hereinbefore mentioned.

WILSON *v.* MUSKEGON, G. R. & I. R. Co. *et al.**(Supreme Court of Michigan, March 23, 1903.)*

[93 N. W. Rep. 1059.]

Railroads—Right of Way—Contract for Deed—Operation.

An instrument providing that the grantor, for a consideration, agreed to convey to defendant railroad company a strip 30 feet wide across certain land described, on the request of the railroad company at any time within a year from the date of the agreement, when construed in connection with Comp. Laws, § 6234, authorizing railroad companies to acquire lands for right of way by purchase, voluntary grant, and donation, and to take possession and hold and use such land, etc., did not constitute a conveyance of a right of way across the land described, nor give the railroad company a right of possession of such right of way as against a subsequent grantee, though the railroad company had constructed its road over the line and maintained possession for several years.

Grant, J., dissenting.

Error to Circuit Court, Muskegon County; Fred J. Russell, Judge.

Action by Lucie S. Wilson against the Muskegon, Grand Rapids & Indiana Railway Company and others. From a judgment in favor of plaintiff, defendants bring error. Affirmed.

T. J. O'Brien and James H. Campbell, for appellants.

William Carpenter, for appellee.

HOOVER, C. J. There are two questions raised by the briefs of counsel: (1) Whether the plaintiff proved a prima facie title to the premises in dispute; and (2) whether the statute under which the defendant's railroad was located justifies us in holding that it acquired a legal estate or right of possession under an executory contract for the sale of land.

Each party claims title from Dennis Smith, plaintiff by deed, and defendant under a writing which reads as follows:

"In consideration of the sum of one dollar to me in hand paid, and of other valuable considerations to me moving, I hereby agree to convey, free of any incumbrance, to the Muskegon, Grand Rapids & Indiana Railroad Company, its successors and assigns, a strip of land thirty (30) feet in width over and across the following described premises, to-wit: the north-east quarter of the north-east quarter of section thirty-one (31) in the township of Muskegon, county of Muskegon, state of Michigan. The said railroad being one to be constructed from a point on or near the lake shore in the city of Muskegon, Muskegon county, Michigan, to the city of Grand Rapids in the same state. And I further promise and agree to make such conveyance on request of said railroad company, at any time when it shall have definitely settled upon and located its line between the points above named and determined upon the construction of the road. Provided, how-

Wilson v. Muskegon, etc., R. Co

ever, that such time shall be within one year from the date hereof. This agreement for right of way shall not injure or be assigned or transferred to any other railroad company now entering the city of Muskegon with its railroad.

“In witness whereof, I have hereunto set my hand and seal this 25th day of February, 1886.

Dennis Smith.

“In presence of L. N. Keating, Lizzie J. Cavanaugh.”

“State of Michigan, County of Muskegon—ss. On this 25th day of February, 1886, before me, a notary public in and for said county, personally came Dennis Smith, who acknowledged that he executed the above instrument as his free act and deed.

“L. N. Keating,

“Notary Public, Muskegon Co., Mich.”

Were this a contract between natural persons, it would be held to convey nothing. It would give an equitable interest, and it might be held to give (by implication) a license to survey and determine a line for the projected railroad. It would not be said to transmit a right of title or possession that would avail as a defense in an action of ejectment. Presumably this railroad company with whom the contract was made was organized under the general law, and had all of the rights which the statute gives to any railroad. It was authorized to acquire a right of way, and to take voluntary grants and donations of real estate and other property. It is urged that this contract made, for the purposes of railroads, when construed in the light of the statute (Comp. Laws, § 6234), gives a right of possession in the railroad company making it, especially where the road has been constructed and possession maintained for a time by such company. We may eliminate the latter portion of the proposition, because if the contract did not, of itself, when considered in the light of the statute, confer this right, there would be nothing left for it to rest upon but an estoppel in pais, and it has been repeatedly held that interests in land cannot rest on estoppel alone. The statute of frauds forbids. I am not satisfied that the Legislature contemplated any such construction. It is true that railroad corporations acquired the right to take and hold property by virtue of the statute, but there is nothing to indicate that they were to acquire it in any other way than any other citizen could do, except it should become necessary to condemn it by virtue of the power of eminent domain. It was apparently not necessary to do this in the present case. The railroad company was able to acquire the land by contract of purchase, and did so. What was the contract? Nothing but a plain every day land contract, which gave it a right to a deed when it performed the contract on its part. No right of possession was given by the terms of the writing. It is only by inference that we can say that it gave a right to enter for the purpose of survey. It could ac-

Wilson v. Muskegon, etc., R. Co

quire title to land by grant or lease, or it could acquire it by judicial procedure.

What remedies the defendant has in equity is not a question for our consideration. If there is a valid executory contract, presumably it can be specifically enforced. If there is none, and none can be secured, it may be that it will be necessary to resort to condemnation proceedings, as in the case of Minneapolis, etc., R. Co. v. Marble, 112 Mich. 12, 70 N. W. 319, where it was said: "It may be a matter of hardship to the railroad company, after all these years of occupancy, and after expending large sums of money in improvements, to be compelled to take condemnation proceedings; but we are unable to agree with its counsel that it acquired title by this parol agreement, or that it can hold land by dedication."

It occurs to the writer to say that it would take but a slight extension of the construction of this statute asked for in this case to make it applicable to the state of facts in that case, for it is as easy to say that this statute abrogates the rule that contracts for the sale of land must be in writing, as that a right of possession goes with a written contract that does not mention it, and, under existing rules, does not include it. Harrett v. Kinney, 44 Mich. 457, 7 N. W. 63; Moran v. Moran, 106 Mich. 13, 63 N. W. 989, 58 Am. St. Rep. 462. If adopted, such construction must be a matter of first impression, for no analogous case is cited. The case of Greenwood v. School District, 126 Mich. 81, 85 N. W. 241, was an injunction bill to restrain the erection of a schoolhouse, and it was dismissed because the district had been in possession under a contract which, though oral, was so far performed that it was inequitable to permit the complainant to repudiate it. It is not, in my opinion, an authority upon which the defendant's contention in this case can be safely sustained.

I think the judgment should be affirmed.

MOORE, CARPENTER, and MONTGOMERY, JJ., concurred with HOOKER, C. J.

GRANT, J. (dissenting). This is an action of ejectment. Both parties claim title from the same grantor, one Dennis Smith. Plaintiff claims by regular chain of title by deed from Mr. Smith. The defendant claims a right of way 30 feet wide across the land by written contract with Smith. The case was tried by the court without a jury, and written finding filed, and judgment entered for the plaintiff. The contract under which defendant claims its right of way was executed February 25, 1886, and reads as follows: "In consideration of the sum of one dollar to me in hand paid, and of other valuable considerations to me moving, I hereby agree to convey, free of any incumbrance, to the Muskegon, Grand Rapids and Indiana Railroad Company, its successors and assigns, a strip of land thirty feet in width over and across the following described premises, to wit, the northeast quarter

Wilson v. Muskegon, etc., R. Co

of the northeast quarter of section thirty-one, in the township of Muskegon, county of Muskegon, state of Michigan. The said railroad being one to be constructed from a point on or near the lake shore in the city of Muskegon, Muskegon county, Michigan, to the city of Grand Rapids, in the same state. And I further promise and agree to make such conveyance on request of said railroad company, at any time when it shall have definitely settled upon and located its line between the points above named and determined upon the construction of the road. Provided, however, that such time shall be within one year from the date hereof. This agreement for right of way shall not inure or be assigned or transferred to any other railroad company now entering the city of Muskegon with its railroad." This contract was recorded June 18, 1886. The railroad company therein named made a map of its line and route through the county of Muskegon, and located, according to said map, the line as running across the southerly part of said land. This map was, on July 13, 1886, filed in the office of the register of deeds. Before December 31, 1886, the company had entered upon the said land, and constructed its roadbed and railroad from the city of Grand Rapids to the city of Muskegon, upon and across said land, at the same time building fences on each side of its track. It commenced running trains regularly from Grand Rapids to Muskegon early in the month of December, 1886. Said railroad has been maintained and operated continuously from that time to the present by the company named in said contract and its lessee, the defendant the Grand Rapids & Indiana Railway Company, and they have been in the exclusive and continuous possession thereof since. There has been no change in its roadbed during all this time. Smith was a resident of Muskegon, and resided there until his death in 1892, and his heirs have since resided there.

Plaintiff concedes that under the agreement the defendants are entitled to a right of way across the land. Her counsel says it is a question only of location. She claims that another location was agreed upon alongside the present one. In fact, her counsel asserts that four feet of the present right of way is a part of the right of way as plaintiff claims it was established by agreement between Mr. Smith and the officers of the company. The record contains no evidence to sustain plaintiff's claim of any such location, except the map filed July 13th. Her counsel says: "It [the Grand Rapids & Indiana Railroad Company] has a right of way immediately adjoining the premises in dispute, and occupied in part by it, to which it is lawfully entitled, and which came to it by the plaintiff's grantor." And, again, "the map itself was offered in evidence, but no other testimony was given tending to show the exact location of the proposed line of the railroad. It can be determined from that map only by applying the rule of the scale on which the map is drawn. That scale is so

Wilson v. Muskegon, etc., R. Co

small that it is impossible to come to a correct conclusion by the use of the rule."

Her counsel further claims that the defendants have only an equitable title, which is no defense to an action of ejectment, and can be enforced only in a court of equity.

Counsel for the defendants contend that the present right of way was located under the agreement; that it was acquiesced in by Mr. Smith and his heirs for over 14 years, and that the defendant (Grand Rapids & Indiana Railway Company) has the legal possession thereof. The location of the right of way under the contract was a floating one, to become fixed only when the conditions of the agreement were complied with. By its terms that defendant (the Muskegon, Grand Rapids & Indiana Railroad Company) was given the right to enter upon the land to make surveys and to select the right of way. It entered, selected it, and inclosed it by fences. All these things were done with the acquiescence of Mr. Smith, and the use and occupancy by the railroad company acquiesced in by him and his heirs since, till the commencement of this suit.

If it be conceded that the right of way now in use is not on the exact line indicated upon the map, this is not a case where the exact line of the map must control. The parties located the line elsewhere, and its location and use were and have been since acquiesced in. This case is not within *Wood v. Railway Company*, 90 Mich. 334, 51 N. W. 263, where the plaintiff contracted to convey to the railroad company a right of way through his lands "on a route lately surveyed by said company." The land in that case had been surveyed and staked out. It was held to be an important fact that the words in the contract, referring to a future survey, were stricken out. When the company selected an entirely different route, the plaintiff immediately protested, and moved seasonably to enforce his rights. In the present case there was no dispute, and the right of way was laid out substantially along the line indicated upon the map. The company was acting under the agreement in locating and constructing its roadbed, and Mr. Smith knew it. There is no evidence that he was injured, or that the company was not acting in good faith. The location of the right of way, under such circumstances, was a full compliance with the agreement.

The court was in error in holding that the defendant (Grand Rapids & Indiana Railroad Company) is not entitled to the possession of its right of way. A railroad corporation can obtain its right of way only in the two methods provided by the statute: (1) By agreement with the landowners; and, (2) that failing, by condemnation proceedings. It cannot commence the latter without exhausting the former. Only when terms cannot be made with the owner can it proceed to condemn. When it has obtained the right of way by agreement,

it is, in the absence of provisions to the contrary, entitled to the right of possession as effectually as though it obtained that right by condemnation proceedings. When condemned, the right of possession becomes absolute upon payment of the sum awarded for such right of way. The only prerequisite to its title and to possession is to pay the compensation awarded. When this is done the land is acquired, and, under the statute, for public use. When the right of way is obtained by agreement with the owner, and the agreement is silent as to possession, the company is entitled to possession upon fulfilling the terms of the agreement. No deed was necessary to establish the legal rights of the company. The agreement, compliance therewith, the location and construction of its roadbed, and its use by the company as required by law, establish the legal right of possession in the company. Its possession is no other or different in character than it would have been if Mr. Smith had made the deed as agreed upon. So long as the railroad company carries on its business as required by law, so long as it is entitled to possession, with or without a deed.

Where the statute "gives the right to agree upon compensation, then the matter of damage may be settled by oral agreement, and the title will vest by virtue of the statute, the same as if ascertained and deposited pursuant thereto. Or the owner may waive prepayment simply, and thereupon the title will vest, subject to the lien for just compensation to be afterwards adjusted and paid." "A release of damages has the same effect as the assessment and payment of damages under the statute." Lewis on Eminent Dom. §§ 294, 298.

I think that the case of Greenwood v. School District, 126 Mich. 81, 85 N. W. 241, is conclusive of this case. There a parol agreement to give an acre of land for a schoolhouse site, not definitely located by the agreement, was held valid, after the school district authorities had selected the land, fenced it, built a schoolhouse, and occupied it for many years. What there rested in parol is here established by a written agreement. The selection, inclosing, and use of the land fully establish the defendant's right to possession, and, as long as it uses the land for the purposes of a right of way, that possession is legal. See, also, Smith v. Hamilton, 20 Mich. 433, 439, 4 Am. Rep. 398.

Judgment should be reversed, and judgment entered in this court for defendant for a strip of land 30 feet wide, the center line of which is the center line of the railroad track of the Muskegon, Grand Rapids & Indiana Railroad, as the same is constructed upon and across the lands described in the declaration. Defendant should recover the costs of both courts.

DANIEL v. FT. WORTH & R. G. RY. CO.

(Supreme Court of Texas, March 9, 1903.)

[72 S. W. Rep. 578.]

Nuisance—Discomfort in Use of Home—Damages.

In one action one may recover damages for discomfort of himself and family in the use of their home owing to the erection and use of a neighboring coal hoist, and also damages for depreciation in the value of the property.

Error from Court of Civil Appeals of Second Supreme Judicial District.

Action of J. T. Daniel against the Ft. Worth & Rio Grande Railway Company. From a judgment for defendant, plaintiff brings error. Reversed.

J. W. Parker, W. T. Carlton, and J. B. Keith, for plaintiff in error.

West, Chapman & West, for defendant in error.

BROWN, J. The Court of Civil Appeals made no findings of fact in this case (69 S. W. 198), but we have referred to the record, from which we make the following statement: Defendant in error was operating a railroad through the town of Stephenville, in Erath county, and J. T. Daniel purchased a lot in said town, about 250 feet west of the railroad track, on which he had resided for some years, when the defendant in error built a platform, 300 feet long, between the main track and plaintiff's residence, between the two side tracks, which were on the west side of the main track. The railroad company also erected near the platform a hoist, about 25 feet high, by which the coal was raised from the platform in iron buckets and dumped into the tenders of engines. There was evidence which tended to prove that the coal dust from coal thus placed in the tender was carried by the wind to and into plaintiff's residence, and settled upon his furniture, the walls, and upon the outside of the house, so as to produce discomfort to the plaintiff and his family. The evidence also tended to show that the noise caused by operating the hoist and buckets, and the noise caused by the engines while taking the coal, prevented the plaintiff and his wife from sleeping at night, and disturbed and annoyed them in their enjoyment of their home.

Plaintiff brought this suit against the railroad company to recover the damages occasioned to him by the depreciation of his property on account of the facts before stated, which were alleged in the petition with sufficient certainty and particularity, and the petition also contained the following allegation: "That, by reason of the things hereinbefore alleged, plaintiff and his wife have experienced and have been subjected to continually, both day and night, great physical and mental discomfort, and been vexed, harassed, and annoyed

Daniel v. Ft. Worth & R. G. Ry. Co

to a degree almost insupportable, to their great and irreparable injury, and have been thereby damaged to the further sum of \$500." The court charged the jury upon the right of the plaintiff to recover for the depreciation in the value of his property, but refused to submit to the jury the following special charge by the plaintiff: "If you believe, from a preponderance of the evidence in this case, that the plaintiff, J. T. Daniel, and his wife, have been personally annoyed and discomforted in the use and enjoyment of their home by smoke or coal dust, or by vibrating, grating, or disagreeable noises coming from defendant's coal yards and coal hoist into or on the house and premises of plaintiff, then you will find for plaintiff, and award to him by your verdict such damages as in your judgment will reasonably and fairly compensate him for such annoyance or discomfort suffered by himself and wife, not to exceed the amount sued for for annoyance." There was a verdict and a judgment for the defendant, which was affirmed by the Court of Civil Appeals.

The trial court committed error in refusing the special charge requested by the plaintiff. If the plaintiff was entitled to recover upon the evidence, the right of recovery is not limited to the depreciation in the value of the property, but he may recover damages for the discomfort of himself and family in the use of the home caused by the erection and use of the coal hoists. *Bal. & Potomac R. R. Co. v. Fifth Baptist Church*, 108 U. S. 335, 2 Sup. Ct. 719, 27 L. Ed. 739; *Randolf v. Bloomfield*, 77 Iowa, 52, 41 N. W. 562, 14 Am. St. Rep. 268; *Illinois Central Ry. Co. v. Katherine Grabill*, 50 Ill. 241; *Pierce v. Wagner*, 29 Minn. 355, 13 N. W. 170; *Brown v. C. & A. Ry. Co.*, 80 Mo. 457; *Penn. Ry. Co. v. Angel*, 41 N. J. Eq. 316, 7 Atl. 432, 56 Am. Rep. 1.

In *Baltimore & Potomac Railway Company v. Fifth Baptist Church*, above cited, the Supreme Court of the United States expresses the rule in this explicit language: "The instruction of the court as to the estimate of damages was correct. Mere depreciation of the property was not the only element for consideration. That might, indeed, be entirely disregarded. The plaintiff was entitled to recover because of the inconvenience and discomfort caused to the congregation assembled, thus necessarily tending to destroy the use of the building for the purposes for which it was erected and dedicated. The property might not be depreciated in its salable or market value, if the building had been entirely closed for those purposes by the noise, smoke, and odors of the defendant's shops. It might then, perhaps, have brought in the market as great a price to be used for some other purpose. But, as the court below very properly said to the jury, the congregation had the same right to the comfortable enjoyment of its house for church purposes that a private gentleman has to the comfortable enjoyment of his own house, and it is the discomfort and annoyance in its use for those purposes which is

Daniel v. Ft. Worth & R. G. Ry. Co

the primary consideration in allowing damages. As with a blow on the face, there may be no arithmetical rule for the estimate of damages. There is, however, an injury, the extent of which the jury may measure." The clear statement of the proposition renders argument in its application to this case unnecessary. We have found but one case that holds the contrary doctrine. *Kemper and Wife v. Louisville*, 14 Bush, 87, in which the Court of Appeals of Kentucky incidentally stated that the plaintiffs in the case were not entitled to recover "for loss of time on the part of the occupants on account of sickness caused by the stagnant water, etc."; but the question does not seem to have elicited discussion from that court, and no reason is assigned nor authority cited in support of the decision.

In support of its opinion, the court of Civil Appeals cites *Rosenthal v. Railway Co.*, 79 Tex. 325, 15 S. W. 268; *Baugh v. Railway Co.*, 80 Tex. 456, 15 S. W. 587; *Railway Co. v. Hall*, 78 Tex. 169, 14 S. W. 259, 9 L. R. A. 298, 22 Am. St. Rep. 42; and *Railway Co. v. O'Maley*, 45 S. W. 227.

In *Rosenthal v. Railway Company* the right of recovery for personal inconvenience on account of the noises complained of was not in issue, but the plaintiff claimed damages to the property because of faulty construction of the roadbed, and on account of noise, smoke, etc., and the court simply held that under the facts of that case the depreciation in the value of the property was the safest measure of damages.

In *Baugh v. Railway Company* the plaintiff alleged depreciation in the value of his property, but in support of his claim set up matters of a character which would have sustained an action for personal discomfort, showing that the nuisance was temporary, and the court held that under such allegations the plaintiff could not recover for loss in the value of the property.

In *Railway Company v. Hall* the action was for depreciation in the value of property arising from smoke, noise, etc. The railroad was constructed near to, but not on, the land. The question arose under article 1, section 17, of the constitution, it being claimed by the railroad company, that the damage to the property could not be recovered, there being no taking of it, but our Supreme Court held that it could be recovered.

Railway Company v. O'Maley was a suit for damages on account of the location of stock pens near the home of plaintiff, and claim was made for the difference between the value of the property before and after the construction of the pens, upon the allegations that the pens rendered the property uncomfortable for the occupants as a home. There was no claim of damages for personal discomfort, and the court held that under the facts the damages to the property were recoverable.

No case decided by this court justifies the conclusion that,

State v. New Orleans Warehouse Co

if a structure, permanent in character, is a nuisance from which injury results to adjacent property, and by which nuisance the health of the occupants is impaired or the comfortable enjoyment of it is destroyed, the injured party is limited to compensation for the impairment of the value of the property. To the contrary, it is a rule of our law that full compensation may be awarded in one suit to the owner for all damages sustained from the same cause, and we see no reason why a party, damaged in the value of his property and in his health or the enjoyment of the property, should be denied the right to recover for either or both wrongs. The existence of a permanent nuisance may cause injury by destroying the comfort of a home and not cause loss in the market value of the property, or it may cause injury to both; hence adequate compensation must embrace all the damage done and no more.

The pleadings and evidence in this case do not present any question of excuse for the railroad company upon the ground that it was reasonably necessary that the coal hoist should be located at that particular place. We therefore do not pass upon that question.

It is ordered that the judgments of the district court and of the Court of Civil Appeals be reversed, and that this cause be remanded, and that the defendant in error pay the costs of the Court of Civil Appeals and of this court.

STATE v. NEW ORLEANS WAREHOUSE CO. *et al.*

(Supreme Court of Louisiana, Dec. 1, 1902.)

[33 So. Rep. 81.]

Railroads—Power to Sell or Let Warehouse.

The question of the right of the Morgan's Louisiana & Texas Railroad & Steamship Company to sell or let its warehouses has not heretofore been decided. It is an open question presented in this suit, and considered for the first time with the view to pass upon that right.

Res Adjudicata.

The lease by the Morgan's Louisiana & Texas Railroad & Steamship Company to the New Orleans Warehouse Company was necessarily subject to the court's decree.

Judgment.

The court decided the question presented without reference to the date of this lease.

Leases.

There is no good ground to annul the lease, only because it had been made pendente lite, as the court would have given it no attention if it had been made in violation of law. No right can be acquired by such transfer adverse to the state's authority and power.

Same—Power of State to Annul.

The lease was necessarily made subject to the state's power to have it decreed null. From that point of view, it affords no ground to decree it null.

State v. New Orleans Warehouse Co**Power to Sell or Lease.**

The Morgan's Louisiana & Texas Railroad & Steamship Company had authority to sell the property. A corporation with power to sell may, under certain circumstances, lease property to a tenant carrying on a business incidental to its own.

Monopolies.

The monopoly charged raises a legislative, and not a judicial, question, independent of all legislation.

If in the competition of business, not discriminative, certain business is placed at some disadvantage, the court, under the law, has no authority to interfere.

Foreign Corporations—Right to Do Business.

A foreign corporation, with right under its charter not sanctioned by the laws of Louisiana, will not be prevented from doing a legitimate business under that portion of its charter which conforms to her laws.

Stock—Payment.

The shares having been paid to the amount stipulated in the charter, this is the extent of the law's requirement.

Land Not Used in Business—Right to Transfer Liabilities of Lessees.

A corporation that has no authority to do a particular business may transfer its right to property it had used in the business closed by the court's decree, until it is again needed. The lessee or vendee does not assume, in becoming lessee or vendee, any obligation or incur any of the personal disabilities of his transferror or lessor.

Same—Power to Let.

If one railroad company can lease a portion of its property for a hotel, a fortiori another can lease a portion of property it happens at the time not to need in its business to a public warehouse company.

Same—Alienation.

The upper story of a building does not fall within the grasp of the constitution, requiring a corporation to dispose of lands within 10 years, if not in use according to the purpose of its charter.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; John St. Paul, Judge.

Suit by the state of Louisiana against the New Orleans Warehouse Company and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Walter Guion, Atty. Gen. (E. Howard McCaleb, of counsel), for appellant.

Farrar, Jonas & Kruttschnitt, for appellee New Orleans Warehouse Co.

Denegre, Blair & Denegre, for appellee Morgan's L. & T. R. & S. S. Co.

BREAUX, J. The state of Louisiana brought this suit to enjoin the Morgan's Louisiana & Texas Railroad & Steamship Company from receiving rental or other compensation from the New Orleans Warehouse Company, or from any other person, for storage in its warehouses.

The state further sues to enjoin the New Orleans Warehouse Company from conducting or carrying on a public or private warehouse in the depots or buildings of the Morgan's Louisiana & Texas Railroad & Steamship Company, and especially from receiving in its warehouses any agricultural

State v. New Orleans Warehouse Co

products or other property on storage, from collecting any compensation for storage from any one, and from issuing warehouse receipts, and from doing any business as a public warehouseman.

Plaintiff also sued to annul and set aside a lease made by the Morgan's Louisiana & Texas Railroad & Steamship Company of its warehouses to the New Orleans Warehouse Company, and to have it decreed by the court that Morgan's Louisiana & Texas Railroad & Steamship Company has no right to lease its property for warehousing purposes.

The present suit is the third brought by the state of Louisiana to close the warehouses in question, to the extent that they are public warehouses.

These warehouses take part of the buildings of the Morgan's Louisiana & Texas Railroad & Steamship Company. The lower floors of these buildings are used for depots of this railroad company. The stories above the first are leased to the New Orleans Warehouse Company. The state charges that these are offending warehouses.

The history of the litigation shows that the first suit was brought against the Southern Pacific Company to enjoin it from conducting a business as before mentioned in the buildings of the Morgan's Louisiana & Texas Railroad & Steamship Company. The grounds of the suit were that the Southern Pacific Company was carrying on business ultra its charter, in which charter nothing is written authorizing it to carry on a warehouse business. Judgment was, in consequence, pronounced in favor of the state and against this defendant, the Southern Pacific Company, forbidding it from carrying on a business as public warehouseman for hire. State v. Southern Pac. Co., 52 Ann. 1822, 28 South. 372.

It appears that the Morgan's Louisiana & Texas Railroad & Steamship Company had leased its road, including the buildings in which public warehousing had been conducted, to the Southern Pacific Company.

Prior to the date that the judgment before mentioned was pronounced, the Southern Pacific Company withdrew from the business of warehousing property, and surrendered its lease, and returned the business of these warehouses to the Morgan's Louisiana & Texas Railroad & Steamship Company. The Morgan's Louisiana & Texas Railroad & Steamship Company continued the warehouse business previously carried on by the Southern Pacific Company, and which the latter had been enjoined from conducting.

In 1900 the state, alleging that the Morgan's Louisiana & Texas Railroad & Steamship Company was conducting the business of public warehouseman, sought a judgment on the ground, inter alia, that the Morgan's Louisiana & Texas Railroad & Steamship Company was not authorized to carry on the business of public warehouseman, and that it was not authorized to sell, convey, or otherwise transfer, by sale,

State v. New Orleans Warehouse Co

lease, or otherwise, any right, privilege, or franchise to receive and store agricultural products or other property. *State v. Morgan's L. & T. R. & S. S. Co.*, 106 La. 513, 31 South. 115. The facts are clearly stated in the cited cases *supra*. We will not restate them to any extent here.

In the last-cited case the judgment of the district court did not grant the injunction to the extent for which the state sued, but restricted the relief granted to an injunction prohibiting the defendant from carrying on a business as a public warehouseman. The decree in the last decision cited *supra* prohibited the Morgan's Louisiana & Texas Railroad & Steamship Company from carrying on a business of public warehouseman, but not a word is said in this decree about its authority to lease or sell this property. The question, it follows, of the Morgan's Louisiana & Texas Railroad & Steamship Company's right to sell or lease this property, is still left open, and is the one question now before us for consideration.

The state charges, in the first place, that the New Orleans Warehouse Company was formed merely for the purpose of circumventing and defeating the judgment rendered in the case of *State v. Morgan's L. & T. R. & S. S. Co.*, 106 La. 513, 31 South. 115.

We are not impressed by that view. It is not sustained by the evidence, nor by the result of the litigation in this case. Had the defendant the Morgan's Louisiana & Texas Railroad & Steamship Company been enjoined by the decree of court last cited to the extent of preventing it not only from keeping the warehouse as a public warehouse, but also from leasing or selling the property, as prayed for by the state, there would have been ground sustaining the state's objection.

There was, in view of the result of the suit now before us for determination, at least some ground for the New Orleans Warehouse Company to infer that the Morgan's Louisiana & Texas Railroad & Steamship Company's right to sell or lease the property would not be denied, in view of the fact that that particular issue had not been decided in the cited cases *supra*. The trend of the litigation at the date of the lease was, in other words, not such as to directly warn the defendant warehouse company against becoming a lessee of the Morgan's Louisiana & Texas Railroad & Steamship Company. It took the chances of adverse litigation, which was, after all, not adverse in the end. Besides, there is no defense made here on the ground that the lease was made prior to the decision of any suit. The fact that certain transactions were entered into *pendente lite* secures no advantage to the defendant. This is the extent of the law prohibiting the sale or other disposition of property during the pendency of a suit.

Plaintiff further charges that the letting of this warehouse by the Morgan's Louisiana & Texas Railroad & Steamship

State v. New Orleans Warehouse Co

Company to the New Orleans Warehouse Company created a monopoly, and that the act is in restraint of trade, by giving to this warehouse company the preference over all others engaged in the warehouse' business.

We do not think that the preference referred to creates a monopoly. It is a preference resulting from the business.

The proximity of the structures in question, and the greater convenience they afford in handling and storing freights, are not the conclusive preference which the law abhors as monopoly.

There are other warehouses similarly situated near the depots of other railroads, and in consequence they afford greater facility than warehouses situated at a distance. The latter warehouses—those situated at a distance—have no valid ground for complaint. They must carry on their business so as to be able to compete. Utility offered by these warehouses (i. e., those at a distance), and also charges, should be equal to those of others (i. e., of those nearer the railroad depots). It is one of the requirements of commerce, with which the court must decline to interfere. In loyal competition the community finds its greatest interest, and the public is in no way concerned in closing warehouses because they afford cheaper rates of storage.

The evidence does not disclose that the least attempt is made by this defendant, Morgan Railroad Company, to improperly influence business, or that it requires property to be stored in the warehouses it has leased to its codefendant, the New Orleans Warehouse Company.

That the Morgan's Louisiana & Texas Railroad & Steamship Company disabled itself by the lease in question from receiving into these buildings freight by its railroad, and thereby failed at times in its most important duty as common carrier, is another charge of plaintiff. This charge is not sustained by the evidence. It does not show, as charged by plaintiff, that the blockades of freight were owing to the fact that these buildings are leased. On the contrary, it appears that the attempted use by the Morgan's Louisiana & Texas Railroad & Steamship Company of the upper stories, as suggested by plaintiff, would have added to the blockade of freight.

The cause of the congestion of freight alleged by plaintiff was traced by witnesses in a position to know to the lack of motive power of the Morgan's Louisiana & Texas Railroad & Steamship Company, and to the enormous volume of business during the business season, but not to the fact that the Morgan's Louisiana & Texas Railroad & Steamship Company had leased these upper stories.

Another contention of plaintiff is that Act No. 37 of 1877, creating the Morgan's Louisiana & Texas Railroad & Steamship Company, did not give to them the right to lease any of its property to others, and that in consequence the lease of

State v. New Orleans Warehouse Co

its buildings to the New Orleans Warehouse Company was ultra vires.

In answer, we can only say that this corporation had the right to sell the property. We think, under the circumstances, that the power to sell carries with it the power to lease. "The right given a corporation by its charter to hold real estate and buildings carries with it the right to lease them, and it is no objection to the validity of such lease that the business in which the property is said to be used is one which the corporation is not authorized to carry on, and that the rental is a share of the net profits." *Nye v. Storer*, 46 N. E. 402, decided by the supreme court of Massachusetts.

Moreover, the warehouse company, a third person, was not placed under the necessity of particularly inquiring into the authority of the company from which it leased.

We do not find that the state has any interest in depriving a third person, acting in good faith, from becoming a lessee, on the ground urged here. An act might be decreed null in an action against the railroad company, although not null on the ground here, in so far as innocent third persons are concerned. The New Orleans Warehouse Company has not committed an act ultra vires.

"The harsh rule which requires a person dealing with corporations to take notice of the extent of their powers is subject to certain well-defined limitations. When the want of power is apparent upon an inspection of the charter or statute, the party dealing with the corporation may reasonably be presumed to have knowledge of the defect, and the defense of want of authority is available. But this defense of want of authority is available against him. It will not avail against one who cannot be presumed to have had knowledge of the want of authority to make the contract. Hence, if the act is apparently within the scope of the corporate powers, and the alleged defect rests upon the existence of certain extrinsic facts peculiarly within the knowledge of the corporate officers, the corporation, as against a third person dealing in good faith, is estopped denying that which by assuming to make the contract it has virtually affirmed. Thus a person dealing with a corporation is not bound to know that a power cannot be rightfully exercised in a particular case, as that the limit of indebtedness fixed by the charter has been reached." Judge Elliott, in his treatise on the Law of Private Corporations (3d Ed. p. 217, § 215).

But we have found no good reason to hold that the Morgan's Louisiana & Texas Railroad & Steamship Company is to be condemned because it attempted to dispose of the property to some advantage, by leasing it to the New Orleans Warehouse Company.

With reference to those upper stories, leased as before mentioned, it appears that they cannot be sold separately from

State v. New Orleans Warehouse Co

the building. Such a sale is out of all question. It would be very much to the detriment of the seller.

Plaintiff's contention is that these structures should be sold or closed to business, as now conducted, and, at any rate, that they should not be leased.

With reference to the upper portion of the property leased, we do not think that the article of the constitution (No. 265) invoked by plaintiff, and which prohibits corporations from holding any real estate for a longer period than 10 years, except such as may be necessary for their legitimate business, is violated. The land and the lower stories of these buildings are indispensable to the Morgan's Louisiana & Texas Railroad & Steamship Company's business. They (the Morgan Company) cannot, in law or reason, be condemned to sell this lower portion in order to get rid of the upper portion. This would be compelling the owner to part with property for a purpose never contemplated by the constitution.

The article of the constitution in question is directed against the permanent ownership of land not in use, and not against the incidental ownership of upper stories of buildings.

The Morgan's Louisiana & Texas Railroad & Steamship Company had these upper structures on its hands.

It had the right to utilize them as it did.

There are trustworthy decisions sustaining the right to lease under the circumstances. In the main, this right was sustained in *Railroad v. Bullard* (Mich.) 79 N. W. 635; also in *People v. Palace Car Co.* (Ill.) 51 N. E. 664. See, also, upon this subject, 1 Wood, R. R. 548.

The testimony shows that it is to the interest of the shippers on this Morgan Railroad that their warehouses be kept open to the public.

No one seriously questions that the common carrier's purpose should always be towards promoting the interest of transportation, and that it should throw into its duty every energy to that end.

This purpose is not diminished by leasing property as a public warehouse, in which its shippers are very much interested, and which it cannot itself operate.

The contention on the part of plaintiff is that carrying on a public warehouse is not incidental to the business of a railroad corporation.

The argument urges that a railroad company might lease a part of its premises for hotel purposes, because the hotel business is incidental to and auxiliary of its main business; citing *Railway Co. v. Hooper*, 160 U. S. 514, 16 Sup. Ct. 379, 40 L. Ed. 515. In our view, a public warehouse, also, may become necessary, and may be conducted in a building of the railroad company, under the circumstances as in this case.

After all, why should this right to lease be more restricted

State v. New Orleans Warehouse Co

when storage is concerned, than that of a hotel? One is as useful, in its particular line, as the other.

With reference to the attack made by the plaintiff on the organization of the New Orleans Warehouse Company, on a number of grounds (another branch of the case), we agree with the view expressed in *Pinney v. Nelson*, 183 U. S. 144, 22 Sup. Ct. 52, 46 L. Ed. 125, cited by plaintiff; i. e., that, when a corporation is formed in one state to carry on business in another, the charter contract must be assumed to have been made with reference to the latter.

But we do not think that the warehouse company has failed to observe our laws to such an extent, as relates to keeping a warehouse, as renders it necessary to put an end to its existence in this state.

Plaintiff raises the objection that the New Orleans Warehouse Company violates the law of Louisiana, because its charter authorizes stockjobbing, and thereby violates Rev. St. § 683, and also in that it authorizes the holding of stock in other corporations of similar character. The facts are as stated in the objection.

None the less, the lessor, the Morgan's Louisiana & Texas Railroad & Steamship Company, cannot very well be prejudiced by a delegation of right which the state of New Jersey has undertaken to make.

In a direct action, it perhaps would present an issue leading to a different conclusion, or in a case in which the company was seeking to exercise such an authority. There is nothing of the kind here. It only seeks to exercise the power to become a lessee,—a right clearly delegated in its charter.

The state's next contention is that no part of the capital stock has been paid in.

The total capital stock was fixed in the charter at \$10,000. The amount of capital stock was \$1,000.

Plaintiff alleges that only the insignificant sum of \$1,000 of the subscribed capital stock has been paid. This was the amount of cash required by the charter.

In *State v. New Orleans Debenture Co.*, 51 La. Ann. 1835, 26 South. 1037, we said "that the class of cases in which the charter does not contain provisions for paying cash is clearly differenced from that class in which it is declared in the charter that the stock must be paid in cash, and expresses the view that cash stock must be paid as provided in the charter."

In the case now before us for decision, the cash stock was paid as required by the terms of the charter.

It is true that the public interest should be protected against fictitious corporations and fictitious stock, or partly fictitious. In this instance it does not appear that there is anything fictitious in the organization of the corporation.

We have not found that the charter contains any provi-

McLucas v. St. Joseph & G. I. R. Co

sion looking toward guarding its books from inspection, or that it has failed to comply with the law requiring it to have an agent in this state.

But it is said, in addition, on the part of plaintiff, that the state of New Jersey is without power to incorporate and organize a corporation for the purpose solely of carrying on and doing business as a public warehouse in this state.

No legislation has yet sought to exclude foreign corporations from doing business in Louisiana. No one seriously questions the authority of the lawmaking power to exclude foreign corporations, but, before it does speak, we would not be justified in discriminating between a foreign corporation doing business in another state, and at the same time one doing business here as an incident of its main business, and a foreign corporation organized in another state only to do business here, if in all respects the charter, as relates to the business done, conforms with the laws of Louisiana.

The charter of the warehouse company authorized it to do a warehouse business. This right it could exercise, although the transferror did not have a similar right. The property necessarily passed free from any personal inhibition against the transferror.

We have given careful attention to the different points presented, and while we feel justified in commending the ability and energy of the attorney general and his assistant counsel, we do not think we should decree that an industry should be closed to the public unless it is clearly apparent that it falls within some statute requiring it to be closed.

In our view, the law and the evidence being in favor of the defendant, the judgment appealed from is affirmed.

McLUCAS *et al.* v. ST. JOSEPH & G. I. R. Co.

(Supreme Court of Nebraska, Feb. 17, 1903.)

[93 N. W. Rep. 928.]

Railroads as Public Highways.

Under the provisions of section 4, art. 11, of the Constitution of Nebraska, a railroad constructed and operated in this state is a public highway.

Same—Adverse Possession.*

The general public has the same interest in the preservation and maintenance of railroads as it has in the maintenance of other highways, and the title to a part of a railroad's right of way, while such road is being operated as a common carrier, cannot be divested by adverse possession.

(Syllabus by the Court.)

Commissioners' opinion. Department No. 1. Error to district court, Jefferson county; Stull, Judge.

*As to whether title by adverse possession can be acquired against a railroad company to lands originally acquired by it for railroad purposes, see foot-note appended to *St. Joseph, etc., Ry. Co. v. Smith (Mo.)*, 5 R. R. R. 562, 28 Am. & Eng. R. Cas., N. S., 562.

McLucas v. St. Joseph & G. I. R. Co

Action by the St. Joseph & Grand Island Railroad Company against Weems H. McLucas and John C. McLucas. Judgment for plaintiff, and defendants bring error. Affirmed.

E. H. Hinshaw and W. H. Barnes, for plaintiffs in error.

M. A. Reed, for defendant in error.

Joel W. Deweese, Frank E. Bishop, Benjamin T. White, and James B. Sheehan, amici curiæ.

KIRKPATRICK, C. This is an action in ejectment brought in the district court of Jefferson county by the St. Joseph & Grand Island Railway Company, defendant in error, against Weems H. McLucas and John C. McLucas, plaintiffs in error, to recover possession of a strip of land extending along the track of the railroad in the city of Fairbury; being 150 feet wide from the center of the track. The land was in possession of plaintiffs in error. The petition alleged that defendant in error was a duly incorporated railway company, operating its line of road through Jefferson county as a common carrier of passengers and freight; that it had a legal estate in, and was entitled to the immediate possession of, a strip of land described in the petition. The answer pleaded that the cause of action stated in the petition did not accrue within 10 years next before the commencement of the action, and that plaintiffs in error were at the commencement of the action, and for more than 10 years prior thereto had been, in the open, notorious, exclusive, adverse possession of the premises, and that such possession had ripened into a title in fee simple. To this answer, for reply, the railway company filed a general denial. Trial was had to the court, without the intervention of a jury, resulting in a finding and judgment for defendant in error.

There has been a very thorough and painstaking investigation of the questions involved, and the authorities bearing thereon, and an able presentation thereof at the bar of this court, not only by counsel in the case, but by other distinguished counsel, who appear as amici curiæ, which has enabled us the more readily to reach a conclusion satisfactory to ourselves.

The trial court found that plaintiffs in error had been in the open, notorious, exclusive possession of the premises in controversy for 15 years prior to the commencement of the action, and it is not claimed that this finding is not abundantly sustained by the evidence. Relying upon this finding, plaintiffs in error contend that the judgment should, as matter of law, have gone in their favor. A number of reasons are urged by defendant in error in support of the correctness of the judgment of the lower court, among which are, first, that in jurisdictions where a right of way may be lost to a railroad company by adverse possession—our own claimed not to be of that number—possession, in order to be adverse, must be of a character inconsistent with the easement of the

McLucas v. St. Joseph & G. I. R. Co

railroad company. In other words, it is said that in such jurisdictions the possession is not adverse as long as it is compatible with the use to subserve which the right of way was in the first instance granted. The ground upon which this contention rests is stated at length, and somewhat aptly, by the Supreme Court of Tennessee, in *Louisville v. French*, 100 Tenn. 209, 43 S. W. 771, 66 Am. St. Rep. 752, as follows: "It appears from the record that the railroad company, under its charter, has an easement or right of way over one hundred feet on each side of the center of its road, and it has been repeatedly held by this court that a user by an adjacent landowner of the right of way up to the line of road for an indefinite time is not adverse to the road easement. It may be used for agricultural or any other legitimate and proper purposes. A house may be built upon it and occupied, and it may be inclosed, and the railroad will not lose its easement. The possession for such purposes is consistent with the easement, no matter what kind of a paper title the party in possession may have, and the possession could not be adverse until the railroad may need the premises, and demand them for railroad purposes. Occupancy with a house or inclosure, and cultivation and use, are not sufficient to defeat the easement of the road, inasmuch as the road can only demand and take its full right of way when it becomes necessary for railroad purposes, and until then the possession is not adverse." Again, the Supreme Court of Michigan, in *Matthews v. Railway Company*, 110 Mich. 170, 67 N. W. 1111, 64 Am. St. Rep. 336, has said: "We recognize the doctrine that, if the use of an owner of a servient estate be consistent with the use of an existing easement, the owner of the servient estate cannot acquire title by adverse possession." While there is some conflict, the great weight of authority sustains the doctrine announced above. From among them, the following may be cited: *East Tenn., etc., R. Co. v. Telford's Extrs.*, 89 Tenn. 293, 14 S. W. 776, 10 L. R. A. 855; *N. C. Invest. Trust Co. v. Enyard*, 24 Wash. 366, 64 Pac. 516; *Mobile, etc., R. Co. v. Donovan*, 104 Tenn. 465, 58 S. W. 309; *Louisville R. Co. v. French*, *supra*; *U. P. R. Co. v. Kindred*, 43 Kan. 134, 23 Pac. 112; *Railroad Co. v. McCaskill*, 94 N. C. 746; *S. P. R. Co. v. Hyant*, 132 Cal. 240, 64 Pac. 272, 54 L. R. A. 522. While the following cases, though some are distinguishable from the case at bar, adhere to the contrary view: *McKinney v. Lanning*, 139 Ind. 170, 38 N. E. 601; *Louisville, etc., R. Co. v. Quinn*, 94 Ky. 310, 22 S. W. 221; *N. Y. R. Co. v. Benedict*, 169 Mass. 262, 47 N. E. 1027; *Woodruff v. Paddock*, 130 N. Y. 618, 29 N. E. 1021.

A second reason urged, and one upon which we place the determination of this case, is that under the Constitution of this state a railroad is a public highway, and that, as such, title to its right of way cannot be taken from it by adverse possession. Section 4, art. 11, of the Constitution of this

McLucas v. St. Joseph & G. I. R. Co

state, is in part as follows: "Railways heretofore constructed or that may hereafter be constructed in this state are hereby declared public highways, and shall be free to all persons for the transportation of their persons or property under such regulations as may be prescribed by law. * * *" The exercise of the right of eminent domain in the condemnation of land for right of way purposes by railroad companies is wholly inconsistent with any other theory than that the railroad is a public highway; and the universal holding of the court, so far as we are aware, is that railroads are highways. *Olcott v. Supervisors*, 83 U. S. 678, 21 L. Ed. 382; *Railroad Co. v. Caldwell*, 31 Cal. 371. That the companies operating them may be compelled to transport passengers and freight alike for all persons is well settled. This court has many times so held. That railroads are impressed with a public character is the more manifestly true under the terms of the constitutional provision quoted. The power of eminent domain is an attribute of sovereignty, and, under the provision of the Constitution, can only be exercised in the taking of private property for a public use, and then only after just compensation. The power is only coextensive with the necessity of the use. *Welton v. Dickson*, 38 Neb. 767, 57 N. W. 559, 22 L. R. A. 496, 41 Am. St. Rep. 771. The power to acquire title to the right of way of a railroad company by adverse possession is wholly inconsistent with the right and interest of the general public in the highways of the state. The fact that a railroad is owned and operated by a private corporation, and that passengers and freight can only be transported thereon upon tracks and in cars constructed especially for that purpose, does not make it any the less a public highway. If a railroad company could lose any portion of its right of way because it has no present or immediate need of it for the actual construction or maintenance of trackage thereon, it might at some time result in so curtailing its right of way and roadbed as to prevent the performance by it of the duties owing to the public, and to perform which it was created. In *Krueger v. Jenkins*, 59 Neb. 641, 81 N. W. 844, this court, speaking by Sullivan, J. (the question under consideration being the power to acquire title to a county road by adverse possession), said: "The right involved in this litigation is one belonging exclusively to the public at large. Neither Douglas county, nor its citizens, have any peculiar interest in it. A county does not hold the legal title to country roads within its borders. It has no power of disposition over them. It has no proprietary interest in them. In performing the duties with which it is charged in connection with them, it acts as an agent of the state, and in the interests of the general public. A county being a political subdivision of the state, created for the purposes of government, it ought not to be bound by limitation laws any more than the state itself. And as to property or

Lee v. Boston El. Ry. Co

rights held exclusively in trust for the general public, the decided weight of authority is that such laws have no application." We apprehend that there is no essential distinction between the case cited and that in hand, and can see no reason why the principle invoked in the former should not be accorded controlling force in the latter. The public has the same interest in a railroad as it has in all other public highways of the state, and we are of opinion that title to the unused portion of the right of way of a railroad being operated in this state cannot be acquired by adverse possession.

The judgment of the lower court is right, and it is therefore recommended that the same be affirmed.

HASTINGS and LOBINGIER, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

LEE *v.* BOSTON EL. RY. CO. (two cases).

(*Supreme Judicial Court of Massachusetts, Suffolk, Jan. 8, 1903.*)

[65 N. E. Rep. 822.]

Street Railroads—Negligence—Excavation near Track.

Defendant street railway company, in excavating under the direction of the commissioners of highways for the purpose of laying a new track, made a ridge of earth between its track and the sidewalk. Plaintiff alighted from a car stepping on the ridge, and instead of going toward the sidewalk took a step toward the excavation. The earth composing the ridge gave way, and she fell: *held*, that defendant was guilty of no negligence.

Exceptions from superior court, Suffolk County; Edward P. Pierce, Judge.

Separate actions by Josephine Lee and George Lee against the Boston Elevated Railway Company. Judgment for plaintiff in each case, and defendant excepts. Exceptions sustained.

Clapp & Glover, for plaintiffs.

E. P. Saltonstall, for defendant.

HAMMOND, J. These two cases were tried together. The evidence fails to show that there was any negligence on the part of the defendant. In broad daylight the plaintiff in the first case stepped from the car upon "a pile of earth about the height of the step of the car, extending from the step of the car some distance towards the sidewalk, on the right-hand side of the street." She noticed the pile before she got off, and she thought it was solid. Having alighted from the car she was no longer a passenger. It is perfectly apparent that, if she had gone to the sidewalk upon the right-hand side of the street, she would have met with no injury. Instead of taking that course, she took a step towards the trench be-

Davis' Adm'r v. Chesapeake & O. Ry. Co

tween the pile and the left-hand side of the street, and, the earth giving way, she fell into the trench. It was agreed at the trial that the work of digging the trench was being done by the authority and consent and under the general supervision of the commissioner of highways of the city, and the excavation was made for the purpose of laying down a new track, and that in order to lay the track it was necessary to cast upon the surface of the street the earth taken from the excavation. Such a method of working upon the street is very common. It cannot be said either that it was negligent so far as respects the plaintiff in the first case, under the circumstances, for the defendant to permit the pile of earth to remain upon the street, or that there was any duty resting upon the defendant to direct her to take the safe course plainly indicated to her by the situation, and to cross to the right side of the street. The defendant had no reason to expect that a person of mature age would be in any danger in alighting from the car at that place in the daytime. Since the second case depends upon the first, the entry in each case must be: Exceptions sustained.

DAVIS' ADM'R v. CHESAPEAKE & O. RY. CO. *et al.*

(*Court of Appeals of Kentucky, Dec. 9, 1902.*)

[70 S. W. Rep. 857.]

Diverse Citizenship—Foreign Corporations Filing Articles of Incorporation.*

Const. § 211, declares that no railroad corporation shall exercise the right of eminent domain or acquire right of way "until it shall have become a body corporate pursuant to and in accordance with the laws of this commonwealth." Ky. St. § 841, provides that no corporation created by any other state shall possess or operate any railway in this state until, by incorporation under the laws of this state, the same shall have become a "corporation, citizen and resident of this state." Any such corporation may, for such purpose, become a corporation, citizen, and resident of this state by being incorporated, by filing with certain officials a copy of its charter or articles of incorporation: *held*, that the members of a corporation which complied with the statute did not merely obtain a license or permission to do business in the state, but became a separate and distinct corporation, resident of the state, and could not remove a suit against it by a citizen to the federal courts.

Constitutional Law—Statute—Interstate Commerce.

The statute is not contrary to the interstate commerce clause of the federal constitution.

O'Rear, Du Relle, and Burnam, JJ., dissenting.

Appeal from circuit court, Lewis county.

"To be officially reported."

Action for death by Henrietta Davis' administrator against the Chesapeake & Ohio Railway Company and others. From

*See note appended to *Calvert v. Southern Ry. Co. (S. Car.)*, 19 Am. & Eng. R. Cas., N. S., 175.

Davis' Adm'r v. Chesapeake & O. Ry. Co

an order removing the cause to the federal court, plaintiff appeals. Reversed.

A. E. Cole & Son, for appellant.

W. H. Wadsworth and E. L. Worthington, for appellees.

WHITE, J. This is an action for damages for the death of Henrietta Davis, alleged to have been caused by the negligence of appellee, its agents and servants, in the operation of a train of cars in Lewis county. The petition was filed September 18, 1901, and summons was served September 19, 1901. The January term, 1902, was the appearance term, at which the defendant was required to answer. On October 5, 1901, an amended petition was filed, making Wm. Lewis, the engineer, Bracken, conductor, and Henry Inskip, brakeman, all alleged to have been in charge of the train that killed Henrietta Davis, parties defendant. In due time, at the January term, 1902, the appellee Chesapeake & Ohio Railway Company filed its petition and bond for removal of the action to the United States circuit for the Eastern district of Kentucky, upon the allegation that it was and had always been a foreign corporation, organized under the laws of the state of Virginia, and upon the allegation that no such persons as Lewis, Bracken, and Inskip, or either of them, were on the train or in charge of the train that killed Henrietta Davis, and the amendment making such persons parties defendant was done for the fraudulent purpose, if possible, of defeating a removal to the United States courts. The appellant offered to file a second amendment, making the Maysville & Big Sandy Railroad Company a party defendant, which the court refused to permit. The cause was then, on appellees' motion, ordered removed to the United States circuit court, and from that order this appeal is prosecuted.

The original petition filed herein describes appellee Chesapeake & Ohio Railway Company as a corporation of this state, and pleads in these words: "Plaintiff states that on the — day of December, 1893, pursuant to section 211 of the constitution of Kentucky, and section 841, Ky. St., the defendant Chesapeake & Ohio Railway Company became a corporation, citizen, and resident of this state, by filing in the office of the secretary of state, and in the office of the railroad commission, copies of the charters or articles of incorporation of the Chesapeake & Ohio Railway Company, organized under the laws of Virginia and West Virginia, authenticated by its seal and by the attestation of its president and secretary, by virtue whereof said company at once became, and is now, a corporation, citizen, and resident of this state, and that thereupon a certificate of said incorporation was issued to defendant by the secretary of state." In the petition for removal the allegation is made that the defendant was, at the time of the filing of this suit, a corporation created, organized, and existing under and by virtue of

Davis' Adm'r v. Chesapeake & O. Ry. Co

the laws of the state of Virginia, and of no other state. The facts pleaded by plaintiff as to compliance with section 841, Ky. St., by filing copies of the charter, etc., are not denied or in any way put in issue. The legal question presented on the petition for removal, then, is whether a compliance with the provisions of section 841 of the Kentucky Statutes and section 211 of the constitution created a corporation in this state, so that it was then a citizen and resident herein.

Section 211 of the constitution provides: "No railroad corporation organized under the laws of any other state, or of the United States, and doing business or proposing to do business in this state, shall be entitled to the benefit of the right of eminent domain or have power to acquire the right of way or real estate for depot or other uses, until it shall have become a body corporate pursuant to and in accordance with the laws of this commonwealth." Section 841 of the Kentucky Statutes provides: "No company, association or corporation created by or organized under the laws or authority of any state or country other than this state, shall possess, control, maintain, or operate any railway or part thereof, in this state until, by incorporation under the laws of this state, the same shall have become a corporation, citizen and resident of this state. Any such company, association or corporation may, for the purpose of possessing, controlling, maintaining or operating a railway or part thereof in this state, become a corporation, citizen and resident of this state by being incorporated in the manner following, namely: By filing in the office of the secretary of state and in the office of the railroad commission, a copy of the charter or articles of incorporation of such company, association, or corporation, authenticated by its seal and by the attestation of its president and secretary, and thereupon by virtue thereof such company, association or corporation shall at once become and be a corporation, citizen and resident of this state. The secretary of state shall issue to such corporation a certificate of such incorporation."

The allegations of the original petition of appellant are that all these provisions of the law were complied with, and that a certificate of incorporation was issued by the secretary of state, and the defendant is sued as a Kentucky corporation. It is quite clear from the statute quoted that the legislature intended that the foreign railroad company should become a corporation of this state, and then an easy and convenient means of so doing was provided. Having complied with the provisions of that law, and become, so far as that law can or does create, a corporation, citizen, and resident of this state, the question is presented, has the original or first corporation the right to remove suits brought against the alleged Kentucky corporation upon the allegation of diverse citizenship? If in this case there are two corporations, although of the same name, it is clear that the foreign corporation cannot

Davis' Adm'r v. Chesapeake & O. Ry. Co

remove, for it is not made a party; but if there be only one corporation, and that a Virginia corporation, the right of removal would not be defeated by an allegation that defendant was a corporation, citizen, and resident of this state. This is a question of law that was properly presented by the original petition and the petition for removal; and, upon hearing, the lower court necessarily held that there was but one corporation, and that one was created by, and organized under and by virtue of, the laws of Virginia. This question is one of great importance to the state and the public, as well as to the parties hereto, and it seems has never been decided by this court.

In some form or other, this question has been presented to the United States supreme court and to the federal circuit court of appeals, and to the circuit courts, under various statutes of the different states, and has been decided. In the supreme court in the case of *Gerling v. Railroad Co.*, 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311, Mr. Justice Gray classified the different states of case on which removal depended thus: "A railroad corporation created by the laws of one state may carry on business in another by virtue of being created a corporation by the laws of the latter state also, as in *Railway Co. v. Vance*, 96 U. S. 450, 24 L. Ed. 752; *Memphis & C. R. Co. v. Alabama*, 107 U. S. 581, 2 Sup. Ct. 432, 27 L. Ed. 518; *Clark v. Barnard*, 108 U. S. 436, 2 Sup. Ct. 878, 27 L. Ed. 780; *Stone v. Trust Co.*, 116 U. S. 307, 6 Sup. Ct. 334, 29 L. Ed. 636, and *Graham v. Railroad Co.*, 118 U. S. 161, 6 Sup. Ct. 1009, 30 L. Ed. 196,—or by virtue of a license, permission, or authority granted by the laws of the latter state to act in that state under its charter from the former state. *Railroad Co. v. Harris*, 12 Wall. 65, 20 L. Ed. 354; *Railroad Co. v. Koontz*, 104 U. S. 5, 26 L. Ed. 643; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83; *Marye v. Railroad Co.*, 127 U. S. 117, 8 Sup. Ct. 1037, 32 L. Ed. 94. In the first alternative, it cannot remove into the circuit court of the United States a suit brought against it in a court of the latter state by a citizen of that state, because it is a citizen of the same state with him. *Memphis & C. R. Co. v. Alabama*, above cited. In the second alternative, it can remove a suit, because it is a citizen of a different state from the plaintiff. *Railroad Co. v. Koontz*, above cited." To which of these two classes does this case belong? Was the foreign railroad corporation licensed, permitted, and authorized to do business in this state under its foreign charter? Or was a new corporation created by the law (section 841), and compliance therewith by the appellee? It is clear from the section of the constitution and the wording of the act itself that the legislative intent was to create a new corporation, that would be a citizen and resident of this state, and be in fact a Kentucky corporation. We say there can be no doubt that such was the

Davis' Adm'r v. Chesapeake & O. Ry. Co

intention of the act, but the inquiry arises, does the law accomplish what the legislators had in mind to do?

In 1889 the legislature of Georgia passed an act providing for a re-leasing of the Western & Atlantic Railroad, and for its operation by the lessee. That act, passed November 12, 1889, provided, among other things, as follows: " * * *

The persons, associations or corporations accepted as lessees under their act, if not already a corporation created under the laws of Georgia, shall from the time of such acceptance, and until after the final adjustment of all matters springing out of this lease contract, become a body politic and corporate under the laws of this state, under the name and style of the Western & Atlantic Railroad Company, which body corporate shall be operated only from the time of their taking possession of said road as lessees; and it shall have the power to sue and be sued," etc. The Nashville & Chattanooga Railroad Company, a Tennessee corporation, became the lessee under the act; and, the question coming before the supreme court of Georgia (*Railway Co. v. Edwards*, 16 S. E. 347), that court held that the act of 1889 created a new corporation in the state of Georgia, known as the Western & Atlantic Railroad Company, and that for an injury in Georgia an action would not lie against the Nashville, Chattanooga & St. Louis Railroad Company, but should be against the home corporation, viz., Western & Atlantic Railroad Company. The same question as to whether the act of 1889 of Georgia created a new corporation came before the United States circuit court of appeals, Sixth circuit, before Judges Taft, Lurton, and Barr, in the case of *Railroad Co. v. Roberson*, 9 C. C. A. 646, 61 Fed. 592. It was there held that the act of Georgia created a corporation, and an action might be maintained in the United States court in Tennessee by a citizen of Tennessee for an injury done in that state, because there was diverse citizenship shown.

In *Railway Co. v. Vance*, 96 U. S. 450, 24 L. Ed. 752, the facts appear to be that the Indianapolis & St. Louis Railroad Company was an Indiana corporation, and leased the St. Louis, Alton & Terre Haute Railroad, which was an Illinois corporation. The legislature of Illinois passed an act confirming and ratifying the lease. The act provides: "The said lessees, their associates, successors and assigns, shall be a railroad corporation in this state, under the said style of 'The Indianapolis & St. Louis Railroad Company' and shall possess the same or as large powers as are possessed by said lessor corporation, and such other powers as are usual to railroad corporations." 3 Laws 1869, p. 316. The supreme court, by Mr. Justice Harlan, said: "The Indianapolis & St. Louis Railroad Company, as lessee of the St. Louis, Alton & Terre Haute Railroad Company, was thus created, by apt words, a corporation in Illinois. The fact that it bears the same name as that given to the company

Davis' Adm'r v. Chesapeake & O. Ry. Co

incorporated by Indiana cannot change the fact that it is a distinct corporation, having a separate existence, derived from the legislation of another state."

In an action between these two railroad corporations, styled *St. Louis, A. & T. H. R. Co. v. Indianapolis & St. L. R. Co.* before the circuit court (Fed. Cas. No. 12,237, 9 Biss. 144), and styled *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* in the supreme court (118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83), a question of jurisdiction was presented, depending on whether the *St. Louis, Alton & Terre Haute Railroad Company* was a corporation of Indiana. The supreme court, by Mr. Justice Miller, said: "It does not seem to admit of question that a corporation of one state, owning property and doing business in another state by permission of the latter, does not thereby become a citizen of this state also. And so a corporation of Illinois, authorized by its laws to build a railroad across the state from the Mississippi river to its eastern boundary, may, by the permission of the state of Indiana, extend its road a few miles within the limits of the latter, or, indeed, through the entire state, and may use and operate the line as one road, by permission of the state, without thereby becoming a corporation or a citizen of the state of Indiana. Nor does it seem to us that an act of the legislature conferring upon this corporation of Illinois, by its Illinois corporate name, such powers to enable it to use and control that part of the road within the state of Indiana as have been conferred on it by the state which created it, constitutes it a corporation of Indiana. It may not be easy in all such cases to distinguish between the purpose to create a new corporation which shall owe its existence to the law or statute under consideration, and the intent to enable the corporation already in existence under the laws of another state to exercise its functions in the state where it is so received. The latter class of laws are common, in authorizing insurance companies, banking companies, and others to do business in other states than those which have chartered them. To make such a company a corporation of another state, the language used must imply creation or adoption in such form as to confer the power usually exercised over corporations by the state or by the legislature, and such allegiance as a state corporation owes to its creator. The mere grant of privileges or powers to it as an existing corporation, without more, does not do this, and does not make it a citizen of the state conferring such powers. In a case where the corporation already exists, even if adopted by the law of another state and invested with full corporate powers, it does not thereby become such new corporation of another state, until it does some act which signifies its acceptance of this legislation, and its purpose to be governed by it. We think what has occurred between the state of Indiana and the Illinois corporation falls short of that." The same court, but a few days later, decided the case

Davis' Adm'r v. Chesapeake & O. Ry. Co

of *Graham v. Railroad Co.*, 118 U. S. 161, 6 Sup. Ct. 1009, 30 L. Ed. 196, and, by Mr. Justice Blatchford, said (page 167, 118 U. S., and page 1012, 6 Sup. Ct., 30 L. Ed. 196): "This act [of New York] professes, in its title, to be an act to consolidate the three companies. It authorizes the sale to the Boston, Hartford & Erie Company of the franchises and property of the other two corporations [which were New York corporations], and provides that such sale shall pass the title to such franchises and property, and that such purchasing company shall thereby 'become possessed of the rights of charter and property sold,' and thereafter have, hold, and use the same in its 'own name and right.' As a purchaser of what this act authorized to be sold to it, the company purchasing became a New York corporation, by its then existing name."

Following the doctrine announced in these cases,—and they have not been overruled,—we are of opinion that by compliance with the provisions of section 841, Ky. St., there was created and organized a railroad corporation, the appellee herein. That corporation so created and organized is a citizen and resident of this state, and, as this domestic corporation was made defendant in the original petition, there existed no grounds to authorize a removal to the United States circuit court. Both the plaintiff and the defendant were citizens and residents of this state.

We recognize the distinction between license and authority granted to a foreign corporation to do business here, and an incorporation as provided in section 841. In the case of *Com. v. Mobile & O. R. Co. (Ky.)* 64 S. W. 451, 54 L. R. A. 916, there were presented facts showing a license to that corporation to do business in this state under its foreign charter, by act of the legislature of this state in February, 1848. That company was indicted in the Carlisle circuit court, under section 842, for a failure to comply with the provisions of section 841, and for operating a railroad without such compliance. The court held that under the act of 1848 there was a grant of license or authority to the railroad company to do business and acquire property in this state as a foreign corporation, and therefore it could not be compelled to incorporate here, or to do anything additional than had been required under the act of 1848. The court said, per O'Rear, J.: "If section 841 is applied to appellee, it will be required, in order to continue the use and enjoyment of the privileges granted to it in 1848, to do something in addition to that required by terms of the grant. It will be compelled to take up the burdens of a citizenship which it has not hitherto had to bear, and deprive itself of privileges deemed by many, or all similarly situated, to be of considerable pecuniary value." The court had in that opinion previously said: "One of the advantages now thought to pertain to its nonresidency is the privilege of claiming the jurisdiction of the federal courts in

Davis' Adm'r v. Chesapeake & O. Ry. Co

certain actions." It will thus be seen that the difference between a grant of license and authority to a foreign railroad company to do business in this state, and an incorporation under section 841, Ky. St., has been recognized by this court. In the argument of that case, learned counsel for the railroad company conceded that the effect of a compliance with section 841 was to create a corporation by, and under authority of the laws of, this state. The opinion so holds, and that holding was necessary to reach the conclusion therein expressed. If a compliance with section 841 was merely formal,—a police regulation,—and effected no change in status or of substantial right, the railroad corporation might have been required to comply therewith, and, for a failure to do so, been subjected to the penalties of section 842. But as the court held that a compliance with section 841 made a material change in the position of the railroad, and required it to surrender a valuable right,—that of claiming the jurisdiction of the federal courts in certain cases,—the court held it could not be required to comply with section 841, because of its contract created by the acceptance of the grant of 1848.

But it is said by learned counsel for appellees that the cases of *Railroad Co. v. James*, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802, and *Louisville, N. A. & C. R. Co. v. Louisville Banking Co.*, 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081, hold that by compliance with section 841 the company so complying does not become a domestic corporation of this state. In our opinion, neither of the cases goes to the extent claimed by counsel. The case of *Railroad Co. v. James* was an action by a citizen of the state of Missouri against the railroad for an injury done in the state of Missouri, and brought in the federal court. The allegation of the petition was that the railroad corporation was a corporation of the state of Arkansas. By answer it was denied that the defendant was a corporation of Arkansas, and the allegation was made that it was a corporation of Missouri. This plea presented a question of jurisdiction in the United States circuit court. We confess there are utterances in that opinion that would go to the extent of holding that a corporation already in existence cannot be reincorporated by another state, but that persons must always be named as incorporators. Yet we find in the opinion the following: "It is competent for a railroad corporation organized under the laws of one state, when authorized to do so by consent of the state which created it, to accept authority from another state to extend its railroad into such state, and to receive a grant of power to own and control, by lease or purchase, railroads therein, and to subject itself to such rules and regulations as may be prescribed by the second state. * * * Such corporations may be treated by each of the states whose legislative grants they accept as domestic corporations." Again, at page 565, 161 U. S., and page 628, 16 Sup. Ct., 40

Davis' Adm'r v. Chesapeake & O. Ry. Co

L. Ed. 802, the court said: "But whatever may be the effect of such legislation in the way of subjecting foreign railroad companies to control and regulation by the local laws of Arkansas, we cannot concede that it availed to create an Arkansas corporation out of a foreign corporation, in such a sense as to make it a citizen of Arkansas, within the meaning of the federal constitution, so as to subject it, as such, to a suit by a citizen of the state of its origin. In order to bring such an artificial body as a corporation within the spirit and letter of that constitution, as construed by the decisions of this court, it would be necessary to create it out of natural persons, whose citizenship of the state creating it could be imputed to the corporation itself." By this we understand the court to mean that the legislature of the laws of one state cannot, out of a corporation already in existence in some foreign state, make a corporation, but that, to create this artificial body, there must be used in its creation some natural persons. Most assuredly, that is true. The legislature of this state cannot, by any sort of enactment, remove an artificial body, created solely by reason of the law of some other state, out of the state of its creation into this state; and likewise, if the corporation has been created once by the law of any state, that corporation cannot be created by our law. It cannot be re-created, because it has an existence. It cannot migrate, because the laws of the state which created it cannot have force beyond the territorial boundary of such state. But that opinion does not deny the right of any state to create a corporation having the same name and powers, and composed of the same stockholders, as a corporation existing in another state. Indeed, it is expressly said this may be done, if persons are used to form the corporation. So far as we are advised, it is always necessary to use natural persons to organize a corporation. Such we understand to be the meaning of section 841. The stockholders and persons composing the foreign railroad corporation, company, or association shall organize into a domestic corporation before they can own, control, or operate a railroad. This corporation so organized and created is a citizen and resident of this state. For convenience in organization, and to save expense, these stockholders and persons are permitted, instead of complying with our general statute as to the organization of railroad companies, to file the copies of their articles of incorporation or charter granted them, properly identified as such by the certificate of the president and secretary of the company. When this is done, by the very words of the statute, a corporation, resident, and citizen of this state is created and organized. The statute uses the words "company, association, or corporation." These words necessarily mean an association of natural persons into one common undertaking. Whether it be a partnership, spoken of as company, a joint-stock as-

Davis' Adm'r v. Chesapeake & O. Ry. Co

sociation, or a regularly chartered corporation, that composes the foreign railway company, when it comes into this state it must be and become a domestic corporation,—a citizen and resident of this state,—which can only be done by being created and organized under our law into a corporation. These persons might organize regularly, under the provisions of the general corporation statute, into a corporation, if they chose; but being already engaged in the business of owning, controlling, and maintaining or operating railroads, it is presumed their articles already signed are sufficient, and our statute accepts such articles in lieu of new ones.

There is nothing in the case of *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081, contrary to this view. That opinion was written by Mr. Justice Gray, who had written *Gerling v. Railroad Co.*, 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311; and also the opinion in *Memphis & C. R. Co. v. Alabama*, 107 U. S. 581, 2 Sup. Ct. 432, 27 L. Ed. 518, and instead of overruling either case, or in any way offering a criticism as to their correctness, he makes extracts from these opinions, and also cites *Railroad Co. v. Vance*, 96 U. S. 450, 24 L. Ed. 752, *Clark v. Barnard*, 108 U. S. 436, 2 Sup. Ct. 878, 27 L. Ed. 780, *Graham v. Railroad Co.*, 118 U. S. 161, 6 Sup. Ct. 1009, 30 L. Ed. 196, and that line of cases, to support his position. The real question determined in the *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* case was the right of an Indiana corporation to sue in the federal court in Kentucky a corporation of Kentucky, when the same stockholders and persons composing the Indiana corporation had also been incorporated in Kentucky under the same name and for the same purposes. The right was upheld, and jurisdiction was sustained. So here the Virginia corporation might have been sued, in which case a right of removal would have existed. This was not done, however. The corporation was sued that was organized and created by the filing in the offices of the secretary of state and railroad commissioner copies of the articles of incorporation of the Chesapeake & Ohio Railway Company as provided by section 841, and which corporation, being thus created and organized, was a corporation, citizen, and resident of this state; and, while its powers, duties, objects, and stockholders were the same as in the Virginia corporation of the same name, this was a separate and distinct corporation, because created by a different sovereignty.

So far as we have examined the adjudicated cases and the text-writers on the subject, it seems to be universally conceded that the question of whether a corporation has been created is never one of power in the state so to do, but always one of legislative intent. In the case of *Railroad Co. v. Harris*, 12 Wall. 65, 20 L. Ed. 354, where the supreme court differs from the court of appeals of Virginia and of West Vir-

Davis' Adm'r v. Chesapeake & O. Ry. Co

ginia as to whether by an act of the Virginia legislature the Baltimore & Ohio Railroad Company became also a Virginia corporation, it was fully conceded that such might have been done if the legislature had so intended. The Virginia courts had concluded that the intention was manifested in the act, but the supreme court thought otherwise. The legislation of this state furnishes ample illustration of the difference between a license to a foreign railroad company to do business in this state, and an act reincorporating a railroad corporation of another state. Let us take an example. By an act of March, 1872, entitled "An act to authorize the Mississippi Central Railroad Company to extend their road into and through the state of Kentucky" (2 Laws 1872, p. 50), the corporation was declared a body politic and corporate, and authorized to construct and operate its road through Kentucky to the Ohio river. This, under the rule of the supreme court, was a mere license to a foreign corporation to do business in this state. The Mississippi Central Railroad Company at that time existed under the laws of Mississippi, of Tennessee, and of Louisiana. In 1877 these corporations were consolidated by enabling acts of the three states into one company, called the Chicago, St. Louis & New Orleans Railway Company; and in March, 1878, the legislature of this state ratified the former act, and the consolidation of the three corporations into one, and granted a charter to the consolidated company. In an action brought in this state by a citizen, a removal was taken to the United States circuit court upon a petition alleging that the defendant Chicago, St. Louis & New Orleans Railroad Company was a foreign corporation, its habitat being Louisiana. Upon motion to remand, Hammond, District Judge (Uphoff v. Railroad Co. [C. C.] 5 Fed. 545), held it was a corporation of this state, and remanded the case because that court had no jurisdiction. Subsequently in 1882 the legislature of this state passed an act authorizing the Illinois Central Railroad Company an Illinois corporation, to acquire and operate, by lease or purchase, the line of the Chicago, St. Louis & New Orleans Railway Company; and it is a matter of common knowledge that in compliance with that legislative permission a lease for a long term of years was executed to the Illinois Central Railroad Company, and that company now operates the line of road. This latter act authorizing the acquisition by the Illinois Central Railroad Company was a mere license to the foreign railroad corporation to do business in this state. Since the passage of that act, section 841 has been passed; and suppose now that the Illinois Central Railroad Company desires to build a line of road for itself in this state, and in order to place itself within the constitutional provision, so as to exercise the power of eminent domain, its stockholders comply with section 841, Ky. St. In such case no court would be justified in holding that that act by the company's stock-

Davis' Adm'r v. Chesapeake & O. Ry. Co

holders did no more than was done by the act of the legislature authorizing the lease. This history of one line of railroad, and the different acts of the legislature of this state in relation thereto, show clearly the distinction and difference between the intent to license and to create a corporation.

It has been repeatedly said by all the text-writers and authorities that no particular form of words is necessary to create a corporation or to grant corporate powers. If the act shows that it was the intention to create a corporation, such has always been held to be the effect. In the case of *Insurance Co. v. Kamper*, 73 Ala. 325, the question arose as to whether the insurance company was a corporation of the state of Mississippi, as well as the state of Alabama, where the first charter was granted. The court concluded that it was a corporation of Mississippi, and said (page 344, 73 Ala.): "This act [of Mississippi] authorized the company to establish in that state one or more departments. But no department could be established until citizens of the state had subscribed for and paid, or secured to the satisfaction of the president and general board of directors, a capital stock of one hundred thousand dollars; and the directors of each department were required to be citizens of the state. Upon the establishment of a department, it was declared, the corporation was to be regarded as a home company, and should be entitled to have and enjoy all the rights, privileges, immunities, and exemptions of life insurance companies incorporated by the laws of Mississippi. Under this act a department was organized, and it may, perhaps, be inferred from the averments of the bill that it was for stock of the department, and not for the capital stock of the company in this state, the appellees were subscribers. The effect of this act was not merely to license, or to enable the corporation formed in this state to transact business and exercise its powers in Mississippi. It is of far wider operation, and creates a corporation having the same name and like franchises as the corporation formed in this state, whenever there was an organization in pursuance of its provisions,—a domestic corporation; in the words of the act, a 'home company.' * * * When there was an organization in pursuance of its provisions, a corporation existed, having its own capital, its own members, its own domicile, its own governing body; and its corporate powers were derived, not from a foreign power, or by reference to the powers a foreign power may have conferred on a corporation of its creation, but were the rights, privileges, immunities, and exemptions of life insurance companies incorporated under the laws of Mississippi. The act, when accepted, when there was an organization under its provisions, became a contract between the state and the corporators."

In the case of *McGregor v. Railway Co.*, 35 N. J. Law, 115, the supreme court of New Jersey held that the Erie Railway Company was a domestic corporation by reason of certain

Davis' Adm'r v. Chesapeake & O. Ry. Co

acts of the legislature. The court said: "The title of the act of 1862 declares that it is an act not only to confirm the sale under the foreclosure of the property, rights, and franchises of the New York & Erie Railroad Company, but to complete the organization of the Erie Railway Company; and the powers and provisions of that act, with the preliminary act of 1860, are such as necessarily to give the Erie Railway Company the character of a corporation of this state, although it is not so expressly declared. 10 Wall. 567. There is not a mere incidental power, conferred or confirmed, but the intrinsic nature of the franchises and privileges the Erie Company is authorized to possess and enjoy in its corporate name, as well as the liabilities imposed by the act of 1862, were such as ipso facto, to make it a domestic corporation.

In the case of *Debnam v. Telegraph Co.* (decided by the supreme court of North Carolina June 7, 1900) 36 S. E. 269, the court after a careful review of all the federal authorities, held that the Southern Bell Telephone Company was not entitled to a removal, because it had been created a corporation by the laws of North Carolina. The court, by Douglas, J., after quoting from the case of *Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co.*, 174 U. S. 562, 19 Sup. Ct. 821, 43 L. Ed. 1081, as follows: "This court has often recognized that a corporation of one state may be made a corporation of another state by the legislature of that state, in regard to property and acts within its territorial jurisdiction," citing *Railroad Co. v. Wheeler*, 1 Black, 286, 17 L. Ed. 130; *Railroad Co. v. Harris*, 12 Wall. 65, 20 L. Ed. 354; *Railroad Co. v. Whitton*, 13 Wall. 270, 20 L. Ed. 571; *Railway Co. v. Vance*, 96 U. S. 450, 24 L. Ed. 752; *Memphis & C. R. Co. v. Alabama*, 107 U. S. 581, 2 Sup. Ct. 432, 27 L. Ed. 518; *Clark v. Barnard*, 108 U. S. 436, 2 Sup. Ct. 878, 27 L. Ed. 780; *Stone v. Trust Co.*, 116 U. S. 307, 6 Sup. Ct. 334, 29 L. Ed. 636; *Graham v. Railroad Co.*, 118 U. S. 161, 6 Sup. Ct. 1009, 30 L. Ed. 196; *Gerling v. Railroad Co.*, 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311; and again on the same page: "But this court has repeatedly said that, in order to make a corporation already in existence under the laws of one state a corporation of another state, the language used must imply creation or adoption in such form as to confer the power usually exercised over corporations by the state or by the legislature, and such allegiance as a state corporation owes to its creator. The mere grant of privileges or powers to it as an existing corporation, without more, does not do this,"—said: "This clear and concise statement of the law would meet our unqualified approval, even if it had come from a different source. Applying this rule in its strictest form, we are clearly of opinion that the act now under consideration does not pretend to be a mere grant of privileges or powers, but is, in legal intent and effect, a creation or adoption in such form as to confer the powers usually exercised over corpora-

Davis' Adm'r v. Chesapeake & O. Ry. Co

tions by the state or legislature, and such allegiance as a state corporation owes its creator. The act says in express terms 'that every telephone * * * company incorporated, created and organized under and by virtue of the laws of any state or government other than that of North Carolina, desiring to own property or to carry on business or to exercise any corporate franchise whatsoever in this state, shall become a domestic corporation of the state of North Carolina by filing, etc.; that, when any such corporation shall have complied with the provisions of this act above set out, 'it shall thereupon immediately become a corporation of this state and shall enjoy the rights and privileges and be subject to the liability of corporations of this state the same as if such corporation had been originally created by the laws of this state.'

* * * We are of opinion that as the defendant has become a domestic corporation of the state of North Carolina, and, in contemplation of law, a citizen thereof, and as the plaintiff has sued the defendant, as a North Carolina corporation, upon a cause of action which discloses no federal question whatever, the case cannot be removed into the circuit court of the United States."

The cases might be multiplied to sustain this view that section 841, Ky. St., is not a mere license to a foreign corporation, but was in itself a creative statute, providing that, when certain formalities are complied with, a corporation is created in this state. The whole question is one of legislative intent, and, as we said above, there can here be no question as to the intention to create a corporation when section 841 is complied with. Appellee Chesapeake & Ohio Railway Company, having complied with that section, became a corporation of this state, a citizen and resident herein, and being such, and sued on a cause of action presenting no federal question, was not entitled to a removal to the United States circuit court. We are aware that Judge Barr, in the case of *Taylor v. Railroad Co.* (C. C.) 89 Fed. 119, took a different view from the one here expressed; and, while we greatly admire and respect his ability as a judge, we cannot agree with him as to the purpose, meaning, and effect of our statutes.

It is suggested that section 841, Ky. St., is unconstitutional, because in conflict with the commerce clause of the federal constitution. We are of the opinion that there is no conflict, and, if there be, the same conflict would exist between section 211 of our constitution and the commerce clause of the federal constitution. There is nothing in section 211 of the constitution, or section 841, Ky. St., that in any way interferes with interstate commerce. So far as section 841 provides, the appellee Chesapeake & Ohio Railway Company may carry all articles of commerce that it may receive outside the state to any point it pleases, in or out of the state, but it cannot do an intrastate business without a

Davis' Adm'r v. Chesapeake & O. Ry. Co

compliance with this section. This is like our statute providing for separate coaches for the white and colored passengers. That law is valid and has been upheld as to all passengers from points in this state to other points in the state, but would not apply to passengers taken outside of the state, —does not apply to interstate business. The question as to the validity of this statute was directly before this court in the Mobile & O. R. Co. Case, *supra*, and it was therein expressly held not to violate the constitution.

The foreign railroad corporation may, under a license or by mere acquiescence, engage in interstate commerce through this state, but it could exercise no power of eminent domain for any purpose whatever. Nor could the legislature grant to such foreign corporation the power of eminent domain, because of section 211 of the constitution. If the power and right of eminent domain is to be exercised, it is necessary that the railroad corporation that exercises it be a corporation of this state. The Virginia corporation could not exercise the power of eminent domain, and by incorporating in this state under the provisions of section 841, Ky. St., this valuable right and great power are conferred on the incorporators. By compliance with this provision there was a right conferred and power given that could only be given to a domestic corporation, and we hold that at the same time, and in order to acquire this right of eminent domain, a corporation was created. It is to be presumed that the corporators, stockholders, and directors, who voluntarily complied with section 841, desired to possess the right of eminent domain; and, as that could only be obtained in this state by a domestic corporation, voluntarily sought to be and were created and organized into a corporation by compliance with section 841.

We conclude, therefore, that appellee is a corporation of this state, and as such was sued, and its petition for removal to the federal court was insufficient, as there was no showing of diverse citizenship. The order and judgment of removal were therefore erroneous, and are reversed, and cause remanded for further proceedings consistent herewith.

O'REAR, J. (dissenting). This is an action brought originally against appellee Chesapeake & Ohio Railway Company by appellant for the death of appellant's intestate, alleged to have been caused by the negligent act of appellee in the operation of its railroad train in Lewis county. Subsequent to the filing of the original petition, the persons alleged to have been in charge of the train as engineer, fireman, and brakeman were made defendants, but they have not been served with process and are not before the court; and in the petition for a removal it is alleged that they were not upon or in charge of the train at the time of the accident. Later the Maysville & Big Sandy Railroad Company was joined as defendant, it being the owner and lessor of the track and right

Davis' Adm'r v. Chesapeake & O. Ry. Co

of way over which appellee is operating its road, but it has not been brought before the court. The sole defendant at the time of the removal proceedings was the appellee Chesapeake & Ohio Railway Company.

The majority opinion assumes the proposition in this case to be (and I think correctly), alone, whether appellee's compliance with section 841 of the Kentucky Statutes constitutes it a domestic corporation. If it does, appellant being also a citizen of Kentucky, the cause is not removable to the federal court. This question might be divided for consideration into these two heads: (1) Is it competent for the legislature to deny a continuance of the privilege to a foreign corporation already within its borders and engaged in the business of carrying on interstate commerce, unless such foreign corporation shall, under such onerous penalties as to practically amount to confiscation of its property, become a citizen of this state? (2) If such foreign corporation should accept the terms so prescribed by the legislature, would it thereby become a citizen of the state of Kentucky, in the sense employed in the federal statutes, so that a suit against it by a citizen of this state would not be removable into the United States courts?

The complex nature of our government has, first and last, been the source of much discussion, and occasional conflict of jurisdiction between the state and federal authorities. Without attempting to enter upon an analysis or a discussion of this question, I hold to the opinion that, in those matters where the federal constitution reserved to the federal government exclusive jurisdiction, the rights of the states over such may not be extended beyond legitimate and proper taxation and the exercise of its police power. In other respects the federal control of the question is, and, from the very nature of the case, must be, ample, complete, and exclusive, and may be exercised as if state lines did not exist. Among these subjects is that of interstate commerce. It is not pretended in this case either that section 841 of the statute under discussion was intended to be or is an exercise of the taxing power, or that it is a police regulation by the state government. The record in this case discloses the fact to be that prior to the enactment of section 841 there existed in this state a railroad corporation created by the laws of this state, known as the Maysville & Big Sandy Railroad Company, which owned a right of way and roadbed extending from Boyd county, Ky., to Covington, Ky.; that appellee, before the enactment of the statute mentioned, acquired from the Maysville & Big Sandy Railroad Company, by lease for a long term of years, its roadbed and properties, and has since been, and is now, operating same under that lease; that appellee Chesapeake & Ohio Railway Company is a corporation originally created by the state of Virginia, with an enabling act by the state of West Virginia. Thus it would appear, and it is not questioned in

Davis' Adm'r v. Chesapeake & O. Ry. Co

this case, that appellee was engaged in carrying on interstate traffic between the states of Virginia, West Virginia, Kentucky, and Ohio. Appellant's petition alleges the lease above referred to in such terms as to permit us to indulge the presumption in this record that the lease was regularly entered into by the permission of this state. Whether such permission is evidenced by a general enactment, or by special act authorizing it, it will amount at least to a license at the time the contract of lease was made. Allowing these facts to be true, then was it competent for the legislature of this state to prohibit appellee's continuing the enjoyment of the property it had acquired under the provision referred to, and its use in carrying on interstate commerce, without appellee should become incorporated as a citizen of Kentucky, and give up the privileges and rights attaching to its then existence as a citizen solely of another state? I maintain that it could not. If the state could legally require that all persons engaged in interstate traffic within the borders of this state should first become citizens of this state, it would be equivalent to saying that none but citizens of this state could engage therein in such traffic. The penalty of \$1,000 per day denounced by statute against all who refuse or fail to first become citizens of this state before they can operate or continue to operate a railroad in or through this state is manifestly prohibitive. By statute, none but corporations can acquire in this state the right to operate railroads. If no corporation but one created by this state, in every sense of the word, a domestic corporation, can operate a railroad in this state, then it necessarily follows that this state not only could, but would by the operation of the statute quoted, if given the effect ascribed to it by the majority opinion, effectually control all commerce within and through this state. If it be conceded that the state may say who may and who shall not carry on the business of a common carrier within its borders, it must of necessity follow that such state exclusively controls and regulates the matter of all commerce therein. In all other things than that of interstate commerce a state may regulate the entrance, or even deny altogether the admission, of foreign corporations to do business therein. It has been definitely settled, too, that a corporation is not a citizen, within the meaning of the provisions of the federal constitution providing that citizens of each state shall be entitled to all privileges and immunities of citizens of the several states.

The precise question of the power of a state to regulate the conduct of interstate commerce by first requiring a license of a common carrier engaged therein, although such carrier was a foreign corporation, was directly presented and determined in the case of *Crutcher v. Com.*, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649. In that case the court said: "If a partnership firm of individuals should undertake to carry on the business of interstate commerce between Kentucky and other states,

Davis' Adm'r v. Chesapeake & O. Ry. Co

it would not be within the province of the state legislature to exact conditions on which they should carry on their business, nor to require them to take out a license therefor. To carry on interstate commerce is not a franchise or a privilege granted by the state. It is a right which every citizen of the United States is entitled to exercise under the constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless congress should see fit to impose some contrary regulation on the subject." In *Railroad Co. v. Pennsylvania*, 136 U. S. 114, 10 Sup. Ct. 958, 34 L. Ed. 394, the facts were that the state of Pennsylvania undertook, by an act of the legislature, to require all foreign corporations having an office or offices in that commonwealth to pay an annual license fee, and providing a penalty for the failure. The Norfolk & Western Railroad Company was a corporation created by the laws of Virginia and West Virginia, and engaged in the carrying on of interstate traffic through other states, and by traffic arrangements into the state of Pennsylvania. Having failed to take out the license prescribed by the Pennsylvania act, judgment was rendered against the railroad company for penalties. Upon appeal the supreme court of the United States, speaking through Mr. Justice Lamar, held: "It is well settled by numerous decisions of this court that a state cannot, under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burdens upon such commerce within its limits." It would seem to follow as a consequence that, if a state cannot regulate or exclude from its jurisdiction a foreign corporation engaged in interstate commerce by the adoption of "the guise of a license tax," it could not do so by any guise. In *Pickard v. Car Co.*, 117 U. S. 34, 6 Sup. Ct. 635, 29 L. Ed. 785, the state of Tennessee sought to impose a license tax upon a Kentucky corporation which was engaged in furnishing cars for the transportation of passengers between the states. The Tennessee statute was held to be invalid as being an interference with interstate commerce.

Whether a foreign corporation proposing to engage or being engaged in carrying interstate commerce would have the right to enter any state without its permission, and to acquire a right of way therein, is a question not presented in this case, and one that has not, so far as I am advised, been expressly determined. In the case of *Railway Co. v. James*, 161 U. S. 554, 16 Sup. Ct. 621, 40 L. Ed. 802,—opinion by Mr. Justice Shiras,—it was intimated that the right existed. At least, the question is there clearly shown to be an open one, so far as the federal authorities are concerned. If the state cannot require first a license from foreign corporations or persons engaged in interstate commerce, before they can enter such state and do business there, it as certainly follows

that such state cannot require more than taking out a license; that is, it could not require such a person or corporation to become a citizen of the objecting state. Although a foreign corporation or person engaging in such traffic has taken out such license, or has conformed to the statute containing the terms set forth in section 841, *supra*, it cannot be held to be a voluntary act when done under the coercive influence of the highly penal statute, threatened to be enforced upon a failure to conform to the statute. Kentucky did not create this corporation; cannot terminate its existence; could not liquidate its affairs at the instance of a creditor or stockholder, even upon showing otherwise justifying it. Its existence as a corporation is not due in any part to the sovereign or creative power of this commonwealth. The utmost that this state could have done was to confer upon the existing corporation, resident conclusively, in the eye of the law, in another state, certain privileges supposed to be necessary, or at least desirable, to be so conferred. The fact of the legal residence of a corporation may be a fiction of the law. But it is a necessary one, and one that is well established and understood. But to say that the same corporation may be, for identical purposes, a resident at the same time of two states, seems but a fancy. At any rate, even if the fact could be accomplished, it should not be unless the fact is that the corporation both intends to and does obtain legal vitality and existence as a corporation from both sovereignties.

It seems that a corporation, so far as the federal authorities go, may be created, having power granted to it by, and deriving corporate existence and authority in part from, two or more states (*Louisville, N. A. & C. R. Co. v. Louisville Trust Co.*, 174 U. S. 560, 19 Sup. Ct. 817, 43 L. Ed. 1081), although this court, in an opinion by Chief Justice Hargis, in *Bridge Co. v. Wooley*, 78 Ky. 523, seems to have taken an opposite view. Nor does it seem to be an open question that the same incorporators may incorporate under the same name in two or more states. But I do not conceive that either of these propositions is involved here. The majority opinion goes to the extent of holding that, by a compliance with section 841 of the Statutes, a foreign corporation engaged in operating a railway in this state thereby becomes a corporation created by this state. There can be but two reasons for an enactment of the statute in question: One is to confer upon foreign corporations proposing to operate railroads in this state the right as such to do so. The other is to deny to any person, except a corporation of this state, the right to engage in that business. The latter, in my view, under the authorities above referred to, would be an unconstitutional requirement. Therefore the first must have been the purpose of our legislation. In other words, it is an enabling act to confer upon corporations already created, and existing and deriving their authority from, and owing allegiance and re-

Davis' Adm'r v. Chesapeake & O. Ry. Co

sponsibility to, some other state, the right to operate a railroad in this state. The case of *Railway Co. v. James* seems all but conclusive of this question. In that case the railroad corporation was created by the state of Missouri. It owned and operated a railroad line extending into and through the state of Arkansas, and also partly through the state of Missouri. The legislature of Arkansas enacted a statute permitting foreign corporations to operate railroads in that state, provided that before they should be "permitted to avail itself of the benefits of this act, or any part thereof, such corporation shall file with the secretary of state of this state a certified copy of its articles of incorporation, if incorporated under a general law of such state or territory, or a certified copy of the statute laws of such state or territory incorporating such company, where the charter of such railroad corporation was granted by special statute of such state; and upon the filing of such articles of incorporation or such charter, with a map and profile of the proposed line, and paying the fees prescribed by law for railroad charters, such railroad company shall, to all intents and purposes, become a railroad corporation of this state, subject to all the laws of the state now in force or hereafter enacted, the same as if formally incorporated in this state. * * *"

In a litigation between a citizen of Missouri and the railway company, brought in the United States court for the Western district of Arkansas, this question was presented, and was certified by the circuit court of appeals of that circuit to the supreme court for decision, and there decided: "In view of the provisions of the act of the general assembly of Arkansas, approved March 13, 1889, did the St. Louis & San Francisco Railway Company, by filing a certified copy of its articles of incorporation under the laws of Missouri with the secretary of State of Arkansas, and continuing to operate its railroad through that state, become a citizen of the state of Arkansas, so as to give the circuit court of the United States for the Western district of Arkansas jurisdiction of this action, in which the defendant in error was and is a citizen of the state of Missouri?"

In the elaborate opinion, in which all the authorities affecting that question seem to have been reviewed, the court thus stated the effect of the act above referred to: "It is competent for a railroad corporation organized under the laws of one state, when authorized to do so by the consent of the state which created it, to accept authority from another state to extend its railroad into such state, and to receive a grant of powers to own and control, by lease or purchase, railroads therein, and to subject itself to such rules and regulations as may be prescribed by the second state. Such legislation on the part of two or more states is not, in the absence of inhibitory legislation by congress regarded as within the constitutional prohibition of agreements or compacts between states. Such corporations may be treated by each of the states whose legislative grants they

Nelson v. Northern Pac. Ry. Co

accept as domestic corporations. The presumption that a corporation is composed of citizens of the state which created it accompanies such corporation when it does business in another state, and it may sue or be sued in the federal courts in such other state as a citizen of the state of its original creation. We are now asked to extend the doctrine of indisputable citizenship, so that if a corporation of one state, indisputably taken, for the purpose of federal jurisdiction, to be composed of citizens of such state, is authorized by the law of another state to do business therein, and to be endowed, for local purposes, with all the powers and privileges of a domestic corporation, such adopted corporation shall be deemed to be composed of citizens of the second state, in such a sense as to confer jurisdiction on the federal courts at the suit of a citizen of the state of its original creation. We are unwilling to sanction such an extension of a doctrine, which, as heretofore established, went to the very verge of judicial power." The language of the act in the Arkansas case was no stronger, and the purpose no more manifest, than in the case at bar. The facts as to whether the foreign corporation becomes a citizen of the state whose privileges it accepts are analogous to this case.

Whatever may be the views of the members of the court, or of other courts of the states, on this subject, we must, and cheerfully should, put ourselves in accord with the declarations of that court of final resort having jurisdiction of this question. For that reason, I hold that the learned circuit judge correctly ordered this case to be removed into the United States court for the Eastern district of Kentucky, and his judgment should have been affirmed.

DU RELLE and BURNAM, JJ., concur.

PETER NELSON and Henry Nelson, Plffs. in Err., v. NORTHERN PACIFIC RAILWAY COMPANY.

(Argued October 16, 17, 1902. Decided January 26, 1903.)

[23 Sup. Ct. Rep. 302.]

Railroad Land Grants—Effect of Order of Withdrawal Based on Map of General Route—Occupancy in Good Faith for Homestead.

The alternate odd-numbered sections within the exterior limits of the general route of the Northern Pacific Railway Company were not so vested in that company by the mere filing of the map of general route and a withdrawal order based thereon as not to be subject to occupancy in good faith by homestead settlers prior to the definite location of the road, although the act of July 2, 1864, chap. 217 (13 Stat. at L. 365), § 6, declares that the "odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company," since this section must be read in connection with § 3, which restricts the grant to such odd-numbered sections as are free from pre-emption or other claims or rights at the date of definite location, and authorizes the

Nelson v. Northern Pac. Ry. Co

company to select other lands in lieu of any found at that date to be "occupied by homestead settlers."

Same—Occupancy in Good Faith—Claim.

Continuous occupation of public land, with a bona fide intention to acquire it under the homestead laws as soon as it should be surveyed, constitutes, when begun prior to the definite location by the Northern Pacific Railroad Company of its route, a "claim" upon the land within the meaning of the act of Congress of July 2, 1864, chap. 217 (13 Stat. at L. 365), § 3, restricting the grant in aid of such railroad to such odd-numbered sections within specified general limits as were free from pre-emption or "other claims or rights" at the date of definite location, and authorizing the company to select other lands in lieu of any found at that date to be "occupied by homestead settlers."

Same—Same—Land within Exterior Limits.

One who in good faith occupies unsurveyed public land within the exterior limits of the general route of the Northern Pacific Railroad Company, after an order of withdrawal based on the map of general route, but before the definite location of the road, is entitled to perfect his title under the homestead laws as soon as the land is surveyed, by act of Congress of May 14, 1880 (21 Stat. at L. 140, U. S. Comp. Stat. 1901, p. 1392), chap. 89, § 3, in force when the occupancy was begun, which allows one who has settled or "shall hereafter" settle on public lands, with a view to acquiring them under the homestead laws, the same time to file his homestead application and perfect his original entry as is allowed to settlers under the pre-emption laws, and declares that his rights shall relate back to the date of settlement.

In Error to the Supreme Court of the State of Washington to review a judgment which reversed a judgment of the Superior Court of Kittitas County in favor of defendant in a suit to recover the possession of real property. Reversed.

See same case below, 22 Wash. 521, 61 Pac. 703.

The facts are stated in the opinion.

Messrs. James Hamilton Lewis, C. H. Aldrich, Thomas B. Hardin, and Ralph Kaufman for plaintiffs in error.

Messrs. James B. Kerr and C. W. Bunn for defendant in error.

MR. JUSTICE HARIAN delivered the opinion of the court:

The Northern Pacific Railway Company brought this action in one of the courts of the state of Washington to recover from the plaintiffs in error the southeast quarter of section twenty-seven, township twenty, north of range fourteen, east of the Willamette meridian, in Kittitas county, in that state,—the company claiming to be the owner in fee, and alleging that the defendants were in unlawful possession of the land.

The defendants denied each of the allegations of the petition, and the case was tried under a stipulation of facts, which for the purpose of the trial were conceded to be true. The facts so conceded were as follows:

The company is a corporation of Wisconsin, and succeeded, prior to the commencement of this action, to whatever right, title, or claim the Northern Pacific Railroad Company had, if any, to the land in dispute. The latter corporation

Nelson v. Northern Pac. Ry. Co

was created by an act of Congress approved July 2d, 1864, chap. 217, granting lands in aid of the construction of a railroad and telegraph line from Lake Superior to Puget sound on the Pacific coast by the northern route, and by the acts and joint resolutions of Congress supplemental thereto and amendatory thereof. 13 Stat. at L. 365. We will hereafter refer to those sections of the act, upon the construction of which the decision of this case mainly depends.

The railroad company duly accepted in writing the terms of the act of Congress, and on the 29th day of December A. D. 1864, such acceptance was served on the President of the United States.

The company fixed the general route of its road extending coterminous with said land, and within 40 miles thereof, by filing a plat of such route with the Commissioner of the General Land Office August 20th, 1873. Thereafter, on November 1st, 1873, that officer transmitted to the register and receiver of the land office for the district in which the land was situate the following letter of instructions:

"Gentlemen:—The Northern Pacific Railroad Company having filed in this department a map showing the general route of their branch line, from Puget sound to a connection with their main line near Lake Pend d'Oreille in Idaho territory, I have caused to be prepared a diagram which is herewith transmitted, showing the 40-mile limits of the land grant along said line, extending through your district, and you are hereby directed to withhold from sale or entry all the odd-numbered sections falling within these limits not already included in the withdrawal for the main-line period. The even sections are increased in price to \$2.50 per acre, subject to pre-emption and homestead entry only. This withdrawal takes effect from August 15th, 1873, the date when the map was filed by the company with the Secretary of the Interior, as required by the 6th section of the act of July 2d, 1864, organizing said company."

The letter of the Commissioner and the diagram therein referred to were received and filed in the local land office November 17th, 1873.

The land in dispute was within the 40-mile limit of the land grant as designated in the diagram.

On December 6th, 1884, the railroad company definitely located the line of its railroad, coterminous with and within less than 40 miles of the land in controversy, by filing a plat of such line, approved by the Secretary of the Interior, in the office of the Commissioner of the General Land Office; and prior to November 18th, 1886, it constructed and completed a section of 40 miles of railroad and telegraph line extending over the line of definite location and coterminous with the land here in controversy. The President of the United States having appointed three commissioners to examine the same, and the commissioners, having performed that duty,

Nelson v. Northern Pac. Ry. Co

reported to the Secretary on the 18th day of November, 1886, that the lines were completed in all respects as required by the act of Congress. On the 30th of November, 1886, the Secretary transmitted that report to the President with a recommendation that the railroad and telegraph line be accepted, and on the 7th day of December, 1886, the President approved that recommendation.

The United States executed and delivered, May 10th, 1895, to the railroad company its letters patent, purporting to convey to the company the above tract under the terms and provisions of the act of 1864, and the various acts and joint resolutions of Congress supplemental thereto and amendatory thereof.

In the year 1881, three years before the definite location of the road, the defendant Henry Nelson went upon the above land and occupied it, and has since continuously resided thereon. It is agreed that he was at the time qualified to enter public lands under the act of Congress approved May 20th, 1862, (12 Stat. at L. 392, chap. 75), entitled "An Act to secure Homesteads to Actual Settlers on the Public Domain," and under the various acts supplemental thereto and amendatory thereof.

The land when occupied was unsurveyed, and was not surveyed until 1893. But as soon as surveyed Nelson attempted to enter it under the homestead laws of the United States in the proper United States district land office. His application was, however, rejected by the register and receiver because, in their opinion, it conflicted with the grant to the Northern Pacific Railroad Company.

The defendant Peter Nelson is in the occupancy of a portion of land in question under license from his codefendant Henry Nelson.

Upon the facts so stipulated, the judgment was that the railroad company was not the owner, had no claim to, and was not entitled to the possession of the land in dispute, and that the defendant Henry Nelson was entitled to remain in possession by virtue of the homestead laws of the United States. Upon appeal to the supreme court of Washington that judgment was reversed, and the cause remanded with directions to enter judgment for the company.

1. Before considering the merits of the case it is proper to remark that although the railroad company holds the patent of the United States for the land in controversy, the defendant, according to the laws of the state, was entitled to judgment, if it appeared that he was equitably entitled to possession as against the plaintiff. Hill's Anno. Codes & Statutes, 530 et seq.; *Burmeister v. Howard*, 1 Wash. Terr. 208.

2. We have seen that the Northern Pacific Railroad Company was created by the act of Congress of July 2d, 1864, chap. 217, making a grant of lands in aid of the construction of the road from Lake Superior to Puget sound. When that grant was made substantially the entire country between

Nelson v. Northern Pac. Ry. Co

those points was untraveled as well as uninhabited except by Indians, very few of whom, at that time, were friendly to the United States. The principal object of the grant, as will appear from its language, was to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, by means of a railroad and telegraph, and to that end, and in order to bring the public lands into market, it was deemed important to encourage the settlement of the country along the proposed route. The public lands in that vast region were unsurveyed, and it was not known when they would be surveyed. Congress, of course, knew that if immigrants accepted the invitation of the government to establish homes upon the unsurveyed public lands, they would do so in the belief that the lands would be surveyed, that their occupancy would be respected, and that they would be given an opportunity to perfect their titles in accordance with the homestead laws.

Such was the situation when the act of July 2d, 1864, was passed. Necessarily the act must be interpreted in the light of that situation. It should not be so interpreted as to justify the charge that the government laid a trap for honest immigrants who risked the dangers of a wild, unexplored country, in order that they might establish homes for themselves and their families. And it should not be supposed that Congress had in view only the interests of the company, which, with the aid of a munificent grant of lands, was empowered to connect Lake Superior and Puget sound with a railroad and telegraph line.

Let us now see what is the fair import of the act of 1864, under which both parties claim possession.

By the 3d section of that act, it was, among another things, provided as follows, to wit: "That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time [of definite location], any of said sections or parts of sections shall have been granted, sold, reserved, occupied by home-

Nelson v. Northern Pac. Ry. Co

stead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than 10 miles beyond the limits of said alternate sections. . . ."

By the 6th section of the act it was, among other things, provided as follows:

"§ 6. And be it further enacted, That the President of the United States shall cause the lands to be surveyed for 40 miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption, before or after they are surveyed, except by said company, as provided in this act." The stipulation of facts omits the latter part of § 6; but of the words omitted this court will take judicial notice. They are as follows: "But the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An Act to Secure Homesteads to Actual Settlers on the Public Domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale."

The railroad company insists that after the order of withdrawal from "sale or entry" made in 1873 by the Commissioner of the Land Office, and based upon its map of general route, no right could be acquired by a settler upon any odd-numbered alternate section of land within the 40-mile limit indicated by the map of general route. As the lands in question were not surveyed until 1893, the company's contention means that during the twenty years succeeding the withdrawal in 1873 all the sections covered by the map of general route which would, upon a survey, appear to be odd-numbered alternate sections, were absolutely excluded from occupancy by any settler having in view the homestead laws.

The defendant insists that the act of 1864 recognized the right of an immigrant to occupy any section of the public lands on the general route up to the time of the definite location of the road, provided it was done in good faith with the intention to perfect his title under the homestead laws whenever it became possible to do so, and that if at the time of definite location it appeared that he was in the occupancy of an odd-numbered alternate section the railroad company could not disturb him.

By the 6th section of the act of July 2d, 1864, it was declared that the odd sections "hereby granted," that is, by that act

granted, should not be liable to sale, entry, or pre-emption before or after they were surveyed, except by the company, as provided in the act. But we have also seen, looking at the 3d section, which was the granting section of the act, that Congress did not grant every odd-numbered alternate section within the general limits specified, but only the odd-numbered alternate sections to which the United States had full title, and which had not been previously reserved, sold, granted, or otherwise appropriated, and which were free from pre-emption or "other claims or rights" at the time the line of the road was definitely fixed—giving to the railroad company the right to select lands, within certain limits, in place of such as were found, at the date of definite location, to have been disposed of or to be "occupied by homestead settlers."

The first inquiry is whether the railroad company acquired any vested interest in the land in dispute by reason merely of the acceptance by the Land Department of its map of general route, or by reason merely of the withdrawal order of 1873. In other words, Did the land, after the general route was established, become segregated from the public domain and cease to be a part of the public lands, so as not to be subject to occupancy, in good faith, by homestead settlers, prior to definite location? These questions have a direct bearing on the present issues; for, if Congress did not intend—as, we think, it did not—that the railroad company should acquire any vested interest in these lands, prior to definite location, we can understand why it excluded from its grant any lands "occupied by homestead settlers" at the time of the definite location of the road.

The above questions are, we think, distinctly answered in the negative by recent decisions of this court. Let us see if such be not the case.

In *St. Paul & P. R. Co. v. Northern P. R. Co.*, 139 U. S. 1, 5, 35 L. Ed. 77, 79, 11 Sup. Ct. Rep. 389, it was held that, after a map of a general route was filed and up to definite location, the grant to the railroad company was in the nature of a "float," and land which previously to definite location had been reserved, sold, granted, or otherwise appropriated, or upon which there was a pre-emption "or other claim or right," did not pass by the grant of Congress.

In *United States v. Northern P. R. Co.*, 152 U. S. 284, 296, 298, 38 L. Ed. 443, 448, 14 Sup. Ct. Rep. 598, 603, 604, the court said: "The act of 1864 granted to the Northern Pacific Railroad Company only public land, . . . free from pre-emption or other claims of rights at the time its line of road was definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land office."

In *Northern P. R. Co. v. Sanders*, 166 U. S. 620, 634, 636, 41 L. Ed. 1139, 1144, 17 Sup. Ct. Rep. 671, 676, it was adjudged that the railroad company "acquired, by fixing its general route, only an inchoate right to the odd-numbered sections

Nelson v. Northern Pac. Ry. Co

granted by Congress, and no right attached to any specific section until the road was definitely located and the map thereof filed and accepted. Until such definite location it was competent for Congress to dispose of the public lands on the general route of the road as it saw proper." In the same case the court, after observing that as the lands there in dispute were not free from claims at the date of definite location, it was of no consequence what was done with them after date, proceeded: "The only ground upon which a contrary view can be rested is the provision in the 6th section of the act of 1864, that 'the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided by this act.' But this section is not to be construed without reference to other sections of the act. It must be taken in connection with § 3, which manifestly contemplated that rights of pre-emption or other claims and rights might accrue or become attached to the lands granted after the general route of the road was fixed and before the line of definite location was established. Literally interpreted, the words above quoted from § 6 would tie the hands of the government so that even it could not sell any of the odd-numbered sections of the lands after the general route was fixed,—an interpretation wholly inadmissible in view of the provisions in the 3d section. The 3d and 6th sections must be taken together, and so taken it must be adjudged that nothing in the 6th section prevented the government from disposing of any of the lands prior to the fixing of the line of definite location, or, for the reasons stated, from receiving, under the existing statutes, applications to purchase such lands as mineral lands."

The principles announced in the Sanders Case were reaffirmed in *Menotti v. Dillon*, 167 U. S. 703, 720, 42 L. Ed. 333, 338, 17 Sup. Ct. Rep. 945, 951, the court adding: "It is true, as said in many cases, that the object of an executive order withdrawing from pre-emption, private entry, and sale, lands within the general route of a railroad, is to preserve the lands, unencumbered, until the completion and acceptance of the road. But where the grant was, as here, of odd-numbered sections, within certain exterior lines, 'not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed,' the filing of a map of general route and the issuing of a withdrawal order did not prevent the United States, by legislation, at any time prior to the definite location of the road, from selling, reserving, or otherwise disposing of any of the lands which, but for such legislation, would have become, in virtue of such definite location, the property of the railroad company."

In *United States v. Oregon & C. R. Co.*, 176 U. S. 28, 43.

Nelson v. Northern Pac. Ry. Co

44 L. Ed. 358, 364, 20 Sup. Ct. Rep. 261, 266, which involved the conflicting claims of two railroad companies to certain lands, and required the court to determine the effect of a map of general route filed by the Northern Pacific Railroad Company, as well as the extent of the grant made to it, the court said: "If, therefore, the Perham map of 1865 were conceded for the purposes of the present discussion to have been sufficient as a map of 'general route,'—and nothing more can possibly be claimed for it,—these lands could not be regarded as having been brought by that map (even if it had been accepted) within the grant to the Northern Pacific Railroad Company, and thereby have become so segregated from the public domain as to preclude the possibility of their being earned by other railroad companies under statutes enacted by Congress after the filing of that map and before any definite location by the company of its line." In the same case: "In opposition to the views we have expressed, it may be said that the clause in the act of July 25th, 1866 (14 Stat. at L. 239, chap. 242), providing for the selection under the direction of the Secretary of the Interior of lands for the Oregon company in lieu of any that should 'be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of,' shows that Congress did not intend to include in, but intended to exclude from, the grant to that company any lands that could have been earned by the Northern Pacific Railroad Company by definitely fixing its route and filing its map of definite location. Undoubtedly those lands would be regarded as having been appropriated when the route of the Oregon road was definitely located, if prior to that date the route of the Northern Pacific Railroad had been definitely fixed, and if such lands were within the exterior lines of that route. But, as we have said, these lands were within the limits of the grant of July 25th, 1866, and had not, at that time or when the route of the Oregon road was definitely located, been appropriated for the benefit of the Northern Pacific Railroad Company, for the reason that the latter company had not then filed any map of definite location. The Northern Pacific Railroad Company could take no lands except such as were unappropriated at the time its line was definitely fixed. It accepted the grant of 1864 subject to the possibility that Congress might, before its line was definitely fixed, authorize other railroad corporations to appropriate lands within its general route, allowing it to select other lands in lieu of any so appropriated. The lands here in dispute were consequently subject to be disposed of by Congress when the act of 1866 was passed; and the line of the Northern Pacific railroad not having been definitely located prior to the passage of the forfeiture act of 1890 (26 Stat. at L. 496, chap. 1040, U. S. Comp. Stat. 1901, p. 1598), the Oregon Company became entitled to take the lands and to receive patents therefor in virtue of its accepted map of def-

Nelson v. Northern Pac. Ry. Co

inite location." See also *Wilcox v. Eastern Oregon Land Co.*, 176 U. S. 51, 44 L. Ed. 368, 20 Sup. Ct. Rep. 269, and *Messinger v. Eastern Oregon Land Co.*, 176 U. S. 58, 44 L. Ed. 370, 20 Sup. Ct. Rep. 271.

The cases above cited definitely determine that the railroad company acquired no vested interest in any particular section of land until after a definite location as shown by an accepted map of its line; and that until definite location the land covered by the map of general route was a "float," that is, at large.

In support of the proposition that the railroad company acquired an interest in the lands in dispute, upon its general route being established, reference has been made to some expressions in the opinion of Mr. Justice Field in *Buttz v. Northern P. R. Co.*, 119 U. S. 55, 71, and 72, 30 L. Ed. 330, 336, 7 Sup. Ct. Rep. 100, 197, to the effect that when the general route of that road was made known by a map duly filed and accepted, "the law withdraws from sale or pre-emption the odd sections to the extent of 40 miles on each side. The object of the law in this particular is plain; it is to preserve the lands for the company to which, in aid of the construction of the road, it is granted." But it is evident, in view of both prior and subsequent decisions, that this language is not to be taken literally or apart from the other portions of the opinions of the eminent jurist who delivered the judgment of the court. If, upon the filing and acceptance of the map of general route, the law withdrew the odd-numbered sections, when the previous holding in many cases that until definite location the grant was a float, with no interest in specific sections being acquired by the railroad company, would be meaningless; and there would be some difficulty in Congress appropriating such lands prior to definite location. Indeed, it is manifest that the court did not mean to announce any new doctrine in the *Buttz Case*; for Mr. Justice Field, when delivering judgment in that case, said that the charter of the Northern Pacific Railroad Company contemplated "the filing by the company, in the office of the Commissioner of the General Land Office, of a map showing the definite location of the line of its road, and limits the grant to such alternate odd sections as have not at that time been reserved, sold, granted, or otherwise appropriated, and are free from pre-emption, grant or other claims or rights. . . . Nor is there anything inconsistent with this view of the 6th section as to the general route, in the clause in the 3d section making the grant operative only upon such odd sections as have not been reserved, sold, granted, or otherwise appropriated, and to which pre-emption and other rights and claims have not attached, when a map of the definite location has been filed."

Further, we had occasion in *Northern P. R. Co. v. Sanders* and *United States v. Oregon & C. R. Co.* above cited, to limit the broad language in the *Buttz Case* which implied that

Nelson v. Northern Pac. Ry. Co

after the general route was fixed the land was withdrawn by the law for the railroad company. We said in the last-named case: "This language was too broad if it is construed to express the thought that public lands, when within the exterior lines of a 'general route,' are 'appropriated' from the time the map of such route is filed, so as to prevent them from being granted by Congress to and from being earned by another railroad corporation prior to the filing of a map of definite location by the company designating such general route."

It results that the railroad company did not acquire any vested interest in the land here in dispute in virtue of its map of general route or the withdrawal order based on such map; and if such land was not "free from pre-emption or other claims or rights," or was "occupied by homestead settlers" at the date of the definite location on December 8th, 1884, it did not pass by the grant of 1864. Now, prior to that date, that is, in 1881, Nelson, who is conceded to have been qualified to enter public lands under the homestead act of May 20th, 1862, went upon and occupied this land and has continuously resided thereon. The land was not surveyed until 1893, but as soon as it was surveyed he attempted to enter it under the homestead laws of the United States, but his application was rejected, solely because, in the judgment of the local land officers, it conflicted with the grant to the Northern Pacific Railroad Company. He was not a mere trespasser, but went upon the land in good faith, and, as his conduct plainly showed, with a view to residence thereon, not for the purposes of speculation, and with the intention of taking the benefit of the homestead law by perfecting his title under that law, whenever the land was surveyed. And for fourteen years before the railroad company by an ex parte proceeding, and without notice to him, so far as the record shows, obtained from the Land Office a recognition of its claim, and for sixteen years before this action was brought, he maintained an actual residence on this land. It is so stipulated in this case. As the railroad had not acquired any vested interest in the land where Nelson went upon it, his continuous occupancy of it, with a view, in good faith, to acquire it under the homestead laws as soon as it was surveyed, constituted, in our opinion, a claim upon the land within the meaning of the Northern Pacific act of 1864, and as that claim existed when the railroad company definitely located its line, the land was, by the express words of that act, excluded from the grant.

This view protects the bona fide settler in his home, established upon the invitation of the government under great difficulties, and does no injustice to the railroad company; for, after restricting the grant to such odd-numbered sections of lands, within specified lateral limits, as were free from pre-emption or "other claims or rights" at the time the line of the road was definitely fixed, Congress, in the act of 1864, as

Nelson v. Northern Pac. Ry. Co

we have seen, proceeded: "And whenever, prior to said time [of definite location] any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof," etc. The words "occupied by homestead settlers" show that Congress intended by the charter of the Northern Pacific Railroad Company—whatever it may have intended as to other companies receiving grants of public lands—that occupancy by a homestead settler, with the intention to take the benefit of the homestead laws, constituted a claim which, existing at the date of definite location, would exclude from the grant land that might otherwise be covered by it. If Congress did not intend thus to protect the occupancy of homestead settlers, the reference to lands being "occupied by homestead settlers," at date of definite location, was meaningless, and it was useless to reserve to the company the privilege of selecting lands in lieu of those lost by such occupancy. Congress knew, when passing the act of 1864, that one going west to establish his home could not know whether the unsurveyed land occupied by him would be an even-numbered or odd-numbered section. Hence, the provision in § 3 in relation to odd-numbered sections "occupied by homestead settlers." The efficacy of such a provision could not be destroyed except by further legislation. It is as if Congress had in words declared that among the "other claims or rights" of which the land must be free at the time of definite location in order that the railroad company might take, were claims arising out of occupancy by homestead settlers. Such settlers Congress, in effect, declared should be protected in their rights, and the railroad company should be reimbursed by lieu lands near by. Nelson's occupancy, we have seen, commenced in 1881, while the definite location of the road occurred in 1884. That he occupied and continuously resided upon the land in dispute as a homestead settler after 1881 is admitted.

If it be said that Nelson's claim was that of mere occupancy, unattended by formal entry or application for the land, the answer is that that was a condition of things for which he was not in anywise responsible, and his rights, in law, were not lessened by reason of that fact. The land was not surveyed until twelve years after he took up his residence on it, and under the homestead law he could not initiate his right by formal entry of record until such survey. He acted with as much promptness as was possible under the circumstances.

In *Ard v. Brandon*, 156 U. S. 537, 543, 39 L. Ed. 524, 526, 15 Sup. Ct. Rep. 406, 409, this court said: "The law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereon. If he does all that the statute prescribes as the condition of acquiring rights, the law protects him in those rights, and does not make their continued existence depend alone upon the ques-

Nelson v. Northern Pac. Ry. Co

tion whether or no he takes an appeal from an adverse decision of the officers charged with the duty of acting upon his application." In the same case the court quoted with approval these words from *Clements v. Warner*, 24 How. 394, 397, 16 L. Ed. 695, 696: "The policy of the Federal government in favor of settlers upon public lands has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land, comprehending their improvements, over that of any other person."

In the recent case of *Tarpey v. Madsen*, 178 U. S. 215, 219, 44 L. Ed. 1042, 1044, 20 Sup. Ct. Rep. 849, 850,—which was a contest between the Central Pacific Railroad Company and a pre-emptor who sought to avail himself of the act of September, 1841,—it was found as a fact that the land in dispute had on it, at the date of definite location (which was on October 20th, 1868), the improvements of a bona fide settler; and one of the questions in the case was how far the rights of the settler, based upon a bona fide occupancy, were affected by the absence of a local land office in which could be made some record of his application or entry. This court said: "It is true that there was then no local land office in which those seeking to make pre-emption or homestead entries could file their declaratory statements or make entries, and the want of such an office is made by the supreme court of the state one of the main grounds for holding that the land did not pass to the railroad company. We agree with that court fully in its discussion of the general principles involved in the failure of the government to provide a local land office. The right of one who has actually occupied, with an intent to make a homestead or pre-emption entry, cannot be defeated by the mere lack of a place in which to make a record of his intent. . . . If Olney was in possession of this tract before October 20, 1868 [date of definite location], with a view of entering it as a homestead or pre-emption claim, and was simply deprived of his ability to make his entry or declaratory statement by the lack of a local land office, he could, undoubtedly, when such office was established, have made his entry or declaratory statement in such way as to protect his rights." In the present case, the settler waited from 1881 to 1893 for the land to be surveyed, and as soon as that was done he attempted to enter it under the homestead law in the proper office, but his claim was overruled upon the theory, unfounded in law, that the land was covered by the railroad grant.

So far we have proceeded on the ground that, as the act of 1864 granted to the railroad company the alternate sections to which at the time of definite location the United States had full title, not reserved, sold, granted, or appropriated, and which were free from pre-emption or other claims or rights at date of definite location, and authorized the company to select other lands in lieu of those then found to be "occupied

Nelson v. Northern Pac. Ry. Co

by homestead settlers," Congress excluded from the grant any land so occupied with the intention to perfect the title under the homestead laws whenever the way to that end was opened by a survey.

3. But the case of the appellant does not depend entirely upon this view of the act of 1864. It is placed on impregnable ground by the act of May 14th, 1880, chap. 89, entitled, "An Act for the Relief of Settlers on Public Lands," and which was in force when, in 1881, Nelson settled upon the land in dispute. The act is as follows: "1. That when pre-emption, homestead, or timber-culture claimant shall file a written relinquishment of his claim in the local land office the land covered by such claim shall be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office. § 2. In all cases where any person has contested, paid the land-office fees, and procured the cancelation of any pre-emption, homestead, or timber-culture entry he shall be notified by the register of the land office of the district in which such land is situated of such cancelation, and shall be allowed thirty days from date of such notice to enter said lands: Provided, That said register shall be entitled to a fee of one dollar for the giving of such notice, to be paid by the contestant, and not to be reported. § 3. That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States Land Office as is now allowed to settlers under the pre-emption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the pre-emption laws." 21 Stat. at L. 140, U. S. Comp. Stat. 1901, p. 1392.

The 3d section of this statute is a distinct confirmation of the rights of a qualified person who had theretofore settled or should thereafter settle "on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws;" though, of course, no lands could be deemed of that character which had prior to such settlement become vested in a railroad company in virtue of an accepted map of definite location. It is, as we have seen, a fixed principle in the law relating to the administration of the public lands that a railroad grant is a mere float until definite location, and that prior to that date all lands, within the exterior limits of a general route, are entirely at the disposal of the government, to be appropriated as it desires. The railroad company, as already shown, acquired, by its accepted map of general route, no interest in any specific lands, but only a right to take those to which, at the date of definite location, the United States had full title, and upon which there was no claim, and which were not

Nelson v. Northern Pac. Ry. Co

"occupied by homestead settlers." It was, therefore, competent for the United States by the act of 1880—which was four years prior to the definite location of the Northern Pacific railroad—to give additional rights to those who had then settled or might thereafter in good faith settle upon any of the public lands. Some who have made comments on this act seem to overlook the broad language of § 3, and to forget that that section embraces, not only those who had theretofore, but those who might thereafter, settle on the public lands, whether surveyed or unsurveyed. Nelson settled on unsurveyed public land, in which the railroad company had no vested or specific interest, and the 3d section of the act of 1880 was purposeless if it did not allow him to perfect his title under the homestead laws, as soon as the land was surveyed.

The meaning we have given to the words "occupied by homestead settlers" in the act of 1864, and what has been said about the act of 1880, finds support in decisions of the Land Department. It will be well, in view of the far-reaching consequences of the decision in the present case, to refer to some of those decisions.

In *Southern P. R. Co. (Branch) v. Lopez* (1884) 3 Land Dec. 130, 131, Secretary Teller said that the act of July 27th, 1866, 14 Stat. at L. 292, chap. 278, relating to the Southern Pacific Railroad Company, "granted only such lands as were 'not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights,' at date of definite location; and provided that 'whenever, prior to said time, any of said sections or parts of sections shall have been occupied by homestead settlers, pre-empted,' etc., lieu lands might be taken." It will be observed that this was the language of the Northern Pacific act of 1864. The Secretary proceeded: "Now a homestead entry, which must be made on surveyed lands, would be within the descriptive terms 'other claims' without doubt; but the question material to the case before me, wherein the land was not surveyed, is whether a homestead settlement on unsurveyed land, with a view to entering it when surveyed, is within said terms. I think it is. Construing together the granting words and those respecting the lieu land selection, it is evident that one of the 'other claims or rights' excepting land from the operation of the grant was occupation [occupied] by homestead settlers.' The word 'occupied' and the idea conveyed by it were foreign to the homestead law at date of this act, as an essential element in the reservation of land. I need not recite the numerous decisions of the courts and of the Land Department, which settle the principle that under the homestead law it is the 'entry' which reserves land (except for the short period during which it is reserved by settlement under the act of May 14th, 1880), and not any occupation by the claimant before or after it. The language of the granting act is therefore peculiar in this

Nelson v. Northern Pac. Ry. Co

respect, and we are to suppose that it was used deliberately, with knowledge of then-existing law, and for a special and important purpose. We must interpret it in accordance with this evident purpose. Congress was aware that by this act it was making grants of land far beyond the line of the government surveys, in regions occupied and to be occupied largely by settlers awaiting the advent of the surveyor to prefer their claims. By § 6 the homestead law was extended to the even sections after survey, and expressly withheld from the odd sections before and after survey, and yet in § 3 land 'occupied by homestead settlers' was excepted from the grant. Congress knew that unsurveyed land could not be 'entered' as homesteads; it had in terms prohibited homestead 'entry' on these lands; it was aware that only by such 'entry' could a claim be appropriated and reserved from the grant, without express exception; and therefore in the use of the words 'occupied by homestead settlers' it intended to make such express exception, and to indicate a different kind of appropriation by a class of settlers not within the letter of the homestead law, though clearly within its spirit, namely, those who had made a home on the public domain in advance of the surveys, with the intention of subsequently claiming it under said law. If this was not the purpose, then the employment of the peculiar language referred to was a vain and useless thing; and such a thing we are not to suppose Congress had done (92 U. S. 733, 23 L. Ed. 634). It therefore follows that the land claimed by Lopez, whose proofs are not questioned in any particular, and who preferred his claim promptly upon survey, was 'occupied by a homestead settler' when the grant to this company took effect, and hence excepted from the operation of the grant."

In *Northern P. R. Co. v. Anrys* (1890) 10 Land Dec. 258, 259, which was a contest between the Northern Pacific Railroad Company and a homesteader who had settled on unsurveyed public lands, Secretary Noble said: "It is urged that the land was not subject to the operation of the homestead law at the date of Newland's settlement, because unsurveyed, and that the homestead claim could have attached only by entry. But it must be remembered that the rights of the parties here must be determined by a proper construction of the railroad grant rather than of the general homestead law. It must be admitted that the ruling in the case at bar is in line with those of the Department for many years. In the case of *Southern P. R. Co. (Branch) v. Lopez*, 3 Land Dec. 130, the question here presented was fully discussed in connection with a grant framed in words identical with those used in the grant for the Northern Pacific company, and it was held that a homestead settlement on unsurveyed land with a view to entering it when surveyed is within the term 'other claims,' and that 'it is evident that one of the "other claims or rights" excepting land from the operation of the grant was "occupa-

Nelson v. Northern Pac. Ry. Co

tion by homestead settlers." " In support thereof it was urged that Congress was aware that by the act in aid of a road extending across the western half of the continent, it was making a grant far beyond the line of government surveys, in regions occupied and to be occupied largely by settlers awaiting the advent of the surveyor to prefer their claims. In this view I concur. It seems beyond question that it was to protect such settlers as described above that Congress excepted from the operation of the grant tracts 'occupied by homestead settlers.' Had Congress intended to extend its protection only to those who had made entry, it would have said so in other and appropriate words. The ordinary exception of 'lands to which a homestead right has attached' would have fully protected that class of settlers. But Congress went further and made occupation the test instead of entry. I do not deem it necessary to cite cases to show that the views of the Department on this point have not changed."

In *Spicer v. Northern P. R. Co.*, 10 Land Dec. 440, 443, the rights of an Indian were disputed by the Northern Pacific Railroad Company under the act of March 3d, 1875, 18 Stat. at L. 402, 420, chap. 131 (U. S. Comp. Stat. 1901, pp. 1419, 1420), extending the benefit of the homestead laws of the United States, with certain restrictions upon the title when obtained, to Indians twenty-one years of age, or the head of a family having abandoned the tribal relations. Secretary Noble said: "The provisions of this act were in force at the date when the company's rights attached on definite location of its road, and, if the matters alleged relative to the claim of the Indian, Enoch, be true, he was at that date, and had been for many years prior thereto, living upon the land in question, as his home, with the intention to acquire title thereto, as a homestead; he had valuable and permanent improvements thereon, and had cultivated the same for many years, during all of which time he claimed it as his home. Such a claim, it seems to me, is clearly covered by the excepting clause of the grant to the company, and, if proven, would be sufficient, in my judgment, to defeat the claim of the company to the land. True, the Indian had put no claim of record for the land, but it is well settled by departmental rulings that while such omission might defeat the claim as against a subsequent settler who duly places his claim of record, it will not defeat such claim as against the United States, and the land covered thereby will be excepted from the operation of any grant for the benefit of a railroad company attaching subsequently to the inception of the settlement right. *Northern P. R. Co. v. Evans*, 7 Land Dec. 131, and authorities there cited. It is also well settled that a claim resting on settlement, residence, and improvements, acquired prior to the date when the company's rights attached under its grant, is sufficient to except the land covered thereby from the operation of such grant."

In *Northern P. R. Co. v. McCrimmon*, 12 Land Dec. 554,

Nelson v. Northern Pac. Ry. Co

it was said: "In support of this appeal, counsel for the railroad company contend that Thomas did not claim the land as government land, but as railroad land, and that, although the land was excepted from the withdrawal on general route, yet Thomas did not insist upon the right to take it as government land, but was satisfied to claim it under the railroad company. Under the ruling of the Department, as announced in the cases of *Northern P. R. Co. v. Bowman*, 7 Land Dec. 238, and *Northern P. R. Co. v. Potter*, 11 Land Dec. 531, the only question to be determined, is, whether there was a settlement on the land at date of definite location by one having the qualification to enter the land under the settlement laws, and, if these facts are shown, the land would be excepted from the operation of the grant, although such settler might not have known of his right, but held the land under the belief that it was railroad land."

In *Northern P. R. Co. v. Plumb*, 16 Land Dec. 80, it appeared that the land in dispute was within the primary limits of the company's grant as shown by map of definite location filed July 6th, 1882, and was also within the limits of the withdrawal on map of general route filed February 21st, 1872. Secretary Noble said: "The only question raised by the appeal is as to whether the occupancy shown by Plumb was sufficient to defeat the grant. It appears that in 1881 Plumb took possession of the tract in question, together with an adjoining 40-acre tract, upon which he resided. In the spring of 1882 he broke the entire tract in question and inclosed it with a fence, and has since had possession of and improved the land. He had never exercised the pre-emption right, and was therefore duly qualified to claim the land under his settlement right. In 1886 he contracted to purchase the adjoining 40 acres, upon which he had resided, from the company, and at the hearing it was sought to show that he also claimed the land in question under the grant at the date of the definite location of the road, but the testimony will not warrant such a finding. Being in possession of the land in question at the date of the definite location of the road with valuable improvements thereon, and duly qualified to assert a right thereto under the settlement laws, he had such a right to the land as served to defeat the grant, and the fact that the claim subsequently asserted by him was under a different law from those providing for settlement can in nowise affect his rights in the premises. Being excepted from the grant by reason of this settlement, Plumb was at liberty to seek title from the government under any law under which such lands might be taken."

In *Northern P. R. Co. v. Benz*, 19 Land Dec. 229, the land in dispute was within the limits of the grant to the company, as shown by map of definite location filed July 6th, 1882, and was covered by the withdrawal upon general route of February 21st, 1872. Secretary Smith said: "The present contest is between the railroad company on one part and Hoy and

Nelson v. Northern Pac. Ry. Co

Benz on the other. If it can be made to appear affirmatively by good and sufficient testimony that either of these parties, Hoy or Benz, was in possession of said land July 6, 1882, when the line of the road opposite thereto was definitely fixed, and, at the same time, had the right to perfect title to the same under the pre-emption or homestead laws, such possession excepted the land from the grant to the railroad company and reduced the contest to one between Hoy and Benz; or, rather, to one between Hoy and the legal representatives of Benz, he having died since entering his appeal." It was found that on July 6th, 1882, Hoy was a competent entryman under the homestead laws.

What has been said as to the meaning and scope of the acts of 1864 and 1880 is not inconsistent with anything decided in *Maddox v. Burnham*, 156 U. S. 544, 39 L. Ed. 527, 15 Sup. Ct. Rep. 448, and *Wood v. Beach*, 156 U. S. 548, 39 L. Ed. 528, 15 Sup. Ct. Rep. 410.

In *Maddox v. Burnham* the question was as to the rights of a homestead occupant as against a certain railway company. Referring to the 3d section of the act of 1880, the court said: "By this section for the first time the right of a party entering land under the homestead law was made to relate back to the time of his settlement. But this act was passed long after the rights of the railway company had accrued and the legal title had passed to it. It is not operative, therefore to divest such legal title, or enlarge, as against such title, any equitable rights which the defendant theretofore had." This was a case, therefore, in which the claim based upon occupancy accrued after the legal title had become vested in the railroad company, not a case in which the grant was, as here, a float with no right attached to any specific section.

In *Wood v. Beach*—which was a contest between a homestead settler and a railway company—it appeared that the map of the line of definite location was filed December 6th, 1866, and a withdrawal followed in 1867, while the occupation and settlement of the homesteader did not commence until June 8th, 1870. Of course, the legal title to the sections granted vested in the railway company upon the filing and acceptance of the map of definite location. Besides the withdrawal in 1867 was pursuant to the express command of the act of Congress of July 26th, 1866, 14 Stat. at L. 290, chap. 270, § 4, which provided that as soon as the railway company should "file with the Secretary of the Interior maps of its line, designating the route thereof, it shall be the duty of said Secretary to withdraw from the market the lands granted by this act in such manner as may be best calculated to effect the purposes of this act and subserve the public interest." It might well be, therefore, that one whose right, resting upon occupancy, had accrued, as in *Maddox v. Burnham*, after the legal title passed to the railroad company, or one who, as in *Beach v. Wood*, did not settle upon the public lands until

Nelson v. Northern Pac. Ry. Co

after the railroad company had definitely located its road, and after the lands had been withdrawn from market pursuant to the directions of an express act of Congress, could not, as against the railroad company, acquire an interest in them by virtue of the act of 1880.

Nor is there any conflict between the decision now rendered and *Northern P. R. Co. v. Colburn*, 164 U. S. 383, 41 L. Ed. 479, 17 Sup. Ct. Rep. 98; for, as appears from the opinion and record in that case, the land there claimed to have been occupied by a homestead settler, at the date of definite location, was surveyed public land, and the good faith of the occupation was not manifested by an entry, or an attempt at entry, at any time in the local land office. It was held that the inchoate right of the homesteader must be initiated by a filing in the land office. In the present case, as we have seen, the land occupied was unsurveyed, and at the time of such occupancy, the land being unsurveyed, there could not then have been any filing or entry in the land office.

The case before us is altogether different. Nelson's occupancy occurred after the passage of the act of 1880. While that act did not apply to a railroad company which had acquired the legal title, by definite location of its road, it distinctly recognized the right prior to such time to settle upon the public lands, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws. In occupying the land here in dispute Nelson did not infringe upon any vested right of the railroad company; for there had not been at the date of such occupancy in 1881 any definite location of the line of the railroad, and the land, so occupied, with other lands embraced by the map of general route, constituted only a float," the company having, at most, only an inchoate interest in them, a right to acquire them, if, at the time of definite location, it was not "occupied by homestead settlers" nor incumbered with "other claims or rights." The withdrawal merely from "sale or entry" in 1873, based only on a map of the general route of the road, did not identify any specific sections, was not expressly directed or required by the act of 1864, was made only out of abundant caution and in accordance with a practice in the Land Department, and did not and could not affect any rights given to homestead occupants by Congress in the acts of 1864 and 1880. Besides, the order made in 1873 to withhold from sale or entry all the odd-numbered sections falling within the limits of the general route was without practical value so far as the land in dispute was concerned; for such land had not been surveyed, and there could not have been any sale or entry of unsurveyed lands. At any rate, the order of withdrawal directing the local land office to withhold from "sale or entry" the odd-numbered sections within the limits of the general route could not prevent the occupancy of one of those sections prior to definite location by one who in good faith intended to claim

Nelson v. Northern Pac. Ry. Co

the benefit of the homestead law; this, because such right of occupancy was distinctly recognized by the act of 1864. But if this were not so, the act of 1880, in its application to public lands, which had not become already vested in some company or person, must be held to have so modified the order of withdrawal based merely on general route, that such order would not affect any occupancy or settlement made in good faith, as in the case of Nelson, after the passage of that act, and prior to definite location. This conclusion cannot be doubted, because the act of 1880 made no exception of public lands covered by orders of withdrawal from sale or entry based merely on general route, and because also public lands, which had not become vested in the railroad company, by the definite location of its line, were subject to the power of Congress.

It results that the Supreme Court of the State of Washington erred in not affirming the judgment of the court of original jurisdiction in favor of the defendants.

The judgment must be reversed, and the cause remanded for such further proceedings as may not be inconsistent with this opinion.

Reversed.

MR. JUSTICE BREWER, with whom MR. JUSTICE BROWN and MR. JUSTICE SHIRAS concur, dissenting:

I dissent from the judgment in this case. It overrules a unanimous judgment of this court, one which for nearly twenty years has been a guide to the Land Department in the construction of the Northern Pacific railroad grant. Further, in effect it declares that an entire section in the act of Congress making the grant, a section which from the inception of the work of construction has always been regarded by the parties interested as a provision intended to secure to the company the full measure of lands granted, is meaningless, and gave the company absolutely no protection whatever.

It is admitted that the company fixed the general route of its road coterminous with the road in controversy and within 40 miles thereof, by filing a plat of such route with the Commissioner of the General Land Office on August 20, 1873, and that on November 1, 1873, the odd-numbered sections within the 40-mile limits of this route were by the Land Department withdrawn from sale or entry and the even-numbered sections increased in price to \$2.50, notice of which order was immediately filed in the local land office. In 1881, eight years thereafter, the plaintiff in error for the first time entered upon the lands and commenced its occupation. It is also admitted that by construction of its road the company has perfected its title to its land grant. Now, when the company filed its map of general route and obtained from the Land Department the order of withdrawal, it believed that it acquired something. It did not suppose that it was doing a vain and useless thing.

Nelson v. Northern Pac. Ry. Co

It did not believe that Congress had cheated it with a delusive expectation of a benefit which it did not intend to give.

Was it justified in such belief? To answer this it is well to look back to the condition of things at the time the granting act was passed. In 1862, Congress created the Union Pacific Railroad Company to build a railroad from the Mississippi river to the Pacific ocean along the only then frequented line of travel. It made to the company a land grant, one fourth the size of the Northern Pacific grant, and agreed to lend it \$16,000 and upwards per mile to aid in the construction, taking a first mortgage on the road as security for the loan. Notwithstanding this grant of land, this loan of money, and the fact that the road was to be along the only frequented line of travel, capital could not be induced to invest in the enterprise. Two years thereafter, and in 1864, Congress passed an amendatory act which doubled the land grant, making it half as large as that of the Northern Pacific, and agreed to take as security for its loan a second mortgage, giving to the company the right to place a first mortgage on the road in an amount equal to the government loan. And only after this large financial assistance and increased land grant was the work of construction commenced. On the same day Congress passed the act incorporating the Northern Pacific Railroad Company and making to it its grant. It promised no assistance in money, but only in lands. In order to give the company assurance that it would obtain its full grant it placed in the act § 6, the section which this court now holds is absolutely ineffectual therefor. That section reads:

“And be it further enacted, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled ‘An Act to Secure Homesteads to Actual Settlers on the Public Domain,’ approved May, twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale.”

At the time of the passage of the act the entire body of the country from the western boundary of Minnesota to the Cascade Range was unoccupied, untraveled, and almost wholly unexplored. As said by Senator Hendricks, when the bill was before the Senate: “Everybody can see at a glance that

Nelson v. Northern Pac. Ry. Co

it is a work of national importance. It proposes to grant lands in a northern latitude where, without the construction of a work like that, the lands are comparatively without value to the government. No person acquainted with the condition of that section of country supposes that there can be very extensive settlements until the government shall encourage those settlements by the construction of some work like this." And by Senator Harlan, the chairman of the Committee on Public Lands: "The Committee on Public Lands agree to report this bill favorably on account of the vast consequence that will attach to the completion of the road. The land is to be conveyed to the company only as the road progresses. The committee were of opinion that if the road should be built the government could well afford to give one half the land, for the distance of 40 miles on each side of the road, to secure its completion. If it should not be built, no lands will have been conveyed." In other words, the proposition was to give half of the lands within 40 miles of the road to the company,—not to give as much land as would be equal to half the lands within 40 miles of the road, but to give half of those lands. The difference is obvious. The construction of a railroad increases the value of contiguous lands. Congress doubles the price of the even-numbered sections which it retains. It makes no little difference to a company whether it receives lands along the line of the road which it constructs, lands which have been increased in value by reason thereof, or an equal amount of lands hundreds of miles away and not so increased in value.

The withdrawal was not left to the discretion of the company, but was to be made by the President, after the general route had been fixed, and "as fast as may be required by the construction of said railroad." True, the language is that he "shall cause the lands to be surveyed;" but this, coupled with the prohibition against sale or entry, was tantamount to a direction to withdraw, and has always been so regarded by the Land Department and all parties interested. Thus he was to determine whether the time had arrived for a withdrawal. The withdrawal was in fact made. The President exercised his judgment and decided that the time had arrived for a withdrawal, and the Land Department through all its officials proceeded to act accordingly. The direction in the withdrawal was "to withhold from sale or entry all the odd-numbered sections falling within these limits." Surely this action of the President and the Land Department is entitled to the highest consideration. As said by Chief Justice Marshall, in *Cohen v. Virginia*, 6 Wheat. 264, 418, 5 L. Ed. 257, 294: "Great weight has always been attached, and very rightly attached, to contemporaneous exposition." See the many authorities on this proposition collected in *Fairbank v. United States*, 181 U. S. 283, 307, 45 L. Ed. 862, 872, 21 Sup. Ct. Rep. 648.

But notwithstanding this section, notwithstanding the

Nelson v. Northern Pac. Ry. Co

action of the executive officers in directing a withdrawal of this land from sale or entry, it is now held by the court that it was subject to homestead entry, and that the entryman acquired a right to obtain title by an entry made eight years after the withdrawal. Of course, as I said, such a ruling nullifies the section. A withdrawal from sale or entry which leaves unaffected the right of purchase or entry is an irreconcilable contradiction. But can there be any reasonable doubt as to the meaning of § 6, or that Congress intended exactly what was done by the executive officers, to wit, the withdrawal of all the odd sections within the 40-mile limit from sale, entry, or pre-emption? The significant words are these: "The odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption, before or after they are surveyed, except by said company." Now it is said in the opinion of the majority that § 3 defines what is "hereby granted," as "every alternate section" to which "the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed," that those lands, and those only, are the ones not liable to sale, entry, or pre-emption, except by the company. It will help to write out the sentence with a substitution for the words "hereby granted" of the definition thereof which is presented, and it will read substantially as follows: The odd sections of land within the withdrawal limits to which the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of the road is definitely fixed, shall not from the time of the withdrawal until the filing of the map of definite location be liable to sale, entry, or pre-emption before or after they are surveyed, except by the company. Or, to put it in another form, the odd sections within the withdrawal limits, which no one purchases or enters before the filing of the map of definite location, shall not be purchased or entered by anybody except the company. It would be a failure of due respect to Congress to use language adequately expressive of the absurdity of such legislation. But Congress never meant any such thing. While it may be that the use of the words "hereby granted" was unfortunate, yet what was intended is clear. Congress intended to grant the odd-numbered sections and retain the even-numbered, and while in the granting clause some qualifications were placed in respect to the odd-numbered sections, in order to protect individual rights then existing, or which Congress might thereafter specifically create, yet as Congress was here not attempting a precise definition of what should pass by the grant, it used the term "granted lands" as descriptive generally of the odd-numbered sections, to distinguish them from the lands retained, the even-numbered sections. It obviously intended that no rights should be acquired, either

Nelson v. Northern Pac. Ry. Co

by sale, entry, or pre-emption, to any of the odd-numbered sections after the filing of the map of general route, and this whether the lands were surveyed or unsurveyed. This is made clear by the last sentence in the paragraph. It says, "and the reserved alternate sections shall not be sold by the government at a price less than \$2.50 per acre." Clearly that meant all the even-numbered sections, and not simply those which happened to be alternate to odd-numbered sections passing to the company. The truth is that in § 3 Congress defines specifically and carefully the lands which it granted. Its attention was directed in that clause to the matter of definition. While in § 6 it was not attempting to define, but to provide for a withdrawal before the filing of the map of definite location, and was simply endeavoring to make effective rights which it intended should accompany such withdrawal.

Again, in *Hewitt v. Schultz*, 180 U. S. 139, 45 L. Ed. 463, 21 Sup. Ct. Rep. 309, it was held that the withdrawal directed by Congress in § 6 coupled with the provision extending homestead and pre-emption rights to all other lands on the line of the road, created an implied prohibition of any withdrawal of lands within the indemnity limits provided in § 3. It is unquestioned that, whenever a grant had been made of lands, the power of the Land Department to withdraw such body of lands, as might seem reasonably necessary for the satisfaction of the grant, had been frequently upheld by this court. See the long list of cases cited in the dissenting opinion on page 159. There is no express prohibition of like action by the Land Department in respect to lands within the Northern Pacific indemnity limits, and the judgment was based solely on the implied prohibition above referred to. The opinion of the court rested mainly on the rulings of the Land Department, as primarily expressed in the opinion of Secretary Vilas in *Northern P. R. Co. v. Miller*, 7 Land Dec. 100, from whose opinion large quotations were made, and in respect to rulings of the Land Department generally, it was said, conceding that the question involved was one of doubt (p. 157, L. Ed. p. 472, Sup. Ct. Rep. p. 315) :

" 'It is the settled doctrine of this court,' as was said in *United States v. Alabama Great Southern R. Co.*, 142 U. S. 615, 621, 35 L. Ed. 1134, 1136, 12 Sup. Ct. Rep. 306, 308, 'that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced.' "

Turning to the opinion of Mr. Secretary Vilas, we find him saying (pp. 110, 111, 113, 119):

"But a peculiarity in legislation of this character is found

Nelson v. Northern Pac. Ry. Co

in the 6th section of the act, in which a provision authorized the 'general route' to be fixed, and required lands to be surveyed for 40 miles in width on both sides of the entire line so fixed, and directed that the odd-numbered sections granted by the act should not be liable to sale or entry or pre-emption before or after they were surveyed, except by said company. In the language of the Supreme Court, in *Buttz v. Northern P. R. Co.*, 119 U. S. 71, 30 L. Ed. 336, 7 Sup. Ct. Rep. 100: The act of Congress not only contemplates the filing by the company, in the office of the Commissioner of the General Land Office, of a map showing the definite location of the line of its road, and limits the grant to such alternate odd sections as have not, at that time, been reserved, sold, granted, or otherwise appropriated, and are free from pre-emption, grant, or other claims or right, but it also contemplates a preliminary designation of the general route of the road, and the exclusion from sale, entry, or pre-emption of the adjoining odd sections within 40 miles on each side until the definite location is made.

"The facts which have been recited show beyond all reasonable question that the privilege given to the company of fixing, first, a line of general route, upon the basis of which the odd-numbered sections within 40-mile limits on either side were to be withdrawn from sale or entry or pre-emption before and after survey, was fully exercised by the company in Washington territory, from the eastern boundary to the mouth of the Wal'a Walla river, and thence along the Columbia to the first range line west of the Willamette principal meridian, and thence north to the international boundary, by its filing and the department's approval of its maps of location on the 30th of July, 1870. These maps and the action taken thereon fully met every requirement of the statute in that behalf. The company, by resolution, fixed this line as the basis of withdrawal, made its formal request that the land should be withdrawn thereon, the line was plainly and sufficiently described, the department accepted it, and applied the statutory consequence by directing the local land officers in Washington territory to withdraw the odd-numbered sections along that line as far north as the town of Steilacoom, first, for a width of 20 miles on either side, and, later in the same year, within the limit of an additional 20 miles; and also by increasing the minimum price of the even-numbered sections within the same limits to \$2.50 per acre. Thus, the action of the company and of the department co-operated to give official determination to the fact upon which the statute became applicable, both to withdraw the odd-numbered sections and to double the minimum price of the even-numbered sections, and both effects were formally recognized and declared. It cannot be doubted that, had no other action been taken before the line of the road for construction was definitely located, this action in regard to the line of the general route of 1870 must have

Nelson v. Northern Pac. Ry. Co

remained continuously operative upon all lands within the limit of 40 miles on either side of the line so established. So obvious is this, indeed, that from the mouth of the Walla Walla river, westwardly along the Columbia, that withdrawal remains to this day obligatory and operative by force of the statute and of that location. . . . By virtue of that withdrawal the odd-numbered sections within 40 miles of all that portion of the route lying east of the Columbia remained for nearly two years at least segregated from the public domain, and all purchasers of the even-numbered sections were required to pay the double minimum price for the land they bought. . . . Having provided the condition upon which a withdrawal of the public domain should be operative upon a preliminary general route for the benefit of this company, without any latitude of authority for any other, the legislative will must be regarded as exclusive of any other. . . . Thus, *the meaning of the act appears to be that the provisional line of general route should, in the first place, be taken as the line upon which the grant was made, and, during the period while no other line was fixed than such line of general route, the lands in the odd-numbered sections within 40 miles should be taken as the granted lands, and, therefore, they are declared by the statute to be the 'hereby granted' lands.'* (The italics are mine.)

Thus the court held that, because by § 6 the odd-numbered sections were withdrawn from sale or entry, and at the same time it was declared that the homestead and pre-emption laws should apply to all other lands, there was an implied prohibition upon the Land Department's withdrawal of odd-numbered sections within the indemnity limits. Now it is held that the withdrawal directed by § 6 and made by the Secretary of the Interior was absolutely meaningless and secured nothing to the company. If the withdrawal directed by § 6 intended nothing, accomplished nothing, it should not have been made the basis for an implied prohibition of the hitherto unquestioned power of the Land Department to withdraw lands in indemnity limits. There is an incongruity in the two decisions which, to my mind, is, to use no stronger expression, both sad and startling.

Further, the Land Department did in fact withdraw from sale or entry all the odd-numbered sections within the 40-mile limits of the general route,—and this withdrawal included the tract in controversy as well as the other odd-numbered sections,—and notice thereof was filed in the local land office, and this many years before the plaintiff in error went upon the land. As heretofore stated, the power of the Land Department to withdraw from private entry lands which it has reason to believe may be necessary to satisfy a land grant has never been denied. It is a power which has been exercised again and again from the inception of land grants. In one case (*Wolcott v. Des Moines Nav. & R. Co.*, 5 Wall. 681, 18 L.

Nelson v. Northern Pac. Ry. Co

Ed. 689), we sustained a withdrawal made by the department beyond the real terminus of the grant on the ground that there was some doubt where the grant terminated, and therefore the department was justified in making the withdrawal cover any possible conclusion as to such terminus. There was in the Northern Pacific act no prohibition on the Land Department's exercise of this customary power. Indeed, as I have shown, it was held in *Hewitt v. Schultz*, 180 U. S. 139, 45 L. Ed. 463, 21 Sup. Ct. Rep. 309, that the express direction to withdraw lands in the place limits was the foundation of an implied prohibition on a withdrawal of lands within the indemnity limits. The purpose and effect of a withdrawal are not to vest any title in the beneficiary of the grant, but to preserve the lands from private entry in order that when the time arrives the grantee may receive the full measure of its grant. As said in *Menotti v. Dillon*, 167 U. S. 703, 720, 721, 42 L. Ed. 333, 339, 17 Sup. Ct. Rep. 945, 951:

"It is true, as said in many cases, that the object of an executive order withdrawing from pre-emption, private entry, and sale lands within the general route of a railroad, is to preserve the lands, unencumbered, until the completion and acceptance of the road. . . . That order took these lands out of the public domain as between the railroad company and individuals, but they remained public lands under the full control of Congress, to be disposed of by it in its discretion at any time before they became the property of the company under an accepted definite location of its road."

This language was quoted with approval in *United States v. Oregon & C. R. Co.*, 176 U. S. 28, 48, 44 L. Ed. 358, 366, 20 Sup. Ct. Rep. 261.

Again, in *Northern P. R. Co. v. Musser-Sauntry Land, Logging & Mfg. Co.*, 168 U. S. 604, 607, 42 L. Ed. 596, 597, 18 Sup. Ct. Rep. 205, 206, we said:

"The withdrawal by the Secretary in aid of the grant to the state of Wisconsin was valid, and operated to withdraw the odd-numbered sections within its limits from disposal by the land officers of the government under the general land laws. The act of the Secretary was in effect a reservation."

And the same doctrine has been affirmed in many cases.

Turning to the rulings of the Land Department, in *Hestun v. St. Paul, M. & M. R. Co.*, 12 Land Dec. 27, 28, it was said by Secretary Noble:

"The legal effect of the withdrawal is to preclude the disposal of the land covered thereby under any of the land laws. In other words, so long as the withdrawal remains in force, the land covered thereby is simply held for the purpose for which the withdrawal was made."

And again, in the same volume, in *Re Chicago, St. P. M. & O. R. Co.* (pp. 259, 261):

"In the case of *Riley v. Welles* [154 U. S. 578 and 19 L. Ed. 648, 14 Sup. Ct. Rep. 1166], referred to and quoted in the

Nelson v. Northern Pac. Ry. Co

Shire Case [10 Land Dec. 85], it was said by the Supreme Court that settlement upon and possession of land within the limits of an executive withdrawal were 'without right,' and that the subsequent recognition by the land officers of such settlement and possession, and the permission to the party to make proof and entry under the pre-emption law, and the issuing patent 'were acts in violation of law and void.' This case of *Riley v. Welles* has never been overruled or modified, but has been referred to and approved in a number of the decisions of the Supreme Court, and must therefore be accepted as expressing the opinion of that tribunal as to the absolute invalidity of settlements upon lands withdrawn by executive order."

In *Re Hans Oleson*, 28 Land Dec. 25, 31, Secretary Bliss thus defined the word "withdrawal:"

"In the nomenclature of the public land laws the word 'withdrawal' is generally used to denote an order issued by the President, Secretary of the Interior, Commissioner of the General Land Office, or other proper officer, whereby public lands are withheld from sale and entry under the general land laws, in order that presently or ultimately they may be applied to some designated public use, or disposed of in some special way. Sometimes these orders are not made until there is an immediate necessity therefor, but more frequently the necessity for their making is anticipated."

And in the same volume (*Inman v. Northern P. R. Co.*) the same Secretary uses this language (pp. 95, 100):

"From the authorities cited the following rules are clearly deducible: First. Subject only to the control and power of disposition remaining in Congress, an anticipatory withdrawal, whether legislative or executive, during the time it remains in force, withholds the lands embraced therein from other appropriation or disposition, and prevents the acquisition of any legal or equitable title or right by settlement or entry in violation of such withdrawal."

Similar declarations may be found in almost every volume of the Land Decisions.

In the execution of this Northern Pacific land grant many withdrawals were made as called for from time to time along the line of general route, and the Land Department has uniformly recognized the validity and effect of such withdrawals. In *Northern P. R. Co. v. Pressey*, 2 Land Dec. 551, it appeared that Pressey settled upon a tract within 40 miles of the line of general route; that the lands at the time of his settlement were unsurveyed; that after survey he made application for a homestead entry, and it was held that he acquired no rights by his settlement, inasmuch as the land had been withdrawn by order of the Land Department, Secretary Teller saying (p. 553):

"The settlement by Pressey upon the odd section was clearly

Nelson v. Northern Pac. Ry. Co

in violation of the order of withdrawal, and he could acquire no rights or equities under such a settlement."

In *Northern P. R. Co. v. Miller*, 7 Land Dec. 100, a case in which the implied prohibition of the withdrawal of indemnity lands was first distinctly decided in the Land Department, Secretary Vilas said (p. 110) in reference to the withdrawal of lands within the place limits of the line of general route:

"Thus the action of the company and of the department co-operated to give official determination to the fact upon which the statute became applicable, both to withdraw the odd-numbered sections and to double the minimum price of the even-numbered sections, and both effects were formally recognized and declared. It cannot be doubted that, had no other action been taken before the line of the road for construction was definitely located, this action in regard to the line of the general route of 1870 must have remained continuously operative upon all lands within the limit of 40 miles on either side of the line so established. So obvious is this, indeed, that from the mouth of the Walla Walla river, westwardly along the Columbia, that withdrawal remains to this day obligatory and operative by force of the statute and of that location.

"If authority be wanting to so manifest a proposition, it is found in the following language of the Supreme Court in the case already referred to."

In *McClure v. Northern P. R. Co.*, 9 Land Dec. 155, in an opinion by Secretary Noble, it was held that, "when the map of general route was filed, the withdrawal thereunder became at once effective, and reserved from general disposal the odd-numbered sections embraced therein."

In *Northern P. R. Co. v. Collins*, 14 Land Dec. 484, it was again decided by the same secretary that "lands withdrawn for the benefit of said grant are not subject to settlement."

In *Central P. R. Co. v. Beck*, 19 Land Dec. 100, which was also a settlement upon unsurveyed land within the place limits of the general route of the road, and in which a withdrawal had been ordered in accordance with the provisions of the act making the grant, Secretary Smith, sustaining the title of the railroad company, said (p. 103):

"I am clearly of the opinion that, after the withdrawal made upon the map of general route, no rights could be acquired adverse to the company by settlement upon the land, and that a settlement so made, even though it existed at the date of the filing of the map of definite location, would not serve to except the land settled upon from the operation of the grant to said company."

In the very last volume of the Land Decisions (vol. 30, p. 247), in respect to the Southern Pacific Railroad Company, whose granting act contained a similar provision in reference to withdrawal on the filing of a map of general route, it was said by Secretary Hitchcock (p. 249):

Nelson v. Northern Pac. Ry. Co

“As between individual claimants and the company no claim could be predicated upon settlement or entry made after the filing of the map of general route, and as against such claims the grant in effect was operative from April 3, 1871, the date upon which the map of general route was filed.”

So that from the beginning until the present time in construing this grant and others containing like provision there has been an unbroken line of decisions in the Land Department to the effect that a withdrawal made on the filing of the map of general route prevents any private claims attaching to the odd-numbered sections of land; and this whether the lands were surveyed or unsurveyed. Indeed, when Congress in the 6th section expressly declared that the lands “shall not be liable to sale or entry or pre-emption before or after they are surveyed,” it would seem as though it had made every provision which language was capable of expressing to reserve from private entry for the benefit of the railroad company all odd-numbered sections, surveyed or unsurveyed, within the place limits of the line of general route.

I have already quoted from *Hewitt v. Schultz* in reference to the duty of following, in case of ambiguity, the construction given to a statute by the department charged with the execution of such statute. That doctrine was there applied although it appeared that the practice of the department during the building of the railroad had been one way and only changed after its completion, and the latter construction was upheld by this court as the ruling of the department. It was said (p. 156, L. Ed. p. 472, Sup. Ct. Rep. p. 315):

“It was admitted at the hearing that the construction of the Northern Pacific act of 1864 announced by Secretary Vilas had been adhered to in the administration of the public lands by the Land Department. We are now asked to overthrow that construction by holding that it was competent for the Land Department, immediately upon the definite location of the line of the railroad, to withdraw from the settlement laws all the odd-numbered sections within the indemnity limits as defined by the act of Congress. If this were done it is to be apprehended that great, if not endless, confusion would ensue in the administration of the public lands, and that the rights of a vast number of people who have acquired homes under the pre-emption and homestead laws, in reliance upon the ruling of Secretary Vilas and his successors in office, would be destroyed.”

Now we have a case in which the ruling of the department has been unchanged from the commencement to the present time,—a ruling which Secretary Vilas in 7 Land Dec. supra, called “so manifest a proposition,” and it is wholly disregarded. The recent and temporary ruling of the Land Department was in the former case sustained in order, as was said, to protect the settler. Here the continuous practice of

Nelson v. Northern Pac. Ry. Co

the department is disregarded, and the patent issued by it to the railroad company is overthrown.

Still again, the company, by reason of § 6, believing that a withdrawal was to be made which should operate to its benefit, filed a map of general route, and a withdrawal was made of the odd-numbered sections of land. It is now held that such withdrawal did not withdraw the odd-numbered sections from entry and sale, but they remained still open to entry or purchase under the land laws. If that be the true construction, it follows that, whereas, if the company had filed no map of general route, no one would know where its line of road was to be until after it filed the map of definite location, and then the title would attach to all odd-numbered sections not burdened with existing claims. But by filing the map of general route, as it did eleven years before filing the map of definite location, it notified everybody of the proposed route, and so all settlers could take advantage of that knowledge and enter the odd-numbered sections contiguous thereto. Having this knowledge of where the line was to be located, of course settlers would come as near to that line as possible, in order to take advantage of the increased value coming from the construction of the road, and so taking advantage of the notice given would deplete the grant of lands which Congress had intended for the benefit of the company.

But this question has been definitely decided by this court. *Buttz v. Northern P. R. Co.*, 119 U. S. 55, 30 L. Ed. 330, 7 Sup. Ct. Rep. 100. That was an action brought by the railroad company for the possession of a tract of land within 40 miles of the general route as also of the land of definite location of plaintiffs' road. The defendant entered upon the land in October, 1871, he at the time possessing all the qualifications of a pre-emptor and intending to obtain title by pre-emption. At that time the tract was, with others, in the occupation of the Sioux Indians. An agreement for the surrender by the Indians of all their rights was ratified on May 19, 1873. On May 26, 1873, the company filed in the Land Department its map of definite location. The defendant was therefore in occupation of the tract with intent to pre-empt it for seven days after the rights of the Indians had ceased and before the filing of the map of definite location. So if the opinion of the court now announced had prevailed the defendant was entitled to hold that tract as against the company. On the 11th of August, 1873, he presented his application for entry, which was refused, and refused because it was within the 40-mile limit, as shown by a map of general route filed on February 21, 1872. This presents the precise question here involved. The unanimous opinion of the court sustained the action of the Land Department in refusing defendant's application to enter, and confirmed the title of the railroad company. In the course of the opinion, by Mr.

Nelson v. Northern Pac. Ry. Co

Justice Field, it was said (p. 72, L. Ed. p. 336, Sup. Ct. Rep. p. 108):

“When the general route of the road is thus fixed in good faith, and information thereof given to the Land Department by filing the map thereof with the Commissioner of the General Land Office, or the Secretary of the Interior, the law withdraws from sale or pre-emption the odd sections to the extent of 40 miles on each side. The object of the law in this particular is plain; it is to preserve the land for the company to which, in aid of the construction of the road, it is granted. . . . Nor is there anything inconsistent with this view of the 6th section as to the general route, in the clause in the 3d section making the grant operative only upon such odd sections as have not been reserved, sold, granted, or otherwise appropriated, and to which pre-emption and other rights and claims have not attached, when a map of the definite location has been filed. The 3d section does not embrace sales and pre-emptions in cases where the 6th section declares that the land shall not be subject to sale or pre-emption. The two sections must be so construed as to give effect to both, if that be practicable.”

This decision, rendered seventeen years ago, has never hitherto been overruled. It was reaffirmed in *St. Paul & P. R. Co. v. Northern P. R. Co.*, 139 U. S. 1, 17, 18, 35 L. Ed. 77, 84, 11 Sup. Ct. Rep. 389, 394, 395, in which, speaking for a unanimous court, Mr. Justice Field said:

“Besides the withdrawal made by the Secretary of the Interior of lands within the 40-mile limit, on the 13th of August, 1870, preserved the lands for the benefit of the Northern Pacific railroad from the operation of any subsequent grants to other companies not specifically declared to cover the premises. The Northern Pacific act directed that the President should cause the lands to be surveyed 40 miles in width on both sides of the entire line of the road, after the general route should be fixed and as fast as might be required by the construction of the road, and provided that the odd sections of lands granted should not be liable to sale, entry, or pre-emption before or after they were surveyed, except by the company. They were therefore excepted by that legislation from grants, independently of the withdrawal by the Secretary of the Interior. His action in formally announcing their withdrawal was only giving publicity to what the law itself declared. The object of the withdrawal was to preserve the land unencumbered until the completion and acceptance of the road. . . . After such withdrawal no interest in the lands granted can be acquired, against the rights of the company, except by special legislative declaration, nor, indeed, in the absence of its announcement, after the general route is fixed.”

In the opinion of the majority some later cases are referred to which are said to qualify the decision in *Buttz v. Northern*

Nelson v. Northern Pac. Ry. Co

P. R. Co. But even the slightest attention to what was decided in those cases shows that in no manner do they qualify or limit that decision so far as it affects the present question. Before noticing those cases it is well to consider what was the purpose and effect of § 6. It was not a granting section. It did not purport to give title to anything to the company. Its whole scope and effect was to withdraw from sale, entry, or pre-emption the odd-numbered sections in order that when the company filed its map of definite location it might secure those odd-numbered sections. The grant was made only by § 3 and attached to particular lands when the map of definite location was filed, but the proposition laid down in the Buttz Case—and the proposition I am contending for here—is that this plaintiff in error could acquire nothing by his entry upon an odd-numbered section after the filing of the map of general route and the withdrawal; that the tract was therefore free from a claim of any kind when the map of definite location was filed, and so there was nothing to prevent the railroad company from receiving title.

Now the cases referred to are *St. Paul & P. R. Co. v. Northern P. R. Co.*, 139 U. S. 1, 35 L. Ed. 77, 11 Sup. Ct. Rep. 389; *United States v. Northern P. R. Co.*, 152 U. S. 284, 38 L. Ed. 443, 14 Sup. Ct. Rep. 598; *Northern P. R. Co. v. Sanders*, 166 U. S. 620, 41 L. Ed. 1139, 17 Sup. Ct. Rep. 671; *Menotti v. Dillon*, 167 U. S. 703, 42 L. Ed. 333, 17 Sup. Ct. Rep. 945; *United States v. Oregon & C. R. Co.*, 176 U. S. 28, 44 L. Ed. 358, 20 Sup. Ct. Rep. 261; *Wilcox v. Eastern Oregon Land Co.*, 176 U. S. 551, 44 L. Ed. 368, 20 Sup. Ct. Rep. 269, and *Messinger v. Eastern Oregon Land Co.*, 176 U. S. 58, 44 L. Ed. 370, 20 Sup. Ct. Rep. 271. After quoting from the opinions in some,—the court sums up by saying: "The cases above cited definitely determine that the railroad company acquired no vested interest in any particular section of land until after a definite location was shown by an accepted map of its line." This is a proposition among the A, B, C's of public land law and needed no authorities in support thereof. But that proposition throws no light on the question as to the scope of the withdrawal given by § 6, and when the cases themselves are referred to not one of them conflicts with the proposition I have heretofore laid down. I have already shown what was decided in *St. Paul & P. R. Co. v. Northern P. R. Co.* and need not repeat. In *United States v. Northern P. R. Co.* it appeared that the Northern Pacific Railroad Company had attempted to locate a line from Portland directly north to Puget sound, and in 1865 had filed a map of the general route thereof. Such a line was not within the authority granted by the act of Congress incorporating the Northern Pacific Railroad Company. On May 4, 1870, Congress made a land grant to the Oregon Central Railroad Company which included some of the lands within the 40-mile limits of the above-mentioned general route. On

Nelson v. Northern Pac. Ry. Co

May 31, 1870, and twenty-seven days after the grant to the Oregon Central Railroad Company, Congress passed an act which authorized the Northern Pacific company to construct a line from Portland to Puget sound, with the privileges and grants provided for in the original act of incorporation, and it was held that the rights of the Oregon Central Railroad Company antedated and were superior to those of the Northern Pacific. First in time, first in right, is as to lands within place limits the settled rule of railroad land grants. What possible bearing this decision can have upon the case before us it is hard to conceive. In *Northern P. R. Co. v. Sanders* the lands in controversy were claimed as mineral lands, and applications for entry of them as such were pending in the Land Department. The court had held in *Barden v. Northern P. R. Co.*, 154 U. S. 288, 38 L. Ed. 992, 14 Sup. Ct. Rep. 1030, that mineral lands did not pass under the grant to the railroad company, and that whether they were known or not known to be mineral lands at the time of the filing of the map of definite location was immaterial. Of course, it followed that whether they were known or not known at the time of the filing of the map of the general route was also immaterial. The lands were of such a character as could not in any event pass to the railroad company any more than the even-numbered sections. They were not withdrawn by filing the map of general route; they did not pass by filing the map of definite location. The four remaining cases all proceeded upon the one proposition that the mere filing of the map of general route does not preclude Congress from making subsequently thereto and prior to the filing of the map of definite location—that is, prior to the time when title vested in the company—any other specific grant of the reserved lands. In other words, until the proposed grantee shall have done all that is necessary to vest title in it, there remains in Congress the power to make other disposition of the lands. But this was no new doctrine in the public land law. It was laid down in *Frisbie v. Whitney*, 9 Wall. 187, 19 L. Ed. 668; in the well known *Yosemite Valley Case*, 15 Wall. 77, sub nom. *Hutchings v. Low*, 21 L. Ed. 82; and has been followed in many cases since. Of course, Congress could, at any time before the filing of the map of definite location and while the title of the company was still inchoate, reserve any of the lands for military or other purposes, or make a specific grant of them to individuals or corporations. But, as said in *St. Paul & P. R. Co. v. Northern P. R. Co.*, 139 U. S. 1, 35 L. Ed. 77, 11 Sup. Ct. Rep. 389, “after such withdrawal no interest in the lands granted can be acquired against the rights of the company, except by special legislative declaration,” and in this case there has been no such legislative declaration.

But it is said that the case of the plaintiff in error is “placed on impregnable ground by the act of May 14, 1880 (chap. 89 [21 Stat. at L. 140, U. S. Comp. Stat. 1901, p. 1392]).” I pass

Nelson v. Northern Pac. Ry. Co

the proposition that this is a general act for the relief of settlers on public lands and the familiar doctrine that a general law passed after a special act does not interfere with the provisions of that act, provided there is room for the operation of both, and there is ample room for the operation of this act on public lands generally without interfering with the special provisions made in the Northern Pacific grant. But the act itself has no force whatever as applied to the present question. The provision is that one who is a settler on any of the public lands of the United States "with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land office as is now allowed to settlers under the pre-emption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he had settled under the pre-emption laws." If we turn to the pre-emption law we find (Rev. Stat. § 2264) that a person intending to pre-empt shall, "within thirty days after the date of such settlement, file with the register of the proper district a written statement." That is, the pre-emptor had thirty days after settlement within which to make his entry, while when we turn to the homestead law (Rev. Stat. § 2290) we find that a party seeking to homestead "shall, upon application to the register of the land office in which he is about to make such entry, make affidavit . . . that his entry is made for the purpose of actual settlement and cultivation." In other words, his right is initiated by the application to enter, and does not relate back to any settlement, and this statute simply gives him a right of thirty days' occupancy before making his application to enter. How such a statute, equalizing the rights of one seeking to make a homestead entry with those of one seeking to make pre-emption, can have any pertinency to the question before us, passes my comprehension.

Again, several pages of the opinion are taken up with references to quotations from opinions in the Land Department as to the meaning of the term "occupied by homestead settlers." Here, again, I am unable to see the pertinency of these references. If there had been no withdrawal, and the question arose as to the effect of plaintiff in error's occupancy of the land as against the rights of the company obtained by the map of definite location, these authorities might be worth considering, but they throw no light upon the effect of the withdrawal, which is the question before us.

The fact that this tract was not surveyed at the time the plaintiff in error entered upon it, nor until after the completion of the road, is immaterial. By the terms of § 6 the prohibition against sale, entry, or pre-emption extended to lands "before or after they are surveyed." Reference is made to several cases in which we held that the rights of a settler were not lost by the failure of the government to make a survey prior

Nelson v. Northern Pac. Ry. Co

to his occupation. But those decisions were to the effect that the settler loses nothing by the neglect of the government. Here it is held that he gains something. If the survey had been completed before he commenced his occupation, and he could not then enter an odd-numbered section, surely he could not, in face of the prohibition of the section, enter the land after it had been surveyed. If, instead of going upon lands that had been surveyed, the settler chose to go into unsurveyed territory, he took his chances of placing his improvements upon an odd or even-numbered section. If he placed them upon what proved to be an odd-numbered section, he acquired no right as against the grant to the company. If he put them on what proved to be an even-numbered section, he would be compelled to pay the government double price. In the latter event does anyone for a moment suppose that it would be an answer to the demand for a double price that the government had failed to make a survey before he chose to occupy the land and make improvements thereon? The construction placed by the majority, not only takes from the railroad company the land which was granted to it, but deprived the government of that which it intended to obtain, a double price for the lands it reserved for sale.

Finally, I may say this decision clouds the title to all the lands granted to the railroad company. At the time the map of definite location was filed, as well as at the time the road was completed, there was not on the records of the Land Department a single word or mark which indicated to any body that plaintiff in error was on the land or claiming it, or that the title of the railroad company was other than perfect. But because plaintiff in error was on the land it is held that the patent of the government to the railroad company conveyed to it no title, and that this occupant by parol testimony may show the fact of his occupancy and overthrow the record title. Yet this court unanimously held in *Northern P. R. Co. v. Colburn*, 164 U. S. 383, 41 L. Ed. 479, 17 Sup. Ct. Rep. 98, that mere occupation, unaccompanied by the filing of a claim in the land office, did not exclude a tract from the operation of the land grant. And that there was no oversight or lack of attention to this particular matter is shown by the fact that the United States promptly filed a brief of thirty-six pages, quoting the principal land decisions referred to in the opinion of the majority, and asked the court to reconsider its decision, which application was denied without dissent. Indeed, as appears from the authorities cited in that opinion, the conclusion was in accord with prior rulings, to the effect that there must be something of record in the Land Department to support the contention of an adverse right. That unanimous opinion of the court is put on one side by the assertion that the land there in controversy had been surveyed, while in this it had not been. No distinction was made in the discussion between surveyed and unsurveyed

Ann Arbor R. Co. v. Kinz

lands, no suggestion that it affected the question in the slightest degree, and, as we have seen, the prohibition against sale, entry, or pre-emption in § 6 extended to lands unsurveyed as well as surveyed. How can one say in respect to any tract claimed by the railroad company that it was not at the time of the filing of the map of definite location in the occupation of some one intending to pre-empt or homestead it? If such occupation is sufficient to avoid the patent of the United States, has the company sure title to any lands?

I think the judgment ought to be affirmed.

ANN ARBOR R. CO. v. KINZ.

(Supreme Court of Ohio, April 28, 1903.)

[67 N. E. Rep. 479.]

Dangerous Premises—Injury to Licensee—Negligence.

The owner of an uninclosed tract of land within a city, which has been graded to a level, leaving a bank on one side of the premises, to which premises adults are not invited, but suffered to resort for the purpose of playing baseball, which amusement attracts to the ground and along the bank young boys to witness the games, is not liable for injury to one of such boys, caused by the caving or falling of the top of the embankment, where its condition does not, to the knowledge of such owner, indicate a reasonable probability of such result.

(Syllabus by the Court.)

Error to Circuit Court, Lucas County.

Action by Arthur Kinz, by his next friend, George Kinz, against the Ann Arbor Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

The plaintiff below, who is now defendant in error, commenced his suit against the plaintiff in error to recover damages for injury to his person, occasioned by the caving of a bank of earth on the premises owned by the railroad company. As the ruling on a demurrer to the petition is assigned as one of the errors committed by the lower courts, the entire petition, omitting the caption, is set out as follows:

“The plaintiff, Arthur Kinz, is a minor of the age of thirteen years, and brings this action by his next friend, George Kinz. The defendant is a railroad corporation engaged in operating and managing a railroad in Lucas county, Ohio, and prior to the time of the occurrences herein complained of as changing the terminus of its road, and removing and changing some of its tracks. In so doing, for the purpose of filling in another part of its roadbed, it made an excavation at a natural bank of ground at a place between Bush and Magnolia streets and opposite Kuper street and near the track of the Wheeling & Lake Erie Railroad, in the city of Toledo. Said excavation was made by a steam shovel, in operating which the said defendant took out a large amount of earth and dirt, and left

Ann Arbor R. Co. v. Kinz

a perpendicular bank of clay some twelve or fourteen feet high and extending several rods in length. This precipitous bank of clay thus left was dangerous by virtue of the fact that earth from the upper part was likely to fall at any and all times, and had been left in such condition since some time in July, 1895, during which time the said defendant was daily running heavy trains on its tracks, which had the tendency to make said bank of earth more loose, and at the time of the occurrences herein complained of the earth was, and had been for a long time, viz., over six months, liable at any time to slip and fall down and injure persons who might be near the bottom of said bank; and if such there were, they were in danger of being overcome or covered by the slipping and falling earth. The bottom of said place where the excavation had been made was left level with the surrounding country, open and accessible to any person.

“Plaintiff says that the place where said excavation was so made, and the country immediately adjacent to and surrounding the same, was, and had been for a long period of time, an open common, unfenced, and so situated that it had been in common and general use for many years by people of all ages, and especially by boys for purposes of play. The character of the ground, and the dangerous condition of said bank, and the likelihood of its caving in and falling down, and the habit and custom of the public, children and boys, as aforesaid, to be in and about the premises and near to where it was dangerous, was known to the defendant, or by the exercise of ordinary care should have been known; and it was the duty of the defendant, when it made said excavation, to have left the ground in such condition by grading and sloping it down so that it would not be liable to fall down and hurt persons near to the same, or to have placed guards which would prevent people from going where the said danger existed. But the defendant negligently and carelessly left this overhanging bank in its dangerous condition, without attempting in any way to protect or guard people who might have occasion to be near there from the danger of the earth falling and hurting them.

“The plaintiff, on the 26th day of August, 1897, was engaged in play near and about the locality, with other youths and children, as he had frequently done before, and in the midst of sport and play came to the bottom of said bank of earth, and, without any knowledge of the danger of the same, was engaged in picking into the bank with its fingers, there being no especial warning that the earth was liable to slip down and fall, and the plaintiff, owing to his lack of experience and immature years, not knowing the danger thereof. All of a sudden the overhanging bank of earth fell down and over him and some other youths who were playing with him, with the result that the plaintiff was entirely covered and buried by the earth. The alarm was given, and he was, after a short

period, dug out in an unconscious and bleeding condition, and taken to his home, where he was confined to his bed for two months, and to the house for four months.

"Plaintiff says that, as a result of the bank of earth falling upon and burying him, the left side of his face has become paralyzed, the drum of his left ear injured so that plaintiff is unable to hear, and, as he is informed and believes, will be permanently injured, and he will always be unable to hear with his said left ear; that his spine was severely injured; his left eye so injured that the sight thereof will be permanently injured; that his health has been greatly impaired, and, as he is advised, his physical condition permanently weakened and affected. He has suffered great pain and anguish, and will continue so to do, and, as he is advised, will always suffer from the results of the casualty complained of. He says that, so far as he was concerned, he was in the exercise of ordinary care, but that the defendant was guilty of great carelessness and neglect in permitting said bank of earth to remain loose, dangerous, unguarded, and liable to fall down and injure people. He therefore says that the defendant is liable to him for all the damage resulting from said injury, which are ten thousand dollars, for which amount he asks for judgment against said defendant."

The petition was afterwards amended by adding the following averment: "Plaintiff, for amendment to the petition, says that he avers that the place where plaintiff received his injury, as in the petition complained, was upon the land of said defendant, and was and had been for a long time prior thereto under the control of said defendant."

The general demurrer to the petition thus amended was overruled, to which the railroad company excepted, and then answered, admitting its corporate capacity, and that it changed the terminus of its road, relaid and changed some of its tracks, and that in doing so it made an excavation at a natural bank of ground between the streets named in the petition by the use of a steam shovel. The nature, extent, and cause of the injuries to the plaintiff the answer denies, as well as all allegations of wrong or negligence made in the petition; and it alleges that the plaintiff was guilty of negligence which contributed directly to the injuries complained of. This charge of contributory negligence is denied by a reply. At the close of all the evidence the railroad company moved the court to direct a verdict in its favor, which was overruled, and exception taken. Certain special charges were requested by the defendant company, which were not given as asked, but were modified, and, as modified, were given to the jury. A general exception to the charge was entered. The jury found for the plaintiff, and assessed his damages at \$1,100. The motion for new trial was overruled, and judgment rendered on the verdict. The case was taken on error to the circuit court, where the judgment was affirmed. Error is prose-

Ann Arbor R. Co. v. Kinz

cuted in this court to reverse the judgments of the lower courts.

Smith & Beckwith, for plaintiff in error.

Hamilton & Kirby, for defendant in error.

PRICE, J. (after stating the facts). We have for consideration in this case not only the question as to the sufficiency of the petition in stating a cause of action against the railroad company, but also, the question whether the uncontroverted facts submitted to the jury tend to establish a right of recovery. The evidence varies somewhat from the averments of the petition, but such variance consists mainly in the phraseology and its coloring, which are natural to a pleading, as compared with the narration of facts and events by witnesses upon the stand. Therefore when we state the controlling and conceded facts of the case as they appear in the record, as well as in the briefs of counsel, we present also the substance of the petition.

At the close of all the evidence the railroad company asked the court to direct a verdict for the defendant. This the court refused to do, and the ruling was excepted to. It is not claimed that the testimony introduced by the defendant tended to strengthen the plaintiff's case, and the motion raised the question whether the undisputed facts tended to show a right of recovery. What are these facts? The premises on which the boy sustained the injury belonged to the railroad company, and are situate in the north part of the city of Toledo, between Bush and Magnolia streets, lying not far from, if not adjoining, the right of way of the defendant company, and extended to the Wheeling & Lake Erie Railroad, a distance of about 200 feet. This tract of land was an open, unfenced common, not near any depot of the company, and none of its buildings were upon it. Part of this ground was higher than the remainder, and on it were some low places, which the company desired to fill, and to grade the tract to a more even surface. In the summer of 1896 the company let a contract for the work contemplated, and it was entered upon some time in June of that year. The earth to make the fills was taken from the high ground of the tract by means of a steam shovel, and after the work of excavation had proceeded well towards completion, on account of a controversy between the company and the contractor, the work was suspended, which was some time in August of the same year. The making of the excavation left a bank, mostly of clay, about 10 feet high, and which was situated at least 100 feet from the tracks of the Ann Arbor Railroad. The steam shovel which removed the earth from the bank left its surface uneven. From its base the ground sloped gradually towards the railroad. The lower portion of the 10-foot embankment had some slope outward, and the upper portion was nearly perpendicular; and at the time of the injury the top of the bank at some places projected slightly. The low places in

Ann Arbor R. Co. v. Kinz

the tract of land had been filled, and the ground, except the bank and its base, graded so that it was nearly level; and it remained in that condition from the time the contractor quit work in the summer of 1896 until after the injury in August, 1897. No other or further work was done on the commons or at the bank during that time, and no change had occurred in the shape or condition of the bank, except as made by the weather and the acts of the injured boy and his companions.

After the work ceased in 1896, young men and others who desired to play baseball assembled and played ball on this common, and this habit was renewed in the summer of 1897. The plaintiff, a boy about 11 years of age, and others, both older and younger than he, were attracted to the common by the games of baseball, and, if they did not engage in that game themselves, were frequently onlookers while others played, and at such times occupied the sloping base of the bank. On the day of the injury the plaintiff and his companions were witnessing the game, and, as on preceding days, whiled away a part of their time in digging into the clay bank, some with their fingers, and others used sticks, the object being to get clay with which to make balls to throw at each other. This amusement was in progress at the time the plaintiff was injured. He, with others, had been so engaged during the progress of the game, and where the plaintiff was, or near thereto, a hole about a foot deep had been made in the bank four or five feet from its base. Some one used an iron ice hook instead of his fingers to get out the clay. While so engaged near the foot of the bank, the top of the bank caved, and a portion of it fell upon the plaintiff, Kinz, and he was injured.

The railroad company did not at any time invite the ball players, or the plaintiff and his companions, or any one, to enter upon or visit the premises. The evidence tends to show that the agents of the company had knowledge that these young men and boys used the grounds for play, but no permission was given, except such as might be implied from silence. There is no evidence tending to show that the railroad company had any knowledge of the habit of the plaintiff or other boys to dig into the bank, or attempt to interfere with its condition. The means of knowing what was transpiring on the unfenced common were such views of the place as the servants and agents of the company might obtain while on trains passing to and fro on the railroad; but we assume that the company had knowledge of the use being made of the premises for playing ball, and that boys, great and small, were in the habit of resorting there for play. There had been no material change in the condition of the common or the bank from the time the grading had been left, except such change as the weather might have caused. This bank was largely clay, as all witnesses have testified, and it had passed through the period of a year of atmospheric changes—the

Ann Arbor R. Co. v. Kinz

storms of autumn, winter, and summer—and remained about the same when young Kinz received his injury. This fact shows that there was nothing in the situation to excite suspicion of danger of the bank falling, and there was nothing to arouse an anticipation on the part of the company that any danger lurked in the existence of the bank. No new danger was taken onto the premises by the company after the boys began to resort thither, nor did the company place thereon anything to attract children, and cause them to congregate there. The only attraction for boys on the grounds was the play of baseball conducted by older boys or men, who were also trespassers, or at best were licensees.

On this statement of the facts, a conclusion of law is not difficult to reach. What duty, under these circumstances, did the railroad company owe these licensees? What duty was omitted by the company? One answer to this question is made by counsel for defendant in error on page 2 of the brief, where it is said: "The injury complained of, as we contend, was attributable to the fact that the railroad company had prevented the contractor from finishing up his work. Had he been permitted to finish it up, the place would have been sloped down, with no likelihood of the clay bank falling over." Again, on page 3 of the brief, it is said: "There never were any fences or other inclosures, nor guards, nor warnings to keep off, nor indications of possible danger." It does not require a close analysis of these complaints to expose their fallacy. The record discloses that the trial court indulged to some extent inquiries as to the justice and propriety of the order to cease the work which the company gave the contractor, but such inquiries were wholly foreign to the case on trial. That was a matter of business between the railroad company and the contractor, to be settled by the parties or through the courts. The company was under no obligations to do any grading of the ground, and when it commenced it could lawfully quit whenever it deemed it proper, being liable to any contractor for an unjustifiable breach of contract with reference to the work. While it would be under obligations to leave no unguarded pitfalls or dangerous traps to which children might be enticed, the extent of the excavation, and where it should stop was a subject for its decision alone. It owed nothing to the public, or any part of it, in reference thereto. One author states the general rule in this form: "The general rule undoubtedly is that the owner or occupier of land is not bound to take pains to prepare his premises in any particular way, to the end of promoting the safety of children who may come thereon as trespassers or as bare licensees; but that, as in the case of adults, they take the premises as they find them, and, if killed or injured by reason of the condition in which they find them, this does not give a right to an action for damages." Commentaries on the Law of Negligence by Thompson,

Ann Arbor R. Co. v. Kinz

vol. 1, § 1025. While this rule has the sanction of very many courts and text-writers—indeed, of a great array of authorities—it is by others regarded as harsh and severe when applied to children, and in many cases it is held that the owner of open or other grounds, where children are permitted to resort by such owner, may be liable for his negligence in keeping on the premises any attractive danger or nuisance or unseen dangerous conditions whereby a child may be injured. The latter is the more humane view, and may be regarded as a modification of the general rule. We think the better and more reasonable proposition is that the owner of property owes no general duty to keep it in condition which will insure the safety of persons who go upon it without invitation or license; yet if he keeps upon his premises dangerous machinery, or other things likely to attract children, and does not guard them to prevent injuries to them, he is liable for injuries resulting from his neglect to provide such guards. One of the reasons assigned for this rule by some authorities is that the keeping on the premises a machine or other thing which naturally entices the very young and curious, and thus attracts their presence, may be construed as an implied invitation to enter the premises so occupied by the dangerous machine or other device, in which case it becomes the duty of the owner to see that the person thus invited is not placed in peril. But it is not our duty to pursue these various cases and authorities as they meet or diverge, for we have no case here calling for such labor. The facts before us show no secret dangers, traps, or pitfalls, and the premises were not in a dangerous condition; nor did the owner place or maintain thereon any object or thing to attract the young and unwary. It was under no obligation to the public or its youth to complete the grading, and slope down to perfect safety all banks, and smooth out the uneven places left by the steam shovel.

The other fault found with the conduct of the railway company is that the grounds were uninclosed, and there were no guards, nor warnings to keep off, etc. What was there that seemed to require warnings or guards to keep off? Nothing but a clay bank several rods in length and about 10 feet high in most places. It was in plain view, and about its presence there could be no mistake. It had been there practically in the same condition for a year preceding the accident, except the effect of weather, which, as one expert witness states, tends to reduce the bank to a condition of repose. "All earth and sand weathers down into what we call a natural slope, or assumes an angle of repose." In no decided case or text-book do we find a rule that required this company to display signs of warning or signals of danger in front of the bank. Omitting to do so was not such negligence as would make it liable for the injury. The danger of the bank falling was neither imminent nor probable until the boys began to undermine it,

Ann Arbor R. Co. v. Kinz

of which the company had no knowledge. There is nothing in the record to show that it had reason to anticipate the result of the acts of Kinz and his companions. But section 3324, Rev. St. 1890, is cited as imposing a duty to fence the grounds. That section provides: "A company or person having control or management of a railroad shall construct, or cause to be constructed, and maintain in good repair on each side of such road, along the line of the lands of the company owning or operating the same, a fence sufficient to turn stock." The section further provides for cattle guards and crossings, and makes the company liable in damages for neglect to maintain such fence, crossings, and cattle guards. The "fence" spoken of must be sufficient to turn stock. From what? Evidently the right of way and tracks of the railroad, and the crossings and cattle guards are to make a safe way for the traveler over the tracks of the railroad, and the cattle guards to prevent cattle from passing from the crossing onto the tracks and right of way of the railroad. Hence it is perfectly apparent that the statute does not refer to lands of the company other than its line of road and right of way, on each side of which must be a fence sufficient to turn stock; and it did not require the company to fence the common where Kinz was injured.

The defendant in error cites many cases in which the owner was held liable for injuries to children upon his premises, no one of which is authority here; nor do they furnish a correct rule by which to measure the conduct of plaintiff in error in this case. We cannot spread out in this opinion the facts upon which each of the various cases stands, but an examination of them will verify our statement. As a sample for investigation, take the case of *Lynch v. Nurdin*, 1 Q. B. 29, cited for defendant in error as a leading case. It is true this case seems to have been approved in two or more decisions of the Supreme Court of the United States (see *Railroad Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745—a turntable case; and *Union Pacific Railway Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434) and in decisions of many of our state courts; and it has been questioned, if not repudiated, since in English courts (see *Hughes v. Macfie*, 2 Hurl. & Colt. 747, and *Mangan v. Atterton*, 4 Hurl. & Colt. 388), and it is not regarded sound by several American courts. However, it has been quoted with approval by this court in several cases. See *B. & I. R. R. Co. v. Snyder*, 18 Ohio St. 399, 98 Am. Dec. 175; *Harriman v. Railway Co.*, 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507. But what is the *Lynch v. Nurdin* Case? "Defendant left his horse and cart unattended, for half an hour, in a public street. During his absence, the plaintiff, a child between six and seven years old, got upon the cart. While the plaintiff was there, another child caused the horse to move on, and the plaintiff fell in consequence, and was hurt. Held, that defendant was liable in an action

Ann Arbor R. Co. v. Kinz

on the case for negligence, although the plaintiff had partly occasioned the accident by his own trespass." It is to be observed that the owner of the horse and cart was first in the wrong in leaving them unattended in a public street, where a young child, rightfully also in the street, was enticed to climb onto the cart from which he fell. Contributory negligence of one so young could not be well sustained; and yet that case has become the reputed mother of a vast progeny of adjudicated cases, each claiming to be a legitimate heir of the doctrine of the parent case. Many of them are "torpedo cases," "turntable cases," and most of them have decisive characteristics of some "attractive nuisance," which the owner kept or permitted on his premises, to which the children have been attracted and injured.

It is said in this case that the lower courts were influenced to their judgments by the case of *Harriman v. Railway Co.*, 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507, and from the language of the opinion of the circuit court, it seems that it rested its conclusions on the *Harriman Case* with some doubts and hesitation. That was a torpedo case. The public, including children, had long been accustomed to pass along the railroad at a certain point, with the permission, or at least without objection, on the part of the company. Some of its servants had left a torpedo inclosed in a box-shaped receptacle on the railroad at this frequented place. It was discovered by a boy, who carried it to the plaintiff, another boy, who stood not far off. In exercising the youthful curiosity to know what was contained in the box, one attempted to open it, when it exploded, and severely injured the plaintiff. The case in this court was decided, as in the lower courts, on a demurrer to the amended petition, which, among other averments, alleged "that there was no reason for making use of said torpedo at said time or place, nor was there any necessity of giving danger signals; but the same were used in mere wantonness, and with a view that said train, on being moved forward, would pass over and explode the same." The petition further charged that the railroad company negligently failed to explode the torpedoes, but left them on its road, where it knew people, including children, were accustomed to pass without hindrance from the company. This court held in that case that the petition stated a good cause of action, and with that decision we are still content. The torpedo was intrinsically dangerous, as well as attractive to children. But it does not follow that the rule laid down in that case can be carried to the support of every claim of liability made against the owner of premises for injuries to either adult or child sustained while thereon by sufferance of the owner. Like every other case, it is to be interpreted and applied according to the facts which were its groundwork. This is the only safe and satisfactory canon for the understanding of all adjudicated cases. How does that case apply

Pennsylvania R. Co. v. Rogers

to the questions at bar? What attracted young Kinz and his companions to the open grounds? The games of baseball as played by their seniors. So says all the evidence. No witness states that the clay bank attracted any one to those grounds. It was but an ordinary, uninviting, unsightly, dismal bank of earth. Therefore the railroad company maintained no attractive or dangerous nuisance on its premises. Other and older trespassers furnished the attraction for the young boys, for which the company is not responsible. A contrary doctrine would shift responsibility for the care and safety of children from parents and guardians to their neighbors—an innovation in the law and morals of the land which we are not willing to encourage. We are unanimously of the opinion there should be no recovery in this case. The petition fails to state a cause of action, and the court erred in refusing to direct a verdict for the defendant below. The judgments of both the lower courts are reversed, and the plaintiff in error is entitled to judgment on the controlling uncontroverted evidence.

Judgment reversed, and judgment for plaintiff in error.

BURKET, C. J., and SPEAR, DAVIS, SHAUCK, and CREW, JJ., concur.

PENNSYLVANIA R. CO. v. ROGERS *et al.*

(Supreme Court of Appeals of West Virginia, March 21, 1903.)

[44 S. E. Rep. 300.]

Garnishment—Jurisdiction.

Garnishment is the exercise of a special and limited statutory power, the requisites of which are jurisdictional.

Same—Same.

Although, in such proceeding, there is no actual manual seizure of a property by the executing officer, it is in the nature of a proceeding in rem, and jurisdiction of the debt or property sought to be thereby subjected must be obtained, else the court cannot pronounce judgment of condemnation against it.

Same—Procedure.

Garnishment is a dual proceeding, moving against the garnishee in personam to compel him to answer and disclose what property and estate of the defendant he has in his hands and to hold the same subject to the order of the court, and against the property and estate itself to extinguish the right of the defendant in it by condemnation and appropriation of it to the satisfaction of the plaintiff's claim.

Same—Jurisdiction—Nonresidents.

A nonresident, temporarily in the state, may be summoned and compelled to answer as garnishee, but if, upon his answer, it be established that he is a nonresident, he cannot be subjected to further proceedings in the cause, for want of jurisdiction, unless, when garnished, he have in the state property of the defendant in his possession, or be bound to pay the defendant money or deliver to him property within the state.

Same—Same—Same—Foreign Corporations.

Foreign corporations and nonresident individuals stand upon the same footing in respect to garnishment, except that the former are subject to garnishment when doing business in the state in which the

Pennsylvania R. Co. v. Rogers

garnishment issues in such sense and to such extent as to have become domiciled therein.

Same—Same—Same—Same.

A debt due from a foreign railroad corporation operating no railroad in this state, and doing no business here other than maintaining, jointly with other railroads, an agency relating to through freight service, and for the soliciting of freight for such company, to be handled on its lines without the state, is beyond the territorial jurisdiction of the courts of this state, and not subject to garnishment here.

Same—Status of Garnishee.

The garnishee, in the eye of the law, is a mere stakeholder, a custodian of property or estate attached in his hands, and has no right to do any voluntary act to the prejudice of either the plaintiff or defendant in the action. He must let the law take its course, except that he may protect himself from jeopardy or injury by unauthorized acts and proceedings.

Same—Jurisdiction.

A garnishee cannot give jurisdiction of a debt due from him by his voluntary appearance, when not previously served with the order of attachment, nor when an attempted service is invalid.

Same—Return of Service.

Omission to show, in the return of service of an order of attachment upon a foreign corporation as garnishee, that the agent upon whom the service was made resides in the county in which he was served, renders the service invalid, and, in such case, the court obtains no jurisdiction of the res, for want of service on the garnishee.

Prohibition.

Prohibition lies from a circuit court to a justice of the peace to restrain him from proceeding in an action when the subject-matter thereof is beyond his territorial jurisdiction, and also when, by reason of want of service or invalidity of service, he has not acquired such jurisdiction; although, when he has jurisdiction of the subject-matter, and the question of his jurisdiction of the person depends upon some fact to be determined by him, his erroneous decision in favor of jurisdiction is only error, not subjecting him to prohibition.

Exemption Laws—Extraterritorial Effect.

In so far as *Mahany v. Kephart*, 15 W. Va. 609, and *Stevens v. Brown*, 20 W. Va. 450, hold that the exemption laws of another state have no extraterritorial force and will not be enforced by the courts of this state, they are reaffirmed.

(Syllabus by the Court.)

Error to Circuit Court, Ohio County; Thayer Melvin, Judge.

Action by the Pennsylvania Railroad Company against W. W. Rogers and others. Judgment for defendants, and plaintiff brings error. Reversed.

J. B. Sommerville, for plaintiff in error.

Caldwell & Caldwell, for defendants in error.

POFFENBARGER, J. This case involves the consideration of questions arising upon the invocation of the extraordinary legal remedy, prohibition, in restraint of the special and limited proceeding known as garnishment. As prohibition lies only to restrain a court or other tribunal from proceeding without jurisdiction, or in excess of its jurisdiction, and as attachment is a purely statutory proceeding, the questions presented are principally jurisdictional in character, and

Pennsylvania R. Co. v. Rogers

perspicuity demands an inquiry into the nature of both proceedings. This should be preceded, however, by a statement of the case.

W. W. Rogers, a citizen of Ohio county, doing a detective and collection business, and having taken, by assignment, a large number of claims from persons residing in Pennsylvania against employees of the Pennsylvania Railroad Company, a foreign corporation, which claims that it does not own or operate any railroad or do any business in this state, instituted, before D. Z. Phillips, a justice of the peace of Ohio county, more than 400 suits against the said nonresident employees on the accounts so assigned, and made the said railroad company a garnishee in each of them. The service of process, as to the garnishee, was by delivering a copy of the order of attachment "to J. J. McCormick, agent of the said garnishee in charge of its business, in the city of Wheeling, in said county, there being no other person within the state of West Virginia upon whom said order of attachment can be legally served." In some of these cases the railroad company appeared specially for the purpose of objecting to the service of process upon it, and moved to be discharged because the order of attachment issued therein had not been properly or legally served upon it. After hearing the evidence and argument of counsel upon the motion, the justice overruled it. Then the garnishee filed its answer, admitting indebtedness, but claiming it was not liable as garnishee, for the following reasons: First, because the justice was without jurisdiction in said cause; second, because said Pennsylvania Railroad Company and the principal debtor in the action were both citizens of the state of Pennsylvania, and the money due was for wages earned by the defendant as an employee of the railroad company, under a contract between him and the railroad company in Pennsylvania, and was not, therefore, subject to garnishment in West Virginia; third, because the wages of the defendant were exempt from execution or forced sale under the laws of Pennsylvania, and could not be subjected to garnishment in the state of West Virginia. The garnishee, therefore, again asked to be discharged, but the motion was overruled, and judgment entered against the garnishee for the amount of the indebtedness admitted. The record here shows a transcript of the proceedings in only one of these cases, that of Rogers, assignee, against James R. Snyder. The bringing of these suits was commenced in July or August, 1901, and many judgments were rendered against the garnishee. On the 10th day of January, 1902, the Pennsylvania Railroad Company presented to a judge of the circuit court of Ohio county its petition, praying for a writ of prohibition to restrain Rogers and Phillips, and each of them, "from proceeding further in their said acts, doings, and proceedings, and from instituting any other or further proceedings against" the petitioner, "either in regard to the said claims of

Pennsylvania R. Co. v. Rogers

the said Rogers against" the petitioner "arising out of the assignment of claims to the said Rogers by any person, or against" the petitioner's "said employees residing in the said state of Pennsylvania." In addition to the facts hereinbefore set out, the petition contains the following averment: "Your petitioner does not own and does not operate any railroad or any part of a railroad in the county of Ohio, or in the state of West Virginia, and does no business in the said last-named state or county. There is, however, located in the said city of Wheeling, an agent of what is known as the 'Star Union Line,' which is an association of several railroads, formed and kept up for the purpose of facilitating the handling of certain freight business, in the city of Wheeling. The name of said agent is J. J. McCormick, and the only service which was had upon your petitioner in said suits brought before the said Phillips, justice as aforesaid, by the said Rogers, was had by serving copies of the orders of attachment issued in said cause upon said J. J. McCormick. Your petitioner is advised that the said J. J. McCormick is not your petitioner's agent, and that the said service of the said copies upon him is not such a service as should or will bind your petitioner in the said cases, and that therefore the said Phillips, justice as aforesaid, is without jurisdiction to render any decision, or enter any order or judgment, against your petitioner in the said cases." The petitioner further shows that some of the employees against whom these actions were brought had instituted chancery suits in Pennsylvania, seeking to restrain the railroad company, by injunction, from paying the judgments recovered by Rogers in Ohio county, and a transcript of the record of one of said equity cases, showing all the proceedings therein and the opinion of the judge in the cause, is filed as a part of the petition. A rule was awarded against Rogers and Phillips, returnable on the 16th day of January, 1902, which on said date was continued until the 1st day of February, 1902, when there was a final hearing, and the court discharged the rule, dismissed the petition, and gave costs against the petitioner, and the cause is now here on a writ of error to said judgment.

Attachment is no part of the general jurisdiction of any court. It is purely statutory, and, though everywhere vested by statute in courts of general jurisdiction, it is still a special and limited power, resting upon its own peculiar grounds, acting in its own prescribed modes, and leading to its own specific results. Drake on Attach. § 83; Waples on Attach. §§ 635, 637. When jurisdiction by attachment is conferred upon and exercised by courts of general jurisdiction, it is special, and unsupported by presumptions in its favor. Waples on Attach. § 639. The statutory prerequisites to attachment are jurisdictional. Waples on Attach. §§ 625, 627.

Attachment is in the nature of a proceeding in rem.

Pennsylvania R. Co. v. Rogers

There is an actual seizure of property, except where it is in the form of garnishment. In the case of garnishment, it retains its character as one in the nature of a proceeding in rem, although there is no actual seizure of property under the order of attachment, for by service of the order upon the garnishee it arrests the debt in his hands, and holds it through him, subject to the judgment of the court. The claim subjected by garnishment is estate of the principal debtor in the hands of the garnishee, and the proceeding is against it as a res, a thing, and not against the garnishee personally, except to compel him to turn it over to the creditor of the principal defendant in satisfaction of his claim. In every practical sense, it amounts to a seizure of a thing. "Garnishment is in the nature of a proceeding in rem, since its aim is to invest the plaintiff with the right and power to appropriate, to the satisfaction of his claim against the defendant, property of the defendant's in the garnishee's hands, or a debt due from the garnishee to the defendant." Drake on Attach. § 452; Wade on Attach. § 338. Without such seizure, no jurisdiction over the res is acquired, and no judgment against it can be rendered, although the court may have jurisdiction of the parties. Garnishment is no exception to this rule, as will be shown. Jurisdiction of the person of the garnishee must be acquired by service upon him, but this does not necessarily give jurisdiction of the res or debt owing by him, which belongs to the defendant, whose right to it must be extinguished by bringing it within the jurisdiction of the court by proper proceedings, and subjecting it to the satisfaction of the plaintiff's demand by a proper judgment.

Just here it is to be further observed that courts have no extraterritorial jurisdiction over either persons or property in attachment suits. To maintain a proceeding, there must be jurisdiction over the one or the other, or both. Waples on Attach. § 644. "Jurisdiction over persons and property in any state is confined to the persons and property within the territorial bounds of the state. No court within it can exercise jurisdiction beyond it. To exercise it over persons or property in another state would be an unwarrantable assumption and arrogation of unlawful authority, entitled to no respect on the principle of comity, but meriting rebuke and resistance as a wanton abuse of power. A judgment rendered in any state against a person or property over which the court has no jurisdiction is not entitled to 'full faith and credit' in other states, but its validity may be questioned on jurisdictional grounds, and its enforcement resisted; for, not being by due process of law, it is entitled to no regard, even in the state where it is rendered; and it may be impeached collaterally anywhere." Waples on Attach. § 648. In other words, such action is absolutely null and void for want of jurisdiction.

In exact alignment with this general proposition of law, which is not questioned anywhere, it has been held by the

Pennsylvania R. Co. v. Rogers

courts of this country, with practical unanimity, that a non-resident cannot be subjected to the process of garnishment, although caught within the estate temporarily and served with process. The moment that it is made to appear to the court that he is a nonresident only temporarily within the state, without property or effects of the defendant in his possession in the state, or owing him a debt payable within the state, the jurisdiction of the court ends. "In this country the question has been repeatedly presented, and the uniform tenor of the adjudications establishes the doctrine, that, whether the defendant reside or not in the state in which the attachment is obtained, a nonresident cannot be subjected to garnishment there, unless, when garnished, he have in the state property of the defendant in his hands, or be bound to pay the defendant money, or to deliver to him goods, at some particular place in that state." Drake on Attach. § 474; Wade on Attach. § 413; Waples on Attach. §§ 387-392.

It is said that the first announcement of this doctrine in this country was made by the Supreme Judicial Court of Massachusetts. In that state the proceeding is called "trustee process," and the garnishee here would there be called the "trustee." The reason given for holding that a nonresident cannot be subjected to garnishment is stated in *Tingley v. Bateman*, 10 Mass. 346, 347, as follows: "The summoning of a trustee is like a process in rem. A chose in action is thereby arrested and made to answer the debt of the principal. The person entitled by the contract or duty of the supposed trustee is thus summoned by this species of effects. These are, however, to be considered for this purpose as local, and as remaining at the residence of the debtor or person intrusted for the principal; and his rights in this respect are not to be considered as following the person of the debtor to any place where he may be transiently found, to be taken there at the will of a third person, within a jurisdiction where neither the original creditor nor debtor reside." It is further stated in said opinion, in the process of foreign attachment, by the custom of London, out of which our system of attachment law originated, and from which it differs to no considerable extent, the garnishee must be suggested to be a man within the city. Proceeding, the court says: "The principal has not been made a party by any legal summons, and he may justly object to the transfer of his demands against Daggett, attempted to be made in this case by Daggett's conclusive or transient removal within the process of this court; that the credits or effects in his hands belonging to Bateman have never been legally attached, and that the summoning of Daggett was to no purpose a sufficient service of this writ; and, as this defect of service appears in the proceedings, the court dismiss the action ex officio." The same principle is announced in all the following cases: *Nye v. Liscombe*, 21 Pick. 263; *Hart v. Anthony*, 15 Pick. 445; *Lovejoy v. Albee*,

Pennsylvania R. Co. v. Rogers

33 Me. 414, 54 Am. Dec. 630; *Lawrence v. Smith*, 45 N. H. 533, 86 Am. Dec. 183; *Baxter v. Vincent*, 6 Vt. 614; *Green v. Bank*, 25 Conn. 452; *Ray v. Underwood*, 3 Pick 302; *Cronin v. Foster*, 13 R. I. 196; *Smith v. Eaton*, 36 Me. 307, 58 Am. Dec. 746; *Jones v. Winchester*, 6 N. H. 497; *Sawyer v. Thompson*, 24 N. H. 510; *Young v. Ross*, 31 N. H. 201; *Peck v. Barnum*, 24 Vt. 75; *Ringe v. Green*, 52 Vt. 204; *Squair v. Shea*, 26 Ohio St. 645; *Peters v. Rogers*, 5 Mason, 555, Fed. Cas. No. 11,033.

In 14 Am. & Eng. Enc. Law (2d Ed.) 815, it is said: "Under statutes providing generally for summoning, as garnishees, persons indebted to the defendant, or having in their possession property belonging to him, it has been held that nonresidents were exempt from liability to be so summoned, though found temporarily within the state, and in some jurisdictions the statutes have expressly provided that only residents of the state shall be so summoned. On the other hand, there are statutes which expressly provide that nonresidents may be summoned as garnishees, and by the weight of authority it seems that the mere fact that a person is a nonresident does not exempt him from liability to be so summoned when the question is not affected by the situs of the res sought to be reached by the process." A hasty reading of this might lead one to say that it is in conflict with the general proposition heretofore announced, but it is not. The distinction between summoning the garnishee, by which jurisdiction over his person is acquired, and the obtaining of jurisdiction of the res, the claim sought to be subjected, must be observed. If a nonresident be found temporarily within the state, he may undoubtedly be summoned, and must appear and answer. But when it is shown by his answer that he is a nonresident, having no property of the defendant in his possession within the state, nor owing him any debt payable within the state, nor bound by any contract to deliver any property to him within the state, the want of jurisdiction of the res appears, and, when established, the proceeding must end, although there is jurisdiction of the person of the garnishee. "When one is summoned as garnishee in a state of which he is not a resident, it is necessary for his own protection that he should answer to the proceeding, and avail himself of whatever defense he has against liability, or he will be liable to a judgment by default against him, if the law under which he was summoned authorize that course of proceeding; for, by the service of process, the court acquires jurisdiction over his person, and the question whether it has, or can take, jurisdiction of the effects in his hands, can only be raised by himself upon his answer." Drake on Attach. § 476. It is to be observed that in the quotation from 14 Am. & Eng. Enc. Law (2d Ed.) it is said the nonresident is liable to be summoned "when the question is not affected by the situs of the res sought to be reached by the process."

But two cases have been found which completely ignore

Pennsylvania R. Co. v. Rogers

the principle that a nonresident cannot be held as garnishee when it is shown that he is a nonresident, and has no effects of the debtor in his possession within the state, and owes him no debt payable within the state. They are *Molyneaux v. Seymour*, 30 Ga. 440, 76 Am. Dec. 662, and *Morgan v. Neville*, 74 Pa. 52. Both of these cases not only ignore that proposition, but fail to distinguish attachment, which is a special limited statutory proceeding, from proceedings in which the courts exercise general jurisdiction, and in which strict compliance with the requirements in matters of procedure is not ordinarily jurisdictional, as we have seen that it is in attachment and garnishment. Where the action is in personam, jurisdiction of the person of the defendant is plenary jurisdiction, giving the court full power for all purposes of the action. But in garnishment, as we have seen, jurisdiction of the person of the garnishee is only partial jurisdiction. It is generally so held. No attention whatever was paid to this distinction in the two cases named. The Pennsylvania decision is vigorously condemned by Mr. Thompson, in his *Commentaries on the Law of Corporations*. See volume 7, § 8073, note 4, pp. 6432, 6433. In 14 Am. & Eng. Enc. Law (2d Ed.) 805, the following is found: "The rule announced in a number of late and well-considered cases, and which seems to be the doctrine which will best protect the interest of commerce, is that a debtor may be charged as garnishee of his creditor, without regard to the illusive theories as to the situs of a debt, in any jurisdiction in which an action could have been brought by such creditor against the debtor for the recovery of the debt, though personal service cannot be had upon the defendant." For this proposition, several cases are cited. But these cases do not repudiate, overturn, nor say anything in conflict with, the proposition that a nonresident cannot be subjected to garnishment unless he has effects of the debtor within the state, or owes any debt payable within the state, or has contracted to deliver to him property within the state. Most of them are cases against foreign corporations doing business within the state, and which have, in some sense, become domestic corporations by having complied with the statute of the state, and voluntarily made themselves subject to its process, just as if they were domestic corporations. Such is *Mooney v. Buford*, 18 C. C. A. 421, 72 Fed. 32. In *Pomeroy v. Rand, McNally & Co.*, 157 Ill. 176, 41 N. E. 636, the garnishee was a resident of the state. In *Mooney v. Railroad Co.*, 60 Iowa, 346, 14 N. W. 343, the garnishee railroad company operated its railroad within the state, and was held to be a citizen of the state. In *Bank v. Insurance Co.*, 83 Iowa, 491, 50 N. W. 53, 32 Am. St. Rep. 316, the garnishee insurance company was held to be doing business within the state, and the case was assimilated to the *Mooney Case*, and the decision based upon the same principle. In *Railroad Co. v. Thompson*, 31 Kan. 180, 1 Pac. 622,

Pennsylvania R. Co. v. Rogers

47 Am. Rep. 497, the garnishee railroad company had leased property and was doing business within the state. In Railroad Co. v. Sharitt, 43 Kan. 375, 23 Pac. 430, 8 L. R. A. 385, 389, 19 Am. St. Rep. 143, the railroad company did business and operated its road in both of the states between the courts of which the conflict occurred, and the question was not one of jurisdiction on the ground involved here, but the enforcement of the exemption laws of a foreign state in the garnishment proceeding. In Harvey v. Railroad Co., 50 Minn. 405, 52 N. W. 905, 17 L. R. A. 84, involving the validity of a garnishment made in Montana, it was found and held that the railroad company operated its railroad in the state of Montana. In Hardware Co. v. Lang, 127 Mo. 242, 29 S. W. 1010, the garnishees were residents of the state. In Insurance Co. v. Chambers, 53 N. J. Eq. 468, 32 Atl. 663, the garnishee insurance company was held to be doing business within the state in which it was garnished. In Railroad Co. v. Barnhill, 91 Tenn. 395, 19 S. W. 21, 30 Am. St. Rep. 889, the garnishee railroad company was held to be a domestic corporation of the state. It is also insisted in the brief that Railroad Co. v. Strum, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. Ed. 1144, at least countenances the proposition that a nonresident temporarily within the state may be subjected to garnishment. It certainly does not so decide. Mr. Justice McKenna says, "We are not concerned to inquire whether the cases which decide that a debtor temporarily in a state cannot be garnished there are or are not justified by principle." At another place he says, of the locality of the debt, "But we do not think it necessary to resort to the idea at all, or to give it important distinction." On the contrary, the following language from him strongly indicates that, at least, the domicile of the garnishee determines the jurisdiction of the debt sought to be subjected: "The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a nonresident to the defeat of his creditors. To do this, he must go to the domicile of his debtor, and can only do it under the laws and procedure in force there. This is a legal necessity, and considerations of situs are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. He, and he only, has something in his hands. That something is the res, and gives character to the action as one in the nature of a proceeding in rem." By the word "debtor" here he means the garnishee, the man owing the debt sought to be subjected by attachment. He quotes from the opinion in Andrews v. Clarke, 1 Carth. 25, passing upon the law of attachment under the custom of London, where it is said: "For it was always the custom in London to attach debts upon bills of exchange and goldsmiths' notes, etc., if the goldsmith who gave the note on the person to whom the bill is directed liveth within the city, without any respect had to the place where the debt was contracted." In that case a

Pennsylvania R. Co. v. Rogers

prohibition was denied which had been asked, upon the grounds that the cause of action did not arise in London, but was made in the county of Middlesex. What Mr. Justice McKenna was disposing of as fallacious and unsound was the proposition, advanced by a Kansas judge, that the situs of the debt is with the man to whom it is due, and not with the man who owes it. He not only abstains from questioning the soundness of the decisions holding that a debtor temporarily in a state cannot be garnished, but he shows also that the case he was considering was within that principle, for he says, "There is no fact of change of domicile in the case. The plaintiff in error was not temporarily in Iowa. It was an Iowa corporation and a resident of the state, and was such at the time the debt sued on was contracted." This opinion does not militate against the principle so generally recognized, but rather upholds it.

This question seems never to have been raised nor passed upon in this state. But two cases, not like, but in some respects similar to this, have been decided. *Mahany v. Kephart*, 15 W. Va. 609, and *Stevens v. Brown*, 20 W. Va. 450. By reference to them it will be seen that in each the Burlington & Ohio Railroad Company was proceeded against as garnishee and debtor of a nonresident person, and that the jurisdiction was sustained upon the ground that said railroad company maintained and operated its road in the state of West Virginia; and it was pointed out in the opinion that it had been held in *Hart v. Railroad Co.*, 6 W. Va. 336, that the acts of the Legislature had conferred corporate powers and privileges upon said railroad company, and that said railroad company is an incorporated railroad company within the boundaries of this state, and that the court would take judicial notice of the fact. It is thus seen that it was found and expressly determined, in order to uphold the jurisdiction of the court, that the railroad company was within the state of West Virginia, and subject to its process. While it is not said that it was domiciled in this state, somewhat stronger language was used, importing that it was substantially a domestic corporation. In *Mahany v. Kephart*, the following is quoted from *Drake on Attach.* § 479: "Where, as is sometimes the case, a corporation is chartered by two or more states, it is not in any of those states a foreign corporation, and may be subjected to garnishment in any of them, though its office and place of business be not in the state in which the garnishment takes place." The other case, *Stevens v. Brown*, was disposed of, and the jurisdiction sustained, upon the same grounds. As tending to uphold their position, counsel for defendants in error quote the following from the opinion in *Beirne v. Rosser*, 26 Grat. 538, which was quoted also in *Mahany v. Kephart*: "All actions are either local or transitory. Real actions are local, and personal actions are transitory. This is a personal action, being for the recovery of

damages for the breach of a contract, and is therefore a transitory action. It is a general principle of the common law that a transitory action can be brought against a party wherever he may be found and served with process, no matter where he may reside, or where the execution may have arisen." This has no shadow of application. It was quoted to uphold the action of the court in giving a personal judgment against Kephart, a nonresident who had appeared to the action, being the defendant, not the garnishee, in the action.

The principle which forbids garnishment of a nonresident individual temporarily in the state applies to foreign corporations. Unless doing business within the state, they are not subject to garnishment therein. This is the only extent to which the rule is relaxed in such cases. "Owing to the growth of corporations, and the transaction of their business in jurisdictions other than those in which they were incorporated, there are statutes in practically all jurisdictions which authorize the service of process upon certain officers or agents of foreign corporations, and a foreign corporation, transacting business in a jurisdiction in which such statutes exist, impliedly submits itself to the jurisdiction of the courts therein, and may be summoned as garnishee if corporations and nonresident individuals are liable to be so summoned." 14 Am. & Eng. Enc. Law (2d Ed.) 816. Observe, that this rule says they may be summoned. It does not say that, by summoning them under such circumstances, jurisdiction of the res is obtained. It is not enough in such case, to confer such jurisdiction, that jurisdiction of the person of the garnishee may be obtained, any more than in the case of an individual. "A corporation frequently does business at the same time in several different states, and it is liable to garnishment in any one of them where it has an officer upon whom process may be legally served, if it has property of the defendant there. If a corporation is chartered in different states, it has corporate existence in each, as a matter of course, and may be treated in each as a resident. But if not thus chartered, so as to be, in contemplation of law, a resident of the state, it comes under the rule governing natural persons." Waples on Attach. § 391. In this statement, Waples appears to be fully sustained by the numerous cases cited in support of the text from the American and English Encyclopædia of Law last above quoted. In most of these cases it appears that the foreign corporations garnished had places of business where they transacted their corporate business with agents in charge of it as their own business. In some, they were railroad companies operating lines through the states under legislative permission, and subjected by legislation to the liabilities of domestic corporations. In some, the statutes expressly made foreign corporations liable to garnishment. Generally, they uphold the propositions quoted from Waples.

The garnishee sought to be held by the justice in this state

Pennsylvania R. Co. v. Rogers

admitted in its answer that it owed the defendant \$24. As it was bound to answer fully, if at all, and make a full disclosure of all the estate of defendant in its hands, and this answer was not controverted or excepted to, the answer amounts to a denial that the railroad company had anything in its hands except said sum of money, and substantially denied that that sum was payable in the state of West Virginia, by averring that it was payable to the defendant in the state of Pennsylvania. By the same answer it averred that it was a citizen of the state of Pennsylvania. Being uncontroverted, the answer must be taken as true as to all these matters. It negatives any liability to the defendant in West Virginia either for money or on account of property, and also the jurisdiction of the court because of the nonresidency of the garnishee. The petition admits, however, that the railroad company had some connection with the Star Union Line of which McCormick was agent, but denies that the railroad company itself was doing business in the state. The existence of this Star Union Line and its operations in the county of Ohio is the only ground for saying that the Pennsylvania Railroad Company does business in the state. This seems to be fully admitted. It is not contended that the railroad company has complied with the statutory requirements giving to foreign corporations the rights, and subjecting them to the liabilities, of domestic corporations. So it must be determined whether its connection with the Star Union Line amounts to a doing business within the state so as to make it liable to garnishment. The Star Union Line is a sort of joint traffic arrangement maintained by several railroads to facilitate the handling and forwarding of freight. One of these is the garnishee company. It appoints the president of the Star Union Line, and he appointed McCormick, the agent in charge, and it is said McCormick solicits freight for the Pennsylvania Railroad Company. The garnishee company contributes to the expenses and maintenance of this arrangement, and in that way to the payment of the agent for his services. It does not amount to a doing business within the state within the meaning of the law of garnishment. The Pennsylvania Railroad Company has not in any sense made itself a West Virginia corporation by contributing to the maintenance of this joint traffic arrangement, although it may in some sense—a limited sense—amount to a doing business within the state. It could not be regarded as being within the state otherwise than transiently. It operates no lines here, runs no cars here, and performs none of its business as a common carrier within the state. Whether it would amount to doing business within the meaning of the statute prohibiting a foreign corporation from doing business without complying with certain regulations is not the test. To do business within the meaning of the law of garnishment, it must bring itself within the state in some substantial way. It is not

Pennsylvania R. Co. v. Rogers

enough, as has been said, that process may be served upon it. That only gives jurisdiction in personam, not necessarily jurisdiction of the claim sought to be reached in its hands. This view is undoubtedly supported by the great weight of authority. In some states, nonresidents are by statute expressly made liable to the process of garnishment, and many cases are to be found in which the decisions are based upon these statutes. Where they do not exist, the foreign corporation held as garnishee is held to be within the state in the transaction of its ordinary corporate business, and that holding is based, in the cases of railroads, in almost every instance, upon the operation of a line of railroad within the state, and not merely upon the presence of an agent whose business it is to solicit freight or to manage a joint traffic arrangement which is handled over the line of some other railroad within the state. *Thomp. Com. Cor.* vol. 7, §§ 8069-8073, fully supports this decision. For a full discussion of the subject and a conclusion in exact accord with ours, see *Freeman on Executions*, § 161a.

The justice was without jurisdiction for another reason. The return of service of the order of attachment is clearly insufficient. It does not show that McCormick, the agent, resided in the county of Ohio. The service was evidently made under section 35 of chapter 50 of the Code. Section 38 of the same chapter provides that service, under any of the preceding four sections, shall be made in the county in which the person served resides, and that the return must show that he resides in the county. It says further that, if the return does not show this, the service shall not be valid. In *Taylor v. Railroad Co.*, 35 W. Va. 328, 13 S. E. 1009, it has been decided that a judgment based on a return of service not showing that fact is void, there having been no appearance. To the same effect is *Frazier v. Railroad Co.*, 40 W. Va. 224, 21 S. E. 723; and the doctrine is approved in *Hopkins v. Railroad Co.*, 42 W. Va. 535, 26 S. E. 187, and *Ry. Co. v. Wright*, 50 W. Va. 534, 1 S. E. 147.

This defect of service would be cured by an appearance in an action in personam, and especially in a justice's court, for section 33 of chapter 50 of the code provides that an appearance by the defendant is equivalent to personal service. But it does not show that an appearance by a garnishee shall be equivalent to personal service, and to construe it to mean that would do violence to the spirit of the law of garnishment. Nor does the statute anywhere provide that a garnishee may confer jurisdiction by his appearance without service of process. Section 197, c. 50, relating to that subject, requires the delivery of a copy of the order of attachment to the person designated by the plaintiff as garnishee, and there is no provision for his appearance until after that is done. Why is this? The garnishee is a stakeholder, and must be impartial. He cannot voluntarily place his creditor's debt within the

Pennsylvania R. Co. v. Rogers

jurisdiction of a court to the end that it may be taken by some other person. The debt must be arrested and detained in his hands by the service of process, and that must be a sufficient service to hold it. "Garnishment rests wholly upon judicial process, and depends upon the due pursuit of the steps prescribed by law for its prosecution. It can borrow no aid from volunteered acts of the garnishee. Such acts will be regarded as void, so far as they interfere with the rights of third parties. Thus, under a law requiring the garnishment process to be personally served on the garnishee, it was held that he had no right to do so, and that the acceptance or waiver of service was a nullity as against other attaching creditors, and equally so as against an assignee of the debt in respect of which the garnishee was charged. So, where the statute prescribed that process should be served on a corporation by service on the president, or any director or manager thereof, an admission of service of garnishment by the attorney of a corporation was held insufficient to give the court jurisdiction of the corporation. So, where no legal service of process had been made on a corporation as garnishee, and yet the secretary of the corporation appeared and answered, and made no objection to the sufficiency of the service, it was held that no judgment could be rendered against the corporation. So, where a garnishment was made after the return day of the writ, and the garnishee appeared and answered, and judgment was rendered against him, it was decided that the process under which he was summoned had no validity, and that he therefore stood as though he had voluntarily appeared and answered interrogatories without notice, and the judgment against him was set aside as against other creditors." Drake on Attach. § 451b. "The garnishee, in the eyes of the law, is a mere stakeholder, a custodian of the property attached in his hands; he has no pecuniary interest in the matter; he has no cost to pay, and therefore none to save; his business is to let the law take its course between the litigants; he has no right to accept or waive service of the proceeding, thereby favoring one party at the expense and injury of another, and creating actually a privilege with priority in favor of one creditor to the prejudice of another." Schindler v. Smith, 18 La. Ann. 476. To the same effect, see Wade on Attach. § 336. It is to be remembered that there has been no service of process on the defendant.

The whole case rests upon the sufficiency of the proceeding against the garnishee, to arrest in its hands the right of the defendant to the debt sought to be subjected. In such case, the court's jurisdiction depends upon something having been seized. Without it, no suit can be maintained against the garnishee. The case is quite different from one in which the defendant has been served or has appeared, and is in a position to take his own exceptions to the proceedings on the ground of insufficiency. Waples on Attach. § 474. "The

Pennsylvania R. Co. v. Rogers

return of the writ must state all of the facts that are essential to a valid service thereof. It must be certain, and must show that the property was attached in the hands of the garnishee, or the court acquires no jurisdiction over the res. The return should also state on whom the writ was served, and the time when service was made. It must recite the performance of those acts required by the statute as conditions precedent to a valid service in garnishment." 9 Enc. Pl. & Pr. 827, 828. "In order that the defendant may be concluded by the proceedings, it has been held necessary that there should have been a proper service of process on the garnishee. The latter has no power to affect the rights of the defendant by voluntarily appearing as garnishee, and, if he does voluntarily appear, the proceedings will afford no protection to him against subsequent liability to the defendant." 14 Am. & Eng. Enc. Law (2d Ed.) 885.

Counsel for defendant in error insist that jurisdiction is admitted by the plaintiff in error in its petition for the writ of prohibition. As before stated, that petition shows that employees of the company have instituted suits in equity in Pennsylvania to enjoin the petitioner from paying over their wages in satisfaction of the judgments rendered by Phillips in Ohio county, W. Va. In the petition is incorporated the record of one of these chancery causes, namely, O. C. Galbraith v. R. M. Rutter and the petitioner. The answer of the railroad company in that suit set up the Ohio county judgment against Galbraith, and insisted upon its validity as a defense in the equity suit, and averred that the claim of Rutter was assigned to Rogers; that the attachment was issued by Phillips, "justice of the peace of Washington district, Ohio county, West Virginia, a competent tribunal under the laws of the state of West Virginia, having jurisdiction of the subject-matter; and that the summons was duly served, and the attachment was duly served on an agent of the defendant, garnishee, and that the proceedings affecting such jurisdiction are regular." The Pennsylvania court record further shows that evidence was taken to sustain the allegations of the answer, and that the court found against the railroad company as to several matters of fact, and that the railroad company excepted to the findings of the court in not holding that McCormick was in its employ; that he was district freight solicitor, whose principal duty it was to solicit freight for the defendant; that the Union Line was the through freight business of the defendant, and a bureau of the defendant for conducting its through freight business; that McCormick had an office in Wheeling, W. Va., as freight solicitor of the Pennsylvania Railroad Company; and that the Pennsylvania Railroad Company had no other office in Wheeling. This cannot amount to an estoppel. "The pleadings of a party in one suit may be used in evidence against him in another, not as an estoppel, but as proof, open to rebuttal

Pennsylvania R. Co. v. Rogers

and explanation, that he admitted certain facts. But in order to bring such admissions home to him, the pleadings must be either signed by him, or it must appear that it was within the scope of the attorney's authority to admit such facts." *Buzard v. McAnulty*, 77 Tex. 438, 14 S. W. 138; *Perry v. Simpson*, 40 Conn. 313; *Tabb v. Cabell*, 17 Grat. 160. It does not preclude or estop the petitioner on the ground of having taken an inconsistent position in judicial proceedings, for the reason that it does not appear to have obtained any advantage from it or injured the other party to this suit. Taken altogether, as a part of the petition, it only shows that the petitioner set up the Ohio county judgment as a defense in the Pennsylvania court, and that that court refused to find from the evidence offered in support of the answer certain facts, which, if found, as contended for by the railroad company, fall far short of establishing that said company is within the state of West Virginia in such sense as to make a debt due from it to a nonresident subject to condemnation by garnishment in the courts of this state. It is said that the agency of McCormick is admitted. Suppose it is; he is an agent, with an office in the city of Wheeling, whose business it is, not to operate a railroad in this state, nor to transact the ordinary business of the Pennsylvania Railroad Company here, but to solicit freight for it. The answer does not admit that the railroad company is a West Virginia corporation, or is doing business within the state as a foreign corporation, nor that the debt due from it is liable to garnishment in this state. True, it says that the justice's court is a competent tribunal, having jurisdiction of the subject-matter. That is a conclusion of law rather than an admission of fact. It also says the proceedings affecting jurisdiction are regular. That, too, is largely a conclusion of law. Treating these admissions as evidence on the questions of fact set up in the petition, eliminating from them the matters of law included, they do not overthrow the averments of the petition that the railroad company, and especially the debt due from it, are not subject to garnishment in this state, as insisted upon in its answer filed in the justice's court. The pleadings in the Pennsylvania equity cause are entitled to but little consideration here as admissions. Speaking of judicial admissions made in pleadings, 1 Am. & Eng. Enc. Law (2d Ed.) 720, says, "They are admissible in behalf of either the adverse party or a stranger, provided they were sworn to by the client personally, or were drawn under his special instructions." The answer was filed by attorneys and sworn to by one of them, and there is nothing to show that it was prepared under instructions from anybody having authority to bind the railroad company generally. On the same page of the same book, in a note, it is said: "In *Boileau v. Rutlin*, 2 Exch. 665, it was held that pleadings in equity, as well as at common law, are not to be treated as positive allegations of the

Pennsylvania R. Co. v. Rogers

truth of the facts therein for all purposes, but only as statements of the case of the party, to be admitted or denied by the opposite side, and, if denied, to be proved and ultimately submitted for judicial decision." This is peculiarly applicable here, where it clearly appears that the railroad company against whom it is attempted to maintain this admission is struggling to protect itself against double liability for a great number of claims asserted against it in the courts of two different states. The record in the case relied upon was not made between the parties to the case in which the transcript of the docket of the justice is filed with the petition—the only one that can be considered here. Hence it is not the same suit, nor between the same parties; and for that reason is entitled to less weight than it would otherwise be entitled to. 1 Am. & Eng. Enc. Law (2d Ed.) 719, 720.

As the justice was without jurisdiction of the res (the real subject-matter) for two reasons: First, that the service of process was invalid, and not cured by appearance, although appearance was made; and, second, because the subject-matter itself is not in the state, nor subject to the process of its courts—the writ or prohibition prayed for ought to have been awarded by the court below. But it is insisted that, although jurisdiction was not acquired, the justice had the power to consider whether he had jurisdiction, and to decide the question of jurisdiction; and that, if he did decide that he had jurisdiction, when in truth he had not, his action in so holding was not without jurisdiction, nor an act in excess of jurisdiction, but simply an error to be corrected on appeal, and not an act without jurisdiction, or in excess thereof, subjecting the court and the parties to the writ of prohibition. For this, *Sperry v. Sanders*, 50 W. Va. 70, 40 S. E. 327, and *Howland v. Railway Co.*, 134 Mo. 479, 36 S. W. 29, are relied upon. The *Sperry Case* is not applicable. It only holds that a court has jurisdiction to determine whether a judgment is valid or invalid. That is purely an exercise of jurisdiction, the parties being before the court, and the validity of the judgment being brought into the court upon the proper pleadings. The *Howland Case* does not sustain the contention, for it asserts that jurisdiction must be obtained, that is, power to hear and determine. It must have jurisdiction, not only of the person, but of the res, after which what is done by the court is merely the exercise of jurisdiction. Works on Courts and Jurisdiction, at page 634, says, "Prohibition will lie to prevent action where the court has not jurisdiction of the person, as well as in cases where there is an absence of jurisdiction of the subject-matter." It must have jurisdiction of the subject-matter. 16 Am. & Eng. Enc. Pl. & Pr. 1094, 1110. Writ lies for excess of territorial jurisdiction. *Id.* 1120. It is necessary for the defendant, as a general rule, to plead and show want of jurisdiction before applying for a prohibition. But omission to do this does not

Pennsylvania R. Co. v. Rogers

prevent its issuance, when the declaration shows that the cause of action did not arise *infra jurisdictionem*, or that its subject-matter is not proper for the judgment and determination of the court, or if the defendant was prevented by artifice, etc., from pleading want of jurisdiction. Bacon, Abr. (Ed. 1852) vol. 8, p. 232. The answer of the garnishee, setting up its nonresidence, was not controverted, so far as the record shows, and must be taken as true. That establishes a want of jurisdiction by showing that the subject-matter is beyond the territorial jurisdiction of the court. It is an utter want of jurisdiction, in defiance of which the justice went on and gave judgment. Had the subject-matter been within the territorial jurisdiction of the court, jurisdiction of it was not obtained, because there was no service upon the garnishee. What purports to be the return of service being void under the statute and decisions of this court, it could not confer any jurisdiction of the subject-matter, although the garnishee appeared and subjected itself to the jurisdiction of the court. Where the court has jurisdiction of the subject-matter, and the question of its jurisdiction of the person turns upon some fact to be determined by the court, its decision that it has jurisdiction, if wrong, is an error, and prohibition is not the proper remedy. Works on Courts and Jurisdiction, 634. But that is not the status of these matters. The return of service, as has been shown, is void on its face, and gives no jurisdiction of the subject-matter, even if the subject-matter were within the territorial jurisdiction of the court. It is not a mere irregularity. It is a statutory requisite of the return, for omission of which the statute says, not that the return is defective, insufficient, or invalid, but that "the service shall not be valid."

It is also objected that the prayer of the petition is defective because too general. The substance of it has been given in the statement of the case. It seeks the writ, as to all of the numerous cases mentioned in the list filed, as an exhibit with the petition: It can only go, of course, if at all, as to the one case, the record of which is exhibited, namely, that of *Rogers v. Snyder* and the railroad company. This court cannot presume that certain things appear, and certain defenses were made, in the other cases. They must be shown. After setting up and showing what has been done generally in these cases, including the particular case, the record of which is exhibited, it prays that Phillips and Rogers may be prohibited from proceeding in their said acts and proceedings. This, of course, embraces that particular case, although it is not specifically named in the prayer. The petition alleges that in doing the acts complained of the justice has acted without any jurisdiction, and that, if not restrained, he will continue his unauthorized proceedings. Although general, and somewhat indefinite in its terms, the petition and prayer are, in substance and effect, sufficiently certain.

Southern Ry. Co. v. Allison

It is insisted that the decisions in the cases of Mahany v. Kephart and Stevens v. Brown, to which reference has been made, ought to be re-examined, and overruled in so far as they hold that the exemption laws of a foreign state have no extraterritorial force or virtue, and will not be enforced by the courts of this state. As tested by the great weight of American authority, these two decisions are right, and no good reason is presented why they should be overruled.

The court below sustained a motion to quash the rule and dismiss the petition for insufficiency of cause shown for the issuance of the writ. The judgment, therefore, stands as one upon demurrer. It must be reversed, for the reasons shown, but judgment cannot now be entered awarding the writ of prohibition. It is only held that the petition is sufficient, and that the court below erred in not so holding, and in quashing the rule and dismissing the petition. Hence, an order will be entered reversing the judgment, and remanding the case to the circuit court of Ohio county for further proceedings in accordance with the principles here announced and further according to law.

SOUTHERN RAILWAY COMPANY, Plff. in Err., v. JOHN H. ALLISON.

(*Argued April 8, 1903. Decided May 18, 1903.*)

[23 Sup. Ct. Rep. 713.]

Federal Jurisdiction—Diverse Citizenship—Suit against Foreign Railroad.

A foreign railroad corporation does not become a citizen of North Carolina, so far as to affect the jurisdiction of the Federal courts upon the question of diverse citizenship, by complying with N. C. Pub. Acts 1899, chap. 62, which declares that such a corporation becomes a domestic corporation by filing with the secretary of state duly authenticated copies of its charter and by-laws.

Same—Same—Effect of Domestication.

The right of a foreign railroad corporation under the act of Congress of August 13, 1888, chap. 866, § 2 (25 Stat. at L. 433), to remove to a Federal court, for prejudice or local influence, a suit brought in a court of North Carolina by a citizen of that state, is not defeated because such corporation has complied with the provisions of N. C. Pub. Acts 1899, chap. 62, which declares that foreign railroad corporations shall become domestic by filing with the secretary of state duly authenticated copies of their charters and by-laws.

In Error to the Supreme Court of the State of North Carolina to review a judgment which affirmed a judgment of the Superior Court of McDowell County entered on a verdict of a jury in favor of plaintiff in an action to recover from a railroad company the damages suffered by reason of its negligence. Reversed.

See same case below, 129 N. C. 336, 40 S. E. 91.

Statement by MR. JUSTICE PECKHAM:

The supreme court of the state of North Carolina affirmed

Southern Ry. Co. v. Allison

a judgment against the railway company, which was entered on a verdict of a jury upon a trial in the state court, and the railway company has brought the case here by writ of error.

The plaintiff below brought his action in the state court against the railway company to recover damages suffered by reason of the alleged negligence of the defendant. The defendant answered, and averred that it was a corporation created and organized under the laws of the state of Virginia; it denied the various allegations of the complaint as to its negligence and as to the damages suffered by the plaintiff, and also set up as a defense plaintiff's contributory negligence. After answer and under the provisions of the 2d section of the act of Congress, chapter 866, approved August 13, 1888 (25 Stat. at L. 433), the defendant, alleging that it was a corporation created under the laws of Virginia, submitted a petition to the United States circuit court in North Carolina, for the removal of the case from the state to the United States court, and the ground for removal, as stated in the petition, was because of "prejudice or local influence" to such an extent that it would "not be able to obtain justice in such state court, or in any other state court to which the said defendant may, under the laws of the state, have the right, on account of such prejudice or local influence, to remove said cause." The petition was supported by an affidavit that set up facts from which the court might find that defendant could not obtain justice in the state court.

The circuit court decided that the proof submitted to it was sufficient; that defendant was a citizen of Virginia, and that it could not, on account of local prejudice and influence, obtain a fair trial in the state court, and it, therefore, ordered the removal of the cause to the United States circuit court for the western district of North Carolina. The court also ordered that its clerk should certify to the state court the order of removal, "together with copies of the petition, bond, and affidavit, to the end that the state court may be advised of the action of this court and of its order of removal, and to the further end that the said state court may proceed no further with the said suit or action, and to the end also that the said state court may direct the clerk of the superior court of the county of McDowell to make a full and complete transcript of the record of said action and to certify the same to this court for trial."

Upon the filing of this order in the state court that court declined to grant the motion to surrender jurisdiction, holding that the case could not be legally removed to the circuit court of the United States, and it made the following order:

"In this case it appears to the court that the circuit court of the United States has caused an order for the removal of the case to the circuit court of the United States, upon petition setting forth that the defendant is a nonresident of the state of North Carolina; and it further appearing to the

Southern Ry. Co. v. Allison

court, by the admission of defendant, through its counsel, that the defendant has complied with the terms of the act of the legislature of the state of North Carolina, being chapter 62 of the acts of the general assembly of North Carolina at its session of 1899: It is thereupon considered by the court that the defendant is a corporation of this state by virtue of said act, and that it is not entitled to remove this cause to the Federal court. It is further considered by the court that the courts of the state of North Carolina have jurisdiction of this cause, and this court declines to surrender jurisdiction thereof. It is ordered by the court that a copy of this order be sent to the clerk of said circuit court of the United States by the clerk of this court."

The act of the legislature of North Carolina, referred to in the foregoing order, is set forth in full in the margin.*

It was admitted that defendant had complied with the terms of the act before the cause of action set out in the complaint of plaintiff had accrued.

When the case was thereafter called for trial in the state court, a motion was again made to dismiss the same from that court because of the removal to the United States circuit court. The motion was again denied, and an exception taken

*(Chapter 62, Public Acts of 1899.)

The General Assembly of North Carolina do enact:

Sec. 1. That every telegraph, telephone, express, insurance, steamboat, and railroad company incorporated, created, and organized under and by virtue of the laws of any state or government other than that of North Carolina, desiring to own property or to carry on business, or to exercise any corporate franchise whatsoever in this state, shall become a domestic corporation of the state of North Carolina by filing in the office of the secretary of state a copy of its charter, duly authenticated in the manner directed by law for the authentication of statutes of the state or country under the laws of which such company or corporation is chartered and organized, and a copy of its by-laws duly authenticated by the oath of its secretary. Such corporation shall pay therefor to the secretary of state, to be turned over by him into the state treasury, such fees as are or may be required by law.

Sec. 2. That if any such charter or by-laws, or any part thereof, filed in the office of the Secretary of State, shall be in contravention or violation of the laws of this state, such charter or by-laws, or such part thereof as are in conflict with the laws of this state, shall be null and void in this state.

Sec. 3. That when any such corporation shall have complied with the provisions of this act above set out it shall thereupon immediately become a corporation of this state, and shall enjoy the rights and privileges and be subject to the liability of corporations of this state the same as if such corporation had been originally created by the laws of this state. It may sue and be sued in all the courts in this state as fully as if such corporation were originally created under the laws of the state of North Carolina.

Sec. 4. That on and after the 1st day of June, 1899, it shall be unlawful for any such corporation to do business, or attempt to do business, in this state without having fully complied with the requirements of this act.

Sec. 5. Any such corporation violating any of the provisions of this act shall forfeit to the state of North Carolina a penalty of \$200 for

Southern Ry. Co. v. Allison

by the defendant. The case was then tried in the state court, and resulted in a verdict for the plaintiff, upon which judgment was entered, and exception taken to the verdict and to the entry of judgment. Defendant appealed from the judgment to the supreme court of the state of North Carolina, and assigned as error, among other things, the refusal of the trial court to recognize the removal, and its trial of the cause after it had been legally removed to the Federal court. The supreme court of North Carolina affirmed the judgment (129 N. C. 336, 40 S. E. 91), and decided against the right claimed by defendant to a removal of the cause under the statute of the United States above referred to.

Messrs. W. A. Henderson, F. H. Busbee, and Charles Price for plaintiff in error.

Messrs. E. J. Justice and J. C. Pritchard for defendant in error.

MR. JUSTICE PECKHAM, after making the foregoing statement of facts, delivered the opinion of the court:

The state court refused to recognize the validity of the order of removal of this case to the Federal court solely because of the state statute, and because of the admitted compliance of

each and every day after the 1st day of June, 1899, on which such corporation shall have continued to operate and do business without having complied with the requirements of this act. Such penalty shall be recovered by the treasurer of the state for the benefit of the state of North Carolina, and it shall be his duty to sue for such forfeitures in the superior court of Wake county as the same accrue.

Sec. 6. No telegraph, telephone, express, insurance, steamboat, or railroad company, which is a foreign corporation of another state doing business in North Carolina, shall be allowed to sue in the courts of North Carolina on or after June 1st, 1899, until such foreign corporation has become a domestic corporation, either by a special act of the legislature, or under the provisions of this act.

Sec. 7. No such foreign corporation, mentioned in the preceding section of this act, shall be allowed to enter into a contract in the state of North Carolina on or after the 1st day of June, 1899, nor shall any such contract heretofore or hereafter made, or attempted to be made and entered into by such corporation in the state of North Carolina, be enforceable by such corporation unless such corporation shall, on or before the 1st day June, 1899, become a domestic corporation under and by virtue of the laws of North Carolina.

Sec. 8. Any such corporation violating the provisions of this act by doing any business in this state without first becoming a domestic corporation in the manner prescribed by law shall, in addition to the penalty prescribed in § 5 of this act, forfeit a penalty of \$500 for each day any such business shall be done by it in the state of North Carolina on or after the 1st day of June, 1899. The amount so forfeited under the provisions of this section shall be recovered by the treasurer of North Carolina, and it shall be the duty of said state treasurer to institute suit for same in the superior court of Wake county: Provided, The business contemplated in this section of this act does not embrace such business as is strictly the business of interstate commerce.

Sec. 9. That all laws and clauses of laws in conflict with the provisions of this act are hereby repealed.

Sec. 10. That this act shall be in force from and after its ratification. Ratified the 10th day of February, A. D. 1899.

Southern Ry. Co. v. Allison

defendant with its provisions. It held that by complying with the statute the defendant became a citizen of North Carolina, so far, at least, as to prevent it from applying for removal as a citizen of another state. We, therefore, assume the sufficiency of the facts to warrant the decision of the circuit court of the United States removing the case to that court, provided the defendant company was a citizen of Virginia and not become a citizen of North Carolina by virtue of its compliance with the state statute.

The ruling of the state court, by which it proceeded to judgment in the case notwithstanding the order of removal to the Federal court, is reviewable here under § 709, Revised Statutes (U. S. Comp. Stat. 1901, p. 575). *Stone v. South Carolina*, 117 U. S. 430, 29 L. Ed. 962, 6 Sup. Ct. Rep. 799; *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 556, 40 L. Ed. 536, 16 Sup. Ct. Rep. 389.

Two propositions were argued at the bar: (1) Whether the state court had the right to pass upon the question of the validity of the order of the circuit court of the United States removing the case to that court. (2) Did the defendant company, which was originally incorporated in the state of Virginia, have the right, as a citizen of Virginia, to remove the case into the Federal court, notwithstanding the defendant company had complied with the statute of North Carolina, which declared that upon doing the things therein mentioned the defendant became a domestic corporation of North Carolina?

In the view we take of this case, it is unnecessary to dwell upon the first of these questions. We therefore address ourselves to the second.

The statute of North Carolina provides, in substance, that a railroad company incorporated under the laws of any state or government, other than North Carolina, which desires to own property or carry on business, or to exercise any corporate franchises within that state, shall become a domestic corporation of the state of North Carolina "by filing in the office of the secretary of state a copy of its charter, duly authenticated in the manner directed by law for the authentication of statutes of the state or country under the laws of which such company or corporation is chartered or organized, and a copy of its by-laws duly authenticated by the oath of its secretary." Section 3 of the act provides:

"That when any such corporation shall have complied with the provisions of this act (above set out) it shall thereupon immediately become a corporation of this state and shall enjoy the rights and privileges, and be subject to the liability, of corporations of this state the same as if such corporation had been originally created by the laws of this state. It may sue and be sued in all courts of this state, and shall be subject to the jurisdiction of the courts of this state as fully as if such

Southern Ry. Co. v. Allison

corporation were originally created under the laws of the state of North Carolina."

It is further provided by § 4 that it shall be unlawful for such foreign corporation to do business, or attempt to do business, in North Carolina after the 1st day of June, 1899, without having fully complied with the requirements of the act. It is admitted that the company did comply with the provisions of the act in relation to filing its charter, by-laws, etc., with the secretary of state.

It early became material to inquire into the nature of the status of corporations with regard to the jurisdiction of the Federal courts under the Constitution and laws of the United States. A recent statement of the law on that subject is contained in the case of *St. Louis & S. F. R. Co. v. James*, 161 U. S. 545, 40 L. Ed. 802, 16 Sup. Ct. Rep. 621. It was said by Mr. Justice Shiras, in delivering the opinion of the court in that case, that, after considerable contention in the courts, it was finally determined by this court that the citizenship of a corporation was that of the state originally creating it, and that it was a presumption of law that the members of the corporation were citizens of the same state.

The facts upon which the decision of the court in that case was based, so far as important to be here observed, were these: The St. Louis & San Francisco Railway Company was a corporation originally created under the laws of the state of Missouri, and it operated a railroad from Monett in the state of Missouri to the southern border of that state. Subsequently, and under provisions of the laws of Arkansas, it entered that state for the purpose of operating its road therein from the southern boundary of the state of Missouri to Fort Smith in the state of Arkansas; the portion of the railroad in Arkansas was operated by the leasing of a railroad already or partly built in that state. The state of Arkansas had provided by its legislation that before any railroad corporation of any other state or territory should be permitted to avail itself of the benefits of the act allowing the purchasing or leasing of any road within that state, the foreign corporation should "file with the secretary of state of this state a certified copy of its articles of incorporation, if incorporated under a general law of such state or territory, or a certified copy of the statute laws of such state or territory incorporating such company, where the charter of such railroad corporation was granted by special statute of such state: and upon the filing of such articles of incorporation or such charter with a map and profile of the proposed line, and paying the fees prescribed by law for railroad charters, such railroad company shall, to all intents and purposes, become a railroad corporation of this state, subject to all of the laws of the state now in force or hereafter enacted, the same as if formally incorporated in this state, anything in its articles of incorporation or charter to the contrary notwithstanding, and such acts on the part

Southern Ry. Co. v. Allison

of such corporation shall be conclusive evidence of the intent of such corporation to create and become a domestic corporation: And provided further, That every railroad corporation of any other state, which has heretofore leased or purchased any railroad in this state, shall, within sixty days from the passage of this act, file a duly certified copy of its articles of incorporation or charter with the secretary of state of this state, and shall, thereupon, become a corporation of this state, anything in its articles of incorporation or charter to the contrary notwithstanding; and in all suits or proceedings instituted against any such corporation process may be served upon the agent or agents of such corporation or corporations in this state, in the same manner that process is authorized by law to be served upon the agents of railroad corporations in this state organized and existing under the laws of this state."

The railroad company, pursuant to that act, filed with the secretary of state of the state of Arkansas a duly certified copy of its articles of incorporation under the laws of Missouri. After this had been done and while the company was operating its railroad from Monett, Missouri, to Fort Smith, Arkansas, one Etta James brought an action in the circuit court of the United States for the western district of Arkansas against the company for negligence in maintaining a switch track at Monett, in Barry county, Missouri, so near its tracks that the husband of plaintiff was struck and killed by it on July 3, 1889, while employed as a fireman on one of the company's engines. The plaintiff was the widow and sole heir at law of her husband, and resided at Monett, and was a citizen of the state of Missouri. She recovered a verdict in the United States circuit court in Arkansas, and the cause was taken to the circuit court of appeals for the eighth circuit by the railroad company, which claimed that the circuit court of Arkansas had no jurisdiction, because the railroad company was a citizen of Missouri and the plaintiff was a citizen of the same state. That court, desiring instructions from the Supreme Court of the United States before deciding the case, propounded the following questions:

"1. In view of the provisions of the act of the general assembly of Arkansas, approved March 13, 1889, did the St. Louis & San Francisco Railway Company, by filing a certified copy of its articles of incorporation under the laws of Missouri with the secretary of state of Arkansas, and continuing to operate its railroad through that state, become a corporation and citizen of the state of Arkansas?

"2d. In view of the provisions of the act of the general assembly of Arkansas, approved March 13, 1889, did the St. Louis & San Francisco Railway Company, by filing a certified copy of its article of incorporation under the laws of Missouri with the secretary of state of Arkansas, and continuing to operate its railroad

Southern Ry. Co. v. Allison

through that state, become a citizen of the state of Arkansas, so as to give the circuit court of the United States for the western district of Arkansas jurisdiction of this action, in which the defendant in error was and is a citizen of the state of Missouri?

“3d. In view of the provisions of the act of the general assembly of Arkansas, approved March 13, 1889, did the St. Louis & San Francisco Railway Company, by filing a certified copy of its articles of incorporation under the laws of Missouri with the secretary of state of Arkansas, and continuing to operate its railroad through that state, become a citizen of the state of Arkansas, so as to give the circuit court of the United States for the western district of Arkansas jurisdiction of this action, in which defendant in error was and is a resident and citizen of the state of Missouri, and the cause of action accrued in the state of Missouri, and arose from an accident that resulted from the operation of the railroad of the company in that state?

“4th. In view of the facts hereinbefore set forth, did the circuit court of the United States for the western district of Arkansas have jurisdiction of this action?”

After a full examination of the prior cases Mr. Justice Shiras, speaking for the court, answered the second question in the negative, observing that such answer rendered it unnecessary to answer the other questions.

Here was a corporation originally incorporated in the state of Missouri going into the state of Arkansas and operating a railroad in that state by leasing a portion of it therein and complying with a statute which provided that, upon filing a certified copy of its articles of incorporation with the secretary of state of Arkansas, it should be regarded as formally incorporated in that state, and it should thereby become a domestic corporation, and yet it was held that defendant could not be sued by a citizen of Missouri in the Federal court in the state of Arkansas; that, although to some extent and for some purposes it might be regarded as a corporation of Arkansas, it was for purposes of jurisdiction in the Federal courts to be regarded as a corporation of the state of Missouri.

The case, it will be seen, was not decided upon the ground that the cause of action had arisen in the state of Missouri. It was admitted that the cause of action was transitory, but the broad question was decided that the company was a corporation of Missouri and a citizen of that state, and could not be sued by another citizen of that state in the Federal courts of Arkansas.

It is stated in the opinion:

“The presumption that a corporation is composed of citizens of the state which created it accompanies such corporation when it does business in another state, and it may sue or be sued in the Federal courts in such other state as a citizen of the state of its original creation.

Southern Ry. Co. v. Allison

"We are now asked to extend the doctrine of indisputable citizenship, so that if a corporation of one state, indisputably taken, for the purpose of Federal jurisdiction, to be composed of citizens of such state, is authorized by the law of another state to do business therein, and to be endowed, for local purposes, with all the powers and privileges of a domestic corporation, such adopted corporation shall be deemed to be composed of citizens of the second state, in such a sense as to confer jurisdiction on the Federal courts at the suit of a citizen of the state of its original creation.

"We are unwilling to sanction such an extension of a doctrine which, as heretofore established, went to the very verge of judicial power. That doctrine began, as we have seen, in the assumption that state corporations were composed of citizens of the state which created them; but such assumption was one of fact, and was the subject of allegation and traverse, and thus the jurisdiction of the Federal courts might be defeated. Then, after a long contest in this court, it was settled that the presumption of citizenship is one of law, not to be defeated by allegation or evidence to the contrary. There we are content to leave it."

In *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 43 L. Ed. 1081, 19 Sup. Ct. Rep. 817, 15 Am. & Eng. R. Cas., N. S., 345, a question arose as to whether the railway company was a corporation of Kentucky as well as of the state where it was originally created. The exigencies of the case did not require a solution of that question, but the *James Case*, 161 U. S. 545, 40 L. Ed. 802, 16 Sup. Ct. Rep. 821, was referred to with approval in the opinion of the court, which was delivered by Mr. Justice Gray. In the course of that opinion, he said (p. 563, L. Ed. p. 1087. Sup. Ct. Rep. p. 821):

"But a decision of the question whether the plaintiff was or was not a corporation of Kentucky does not appear to this court to be required for the disposition of this case, either as to the jurisdiction, or as to the merits. As to the jurisdiction, it being clear that the plaintiff was first created a corporation of the state of Indiana, even if it was afterwards created a corporation of the state of Kentucky also, it was and remained, for the purposes of the jurisdiction of the courts of the United States, a citizen of Indiana, the state by which it was originally created. It could neither have brought suit as a corporation of both states against a corporation or other citizen of either state, nor could it have sued or been sued as a corporation of Kentucky, in any court of the United States."

So it seems that a corporation may be made what is termed a domestic corporation, or in form a domestic corporation, of a state in compliance with the legislation thereof, by filing a copy of its charter and by-law with the secretary of state; yet such fact does not affect the character of the original corpora-

Southern Ry. Co. v. Allison

tion. It does not thereby become a citizen of the state in which a copy of its charter is filed, so far as to effect the jurisdiction of the Federal courts upon a question of diverse citizenship.

Considerable stress has been laid, by those holding opposite views, upon the case of *Memphis & C. R. Co. v. Alabama*, 107 U. S. 581, 27 L. Ed. 518, 2 Sup. Ct. Rep. 432, 13 Am. & Eng. R. Cas. 172. It was there held that a railroad company, having been made by the statutes of Alabama an Alabama corporation, although having previously been incorporated in Tennessee, could not remove into the circuit court of the United States a suit brought against it in Alabama by a citizen of that state. But in that case the company was required by the legislation of Alabama to open books in that state for the subscription of stock in the capital of the corporation, so as to afford the citizens thereof an opportunity to take stock to the amount of a million and a half of dollars of the capital of the company. The Alabama act also provided that the company should, at the first meeting of the stockholders, designate a time when and a place or places in northern Alabama where, for the convenience of the citizens of the state who may be stockholders, an election for directors should be held, notice whereof was to be given in the newspapers, and elections for directors should be held at the same time both in Alabama and in Tennessee.

This court held that, by reason of the particular language used in the act, there was a separate original Alabama corporation formed; that the sections, taken altogether, made it a corporation created as well as controlled by the state of Alabama. It is stated in the opinion, page 584, L. Ed. p. 519, Sup. Ct. Rep. p. 435:

“The whole act, taken together, manifests the understanding and intention of the legislature of Alabama that the corporation, which was thereby granted a right of way to construct through this state a railroad, with which any railroad company, chartered or to be chartered in this state, should have the right to connect its road, and which was required to construct a branch railroad in this state, to open books for subscriptions of stock to a certain amount in this state, to apply the moneys here subscribed to the construction of the road within this state, and to hold elections in this state, was and should be in law a corporation of the state of Alabama, although having one and the same organization with the corporation of the same name previously established by the legislature of Tennessee.”

The difference between the above case and the cases we have already referred to is plain and fundamental, but in any event we regard the *James Case*, reaffirmed and approved as it is by that of *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 43 L. Ed. 1081, 19 Sup. Ct. Rep. 817, 15 Am. & Eng. R. Cas., N. S., 345, as decisive of the case before us.

Southern Ry. Co. v. Allison

We do not subscribe to the doctrine that, if a corporation files its charter in one state, after having been first chartered in another state, and is sued by a citizen of the state in which it filed its charter, in the state courts of that state, the right of removal to the Federal courts will be denied, while, at the same time, if such a corporation is sued by a citizen of the state in which it filed its charter, in the United States courts, the jurisdiction of the United States courts will be sustained upon the ground that in the Federal courts the corporation is domestic in the state where it was originally created and where its original incorporators are citizens, and it will be conclusively presumed, as a matter of law, that they are citizens of the state originally chartering it. If there be jurisdiction in the United States courts in the latter case, on the ground that it is a corporation and citizen of the state in which it was created, that fact gives jurisdiction to the Federal court to remove the case from the state court when the corporation is sued by a citizen of the state in which it filed its charter, because such corporation is a citizen of another state, namely, the state in which it was originally created. The citizenship of the corporation is not changed because of the particular court in which the action is commenced. If it be a citizen of another state in the one case, it is such citizen also in the other, and, if the other party to the action be a citizen of a state other than the one which created the corporation, the jurisdiction of the Federal courts exists, and the right of the corporation (upon complying with the statute) to remove the case from the state court when it is sued by a citizen of the state where its charter may have been subsequently filed, is granted by the laws of the United States.

We have read with respectful consideration the cases of *Debnam v. Southern Bell Teleph. & Teleg. Co.*, 126 N. C. 831, 36 S. E. 269, and *Layden v. Endowment Rank, K. of P.*, 128 N. C. 546, 39 S. E. 47, in which the supreme court of North Carolina comes to a different conclusion from that which we have reached in regard to the jurisdiction of the Federal courts in such a case as this; but we cannot concur in the doctrine of the supreme court of the state as announced in those cases. We feel bound by the decisions of this court upon that subject.

The supreme court of South Carolina has come to the same conclusion that we reach in this case, having altered its holding in *Mathis v. Southern R. Co.*, 53 S. C. 257, 31 S. E. 240, after the decision of the *James Case*, 161 U. S. 545, 40 L. Ed. 802, 16 Sup. Ct. Rep. 821. See, to that effect, *Wilson v. Southern R. Co.*, 64 S. C. 162, 36 S. E. 701, 41 S. E. 971, 5 R. R. 496, 28 Am. & Eng. R. Cas., N. S., 496.

In *Walters v. Chicago, B. & Q. R. Co.*, 104 Fed. 377, the United States circuit court in Nebraska held, in accordance with the principles maintained in the *James Case*, that the defendant, although made a domestic corporation of Ne-

Douglass v. Concord & M. R. R

braska, yet, having in fact been originally created by the state of Illinois, was a citizen of that state. The motion to remand to the state court was therefore denied.

We are of opinion that the plaintiff in error was not a citizen of the state of North Carolina at the time it was sued by the defendant in error, so far as regards the jurisdiction of the Federal courts, and that the order of removal made by the circuit court of the United States operated to withdraw from the state court the right to hear and determine the case. The judgment of the Supreme Court of North Carolina is therefore reversed, and the case remanded to that court for further proceedings not inconsistent with the opinion of this court.

So ordered.

DOUGLASS v. CONCORD & M. R. R. et al.

(*Supreme Court of New Hampshire, Hillsborough, Feb. 3, 1903.*)

[54 Atl. Rep. 883.]

Railroad Companies—Merger—Conversion of Stockholder's Shares—Laches.

Laws 1889, p. 35, c. 5, § 1, provides that if a railroad shareholder dissents from a merger the new corporation shall apply to a Supreme Court justice for the appraisement of his stock, which shall be had after a hearing, whereupon the amount awarded shall be paid to the shareholder; or if that cannot be done, or if he refuses it, it may be deposited with the State Treasurer. A contract of merger made September 19, 1889, provided that, if any stockholder did not accept the stock of the new company apportioned to him in exchange for his old stock, it, with any other that he might have, might be sold by the directors, and the proceeds applied to the uses of the corporation. In May, 1871, a shareholder had placed a certificate with an agent, and on May 15th it was presented to the corporation, bearing a purported assignment, and a certificate was issued to the agent. In 1873 the shareholder received this certificate, but did not examine it till 1898. The agent died in 1886. The shareholder had no actual notice or knowledge of the merger until 1898. No steps were taken by the new company under the statute: *held*, that the shareholder's rights had not been lost by laches.

Same—Same—Same.

Under the statute, the shareholder was not bound to attend the meeting at which the merger was arranged, in order to oppose a contract illegally depriving her of the value of her stock.

Same—Same—Same—Liability of Assignee—Estoppel.

The new company assigned its unissued stock to another corporation: *held* that, as no one had rightfully acquired rights, or invested money, or changed position, on the strength of the stockholder's silence, she was not estopped to claim her property; the assignee corporation being put on inquiry as to its assignor's title to unissued stock.

Same—Same—Same—Refusal to Accept New Stock.

Evidence, in an action by a stockholder in a merged company to compel an exchange of her old stock for stock of the new company, examined, and held to sustain a finding that she had never in fact refused to accept the latter stock.

Exceptions from Superior Court; Young, Judge.

Suit by Mary Ann Douglass against the Concord & Montreal Railroad and another. Decree for plaintiff, and defendants except. Exceptions overruled.

Douglass v. Concord & M. R. R

May 27, 1865, the plaintiff became the owner of five shares of the stock of the Boston, Concord & Montreal Railroad, and a certificate was issued to her on that date. In May, 1871, she placed the certificate and other papers in the possession of Henry Brown for safe-keeping. May 15, 1871, the certificate was presented to the corporation, bearing an indorsement which purported to transfer the shares to Brown, and a new certificate was issued to him therefor. In 1873 the plaintiff received from Brown what she supposed to be the papers previously delivered to him. The stock was then of little value, and the plaintiff had never received a dividend or other return upon her shares. She did not examine the certificate until the summer of 1898, when her attention was called to it, and she then discovered that it stood in the name of Brown, and was indorsed in blank by him. Upon subsequent inquiry, the plaintiff learned that the stock had stood in the name of Brown upon the books of the corporation since May, 1871. Brown died in 1886.

In September, 1889, at meetings of the stockholders of the Concord Railroad Corporation, and of the Boston, Concord & Montreal Railroad, an agreement was made for the creation of a new corporation by the union of those companies; and on September 19, 1889, a contract was executed by the authorized agents of the corporations, this action being taken under the authority of chapter 5, p. 35, Laws of 1889. The contract provided that the stock of the new corporation should be of different classes, and that shareholders of the Boston, Concord & Montreal Railroad owning stock such as that held by the plaintiff should have the right to exchange their shares for an equal number of shares of a certain class in the new corporation. The agreement further provided: "The stock of the new corporation shall be full payment for the stock of the old corporation for which it is to be exchanged as aforesaid, and the latter stock shall thereupon become the property of the new corporation. If any stockholder does not accept the stock apportioned to him in exchange for his old stock as aforesaid, it, together with any other stock belonging to the corporation, may be sold by the directors as they may see fit, and the proceeds be applied to the uses of the corporation."

The plaintiff had no actual notice of the meetings of September, 1889, or of the contract of union, nor did she know until the summer of 1898, after the time when her attention was directed to the facts as to the certificate. Upon discovery of the facts concerning the certificate, the plaintiff notified the Concord & Montreal Railroad—the new corporation—that she claimed to be the legal owner of the stock; and on November 21, 1899, she made demand on the corporation to return to her five shares of stock, and tendered the certificate by her in exchange therefor. At the date of demand

Douglass v. Concord & M. R. R

there was no unissued stock of the Concord & Montreal Railroad that could be substituted for those five shares, and the corporation refused to issue to the plaintiff any stock in exchange for her certificate.

In March, 1896, the Concord & Montreal Railroad sold all its unissued stock, including the five shares corresponding to the stock standing in the name of Henry Brown, and applied the proceeds to the uses of the corporation. No stock has ever been set apart for the plaintiff or Henry Brown, and the defendants refuse to account in any manner to the plaintiff for the proceeds of the sale. June 29, 1895, the Concord & Montreal Railroad granted, demised, and leased to the Boston & Maine Railroad all its property, rights, and franchises, including its unissued stock. The lease was made according to law, and notice thereof given to stockholders of both corporations, in accordance with the by-laws of each. The sale of the unissued stock, and the application of the proceeds, were in accordance with the terms of the lease.

The defendants moved for judgment, claiming, among other things, that upon the facts the plaintiff was guilty of laches, had forfeited all right to claim an exchange of stock, and was estopped from setting up this claim, the stock having been sold, and its avails having become the property of the Boston & Maine Railroad. It was found that the plaintiff was not estopped, and was not guilty of any laches, and the defendants excepted. The bill was dismissed as against the Boston & Maine Railroad, and the plaintiff excepted. The court ruled that the plaintiff could recover from the Concord & Montreal Railroad the value of the five shares of stock, with accrued dividends to the day the plaintiff discovered that the stock had been converted, and interest from that date, and the Concord & Montreal Railroad excepted.

Taggart, Tuttle & Burroughs, for plaintiff.

Mitchell & Foster and Streeter & Hollis, for defendants.

PARSONS, C. J. "If any stockholder in a railroad corporation of this state, which shall make a contract of lease or agree to unite with another railroad corporation pursuant to this act or any other law of this state, shall dissent from said lease or union, the corporation in which he is a stockholder in case of lease, or the united corporation in case of union, shall apply by petition to any justice of the Supreme Court in term time or vacation, * * * praying that action may be taken by the court to determine the value of the stock, interest, or property right taken of any dissenting stockholder or any stockholder who may be entitled to have the value of his stock, interest, or property right taken determined. * * * When notice has been given, * * * the justice shall proceed to hear the parties and shall determine, as soon as practicable, the value of the stock, interest, or property right taken of dissenting stockholders and all such other stockholders who have not assented to the lease or union as are

Douglass v. Concord & M. R. R

itled to have compensation for their stock, interest, or perty right taken, and shall award such stockholders such compensation as they may be entitled to receive. * * *

petitioner shall forthwith pay or tender the sum so awarded he stockholders entitled thereto, and if for any reason it is practicable to make or tender such payment, or if such per- refuses to receive the same when tendered, said justice order and direct the petitioner to deposit the money with State Treasurer." Laws 1889, p. 35, c. 5, § 1.

he Concord & Montreal Railroad was formed by the union he Boston, Concord & Montreal Railroad and the Concord road Corporation, under the authority of the act cited. plaintiff owned five shares of the stock of the Boston, cord & Montreal Railroad, and, by the terms of the agree- it of union, was entitled to five shares of one of the classes he capital stock of the new corporation. If the plaintiff ented from, or did not assent to, the union of the two cor- ations, the new corporation could have had the value of plaintiff's stock ascertained; and upon payment or tender s value, or deposit of the same with the State Treasurer, ld have become the owner of the plaintiff's stock in the ton, Concord & Montreal Railroad, and of her right to five es in the new corporation. Such proceedings have not a had, and nothing has been paid or tendered the plaintiff er stock, or deposited for her use. It is claimed that the ndants have become the owners of the plaintiff's stock, out paying anything for it, because the plaintiff did not onably apply for an exchange of stock. It is said the ntiff had constructive if not actual notice of the meeting of Boston, Concord & Montreal Railroad for the formation e new corporation, and is bound by the action of that ting and the contract of union there entered into. Assum- his to be so, she was not bound by any unauthorized on taken at the meeting, or by any action of the defend- not authorized by the contract to which the corporation hich she was an owner was a party. As it is the law of state that the union of two railroad corporations cannot be ted without the payment of the value of their interests to kholders who do not assent (*Dow v. Railroad*, 67 N. H. i Atl. 510), and as the legislative authorization for the on proposed to be taken expressly provided for such pay- t as an essential to the validity of such contract, she was egally bound to attend the meeting to oppose a contract ally depriving her of the value of her stock. The con- provides: "If any stockholder does not accept the stock ortioned to him in exchange for his old stock as aforesaid, gether with any other stock belonging to the corporation, be sold by the directors as they may order, and the pro- s be applied to the uses of the corporation." This pro- on manifestly relates to the possible contingency that some kholder might not assent to the union, whereby proceed-

ings might be necessary under the law for the ascertainment of the value of such stock, and one of the uses of the new corporation for which the proceeds of refused stock would be applicable would be payment of the sums awarded such stockholders. No stock was ever set apart for the plaintiff or Henry Brown, in whose name the plaintiff's stock stood on the books of the Boston, Concord & Montreal Railroad. It is understood from the findings that no certificate for the same was in fact ever offered to or refused by either of them.

The plaintiff's delay in presenting her stock for exchange must have been understood by the defendants either as an assent to the agreement of union or as a dissent therefrom. If they understood she assented to the contract, they understood she did not refuse to accept the stock, and that they had no right to sell it. If they understood she dissented, under the law they had no title to her corporate interest without paying its value, to be ascertained in proceedings the burden of commencing which rested with them, and not with her. There is no suggestion of any method, either in the statute or the contract of union, if either could be upheld, by which any stockholder could be or was to be deprived of his corporate interest without payment in stock or money. If a provision, in the contract of union, that all stockholders who did not present their stock for exchange within a time named, or a time denominated reasonable, should forfeit their right to stock in the new corporation and to compensation for its value, would have been valid and binding upon the plaintiff, in actual ignorance of the provision, no such provision was attempted to be inserted. The defendants, justifying their sale of the stock upon the ground that the plaintiff did not accept the stock—the sole provision of the contract upon which reliance is placed—cannot maintain that position in fact, if sufficient in law, without establishing that the owner of the old stock did not accept the new stock. Nonpresentation for exchange, if evidence of refusal, is not conclusive. Upon the facts stated, it cannot be held, as matter of law, that the force of the delay as evidence is not answered by the other evidence in the case, or that the finding that the plaintiff did not in fact refuse to accept the stock, included in the general finding for her, was unwarranted.

The Concord & Montreal Railroad could convey to the Boston & Maine Railroad no better title to its unissued stock than it possessed. What the transaction as to the sale of the stock under the lease was, does not appear with clearness. If the stock was leased and sold by the lessor subsequently, as the agent of the lessee, the latter receiving the proceeds, there would seem to be no reason why the principal should not account as well as the agent. If the sale was made by the Concord & Montreal, and the proceeds applied to the uses of the corporation generally, it may be doubtful whether the proceeds could be followed into the hands of the lessee, if received in the mass of the corporate property leased.

Florida Cent. & P. R. Co. v. Davis

The plaintiff has filed no brief, and it is probably of no practical importance whether the decree runs against both defendants or one only. In the absence of request for the consideration of the plaintiff's exception, and in view of the uncertainty of the ground upon which the order was made, this order is not disturbed. If the plaintiff had not become a stockholder of the Concord & Montreal Railroad by acceptance, the notice of the meeting to lease the road to the Boston & Maine was not constructive notice to her. If she had accepted the stock, and so become a member, a vote by the corporation to sell or lease her stock, without her consent, was unauthorized and void.

The authorities cited by the defendants upon the question of laches and estoppel have no application. The plaintiff did not lie by with knowledge of her rights, and no one has rightfully acquired rights, or invested money, or changed his position, upon the strength of her silence. If in good faith the Concord & Montreal Railroad sold the stock, understanding, because of want of application, the owner refused to accept, they are not harmed by the order requiring them to account for the proceeds. If the unissued stock was an inducement to the Boston & Maine Railroad to make the lease, they were put upon inquiry as to the title of the Concord & Montreal Railroad thereto, and bound to inquire whether the owners had in fact refused to accept it.

The defendant the Concord & Montreal Railroad wrongfully converted the plaintiff's stock, either at the date of the lease to the Boston & Maine (June, 1895) or the date of the sale (March, 1896), and the plaintiff is entitled to recover the value in an appropriate action. No objection is made to the form of the proceedings or to the damages assessed.

Exceptions overruled.

CHASE and BINGHAM, JJ., did not sit. The others concurred.

FLORIDA CENT. & P. R. CO. v. DAVIS.

(*Supreme Court of Florida, Division A., March 31, 1903.*)

[34 So. Rep. 218.]

Railroads—Killing Dogs.

A railroad company is liable in damages for the negligent killing of a dog by its engine and train of cars, dogs in this state being property, and taxable as other personal property.

(Syllabus by the Court.)

Error to Circuit Court, Madison County; John F. White, Judge.

Action by Charles E. Davis against the Florida Central & Peninsular Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Henderson & Henderson and H. J. McCall, for plaintiff in error.

Chas. E. Davis, in pro. per.

Le Croix v. Western & A. R. Co

SHACKELFORD, J. The defendant in error, who was plaintiff below, brought an action against the plaintiff in error in the Madison county circuit court for the alleged negligent killing of a dog. The declaration alleged, in substance, that plaintiff was possessed of a certain dog, upon which he was paying taxes, and that said dog went upon the railroad of defendant at a place that was commonly traveled by pedestrians, and that while said dog was so upon said railroad of defendant it was negligently struck and killed by the locomotive and train of cars of defendant; the damages being laid at \$200. A demurrer was interposed by the defendant to the declaration upon the grounds that no cause of action was set forth therein, and that no "cause of action can accrue in this state to any damage done to dogs, such as the declaration sets forth and claims." The demurrer was overruled, pleas filed, and trial had, which resulted in a verdict and judgment for plaintiff in the sum of \$50. The defendant seeks reversal by writ of error. The testimony is not brought up, and the only error assigned is the overruling of the demurrer.

In this state a dog is property, and taxable as other personal property. Chapter 4322, Laws Fla. § 16; Acts 1895, p. 17. Where dogs are returned by the owner for taxation, the larceny or malicious killing, wounding, or injuring thereof is made a crime. Chapter 4164, Laws Fla.; Acts 1893, p. 92. In those states where dogs are held to be property, the decided weight of authority seems to be to the effect that a railroad company is liable for the negligent killing thereof. See *St. Louis, A. & T. Ry. Co. v. Hauks*, 78 Tex. 300, 14 S. W. 691, 11 L. R. A. 383; *St. Louis S. W. Ry. Co. v. Stanfield*, 63 Ark. 643, 40 S. W. 126, 8 Am. & Eng. R. Cas., N. S., 115, 37 L. R. A. 659; *Fink v. Evans*, 95 Tenn. 413, 32 S. W. 307; *Jones v. Bond* (C. C.) 40 Fed. 281; 3 *Elliott on Railroads*, § 1190; *Graham v. Smith*, 100 Ga. 434, 28 S. E. 225, 62 Am. St. Rep. 323, 40 L. R. A. 503, and note 509; *Citizens' Rapid-Transit Co. v. Dew*, 100 Tenn. 317, 45 S. W. 790, 40 L. R. A. 518, 66 Am. St. Rep. 754. No error was committed in overruling the demurrer.

The judgment must be affirmed, and it is so ordered, at the cost of the plaintiff in error.

LE CROIX v. WESTERN & A. R. Co.

(Supreme Court of Georgia, May 30, 1903.)

[44 S. E. Rep. 840.]

Action against Railroad—Venue.

The act approved November 12, 1889 (Acts 1889, p. 362), for the lease of the Western & Atlantic Railroad, providing that suits may be brought "in any county through which the road runs," does not give the plaintiff the right to elect in which county suits may be brought. Actions against said company are governed by the provisions of the

Stephens v. New York, etc., Ry. Co

Civil Code of 1895, § 2334, and, where the injury occurred in Fulton county, a suit therefor could not be brought in Cobb county.
(Syllabus by the Court.)

Error from Superior Court, Cobb County; Geo. F. Gober, Judge.

Action by Hattie Le Croix against the Western & Atlantic Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

E. P. Green and N. A. Morris, for plaintiff in error.

Payne & Tye and Clay & Blair, for defendant in error.

LAMAR, J. At the time of the adoption of the act for the lease of the Western & Atlantic Railroad (Acts 1889, p. 362), it was not known whether the lessee would be a domestic or foreign corporation, or where the home office of the lessee company would be. In the interest of the public it was provided that suits might be brought "in any county through which the road runs, * * * for any cause of action * * * to which it might become liable." This was in any county, regardless of the general rule requiring these suits to be brought in the county where the cause of action arose. It was not intended to change the law contained in the Civil Code of 1895, §§ 2334, 1900, or to take that road out of the provision of any statute on the subject of venue then or thereafter of force, but rather to preserve existing provisions and the right of the state to legislate in the future. The provisions of the last act as to where suits shall be brought did not modify the rule as to when they should be brought in one or another of such counties. In *Sawtell v. W. & A. R. R.*, 61 Ga. 567, the suit was under a former lease act and the constitution of 1868. That ruling could not be followed under the present lease act and the Constitution of 1877, in view of the provisions of the Civil Code of 1895, § 5732, as to special acts changing a general law. Even if it had been valid when enacted, it would have been repealed by the provisions of the act of 1892 (Acts 1892, p. 59). Civ. Code 1895, § 2334. It follows that the plaintiff could not in 1902 sue in Cobb county for a cause of action arising in Fulton county.

Judgment affirmed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

STEPHENS v. NEW YORK, O. & W. Ry. Co.

(*Court of Appeals of New York, April 28, 1903.*)

[67 N. E. Rep. 119.]

Railroads in Streets—Release of Abutter's Interest.

A property owner consented, in consideration of the location of the line of railroad in a street adjoining his premises, to its construction and operation, and agreed to execute a release: *held* an agreement to release his interest in the soil of the street, but the extent of the

Stephens v. New York, etc., Ry. Co

right conferred on the railroad company to use the street depends on the circumstances existing at the time of the execution of the agreement.

Same—Grant of Right of Way—Sidings and Switches.

Where a property owner granted a right of way along the street in front of his property to a railroad company in consideration that it would make no unnecessary obstruction of the street, and make access to his lots as convenient as possible, it does not give the railroad company the right to utilize the street for as many tracks, sidings, and switches as it may deem necessary, where it, acting under the permission of the village that it might operate its track, has constructed a single track thereon in conformity with the map filed by it, in which its line in the street was marked by a single red line in the center.

Same—Location of Track—Sufficiency of Map.

Under the general railroad act of 1850 (Laws 1850, p. 211, c. 140), authorizing a railroad company to lay out and construct its road not exceeding six rods in width, and requiring it to make a map and profile of the route adopted, a map on which the proposed railroad is marked by a single red line, without any indication whether the line is the center or exterior line of the route, or of its width, or of the amount of land to be taken, is insufficient.

Same—Same—Additional Tracks.

Where the location of a proposed railroad is not definitely described upon the map filed by the company, nor in the instrument executed by an abutting property owner, conferring a right of way, the track, as established at the time the grant is made, is unchangeable, and the railroad company has no power, without the property owner's consent or by condemnation proceedings, to build additional tracks, switches, or sidings.

Same—Same—Injunction.

Where a railroad company, having a right to maintain only a single track in a highway, without permission of abutting owners or condemnation proceedings constructs switches and sidings, it is a trespasser, and can be enjoined therefor.

Same—Damages.

Where a property owner has consented to the location of a single-track railroad in an adjoining highway, he can recover damages where the railroad company without right builds additional tracks, so far as such damages can be separate from the injury caused by the operation of the single track.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by John J. Stephens against the New York, Ontario & Western Railway Company. From a judgment of the Appellate Division (70 N. Y. Supp. 1149) affirming a judgment for defendant entered on the report of referees, plaintiff appeals. Reversed.

The action was commenced in 1889 to restrain the operation of the defendant's road upon tracks opposite the plaintiff's premises on Second street, in the village of Fulton, until his interests were acquired through condemnation proceedings, and to recover the damages sustained by him in the past. The principal defense to the action was based upon a resolution of the trustees of the village permitting the defendant's predecessor, the New York & Oswego Midland Railroad Company, to lay the track of its railroad in the street, and upon an instrument in writing, and under seal, executed by the

Stephens v. New York, etc., Ry. Co

plaintiff and other abutting landowners, giving their consent to the operation of the railroad upon the street in front of their lots. The trial was had before a referee, who, upon findings, rendered a decision in favor of the defendant, and dismissed the complaint. Upon appeal the Appellate Division in the Fourth Department affirmed the judgment entered upon the referee's decision, and the plaintiff appealed to this court.

The facts, as they are established by the findings, show the defendant to be the successor in interest of all the rights, privileges, and franchises of the New York & Oswego Midland Railroad Company, which latter corporation was organized, prior to 1869, within this state. The plaintiff, at the time of the events in question, was the owner of certain lands on the southwest corner of Second and Cayuga streets, upon which were erected buildings, and his properties extended along upon the west side of Second street and upon the south side of Cayuga street. The buildings were used for stores, residences, and an opera house. He owned the fee of the soil to the center of Second street. In May, 1868, application was made by the New York & Oswego Midland Railroad Company to the trustees of the village "to make, grade, and lay the track of its railroad, and to operate the same, within the village of Fulton and upon Second street," and such a permission, in terms, was granted by a resolution of the trustees upon conditions, which were complied with. By an instrument bearing similar date to the resolution of the village trustees, a number of persons, under their hands and seals, consented to the construction and operation of the proposed railroad upon the street. The instrument was in the following form: "In consideration of one dollar to each of the subscribers in hand paid by the New York & Oswego Midland Railroad Company, the receipt of which is hereby acknowledged, and in consideration that the said company shall and will locate the line of their road along and through Second street in the village of Fulton in the county of Oswego, the subscribers severally owning lots lying on and bounded by said street, we, the subscribers, severally consent to the location, construction and operation of such railroad along and upon such street, in front of our respective lots, for no other or further payment for damages than the sums set opposite our respective names, and we severally agree to execute a proper release upon reasonable notice, upon the payment of such sums: provided, however, that the company shall do no unnecessary damage to or make no unnecessary obstruction of the street and shall put the same in as good condition as can be reasonably done and shall also make the access to our respective lots as easy and convenient as practicable. We further agree and covenant that the said company may enter upon said street and commence the construction of their road before the formal execution of release, they doing no unnec-

Stephens v. New York, etc., Ry. Co

right conferred on the railroad company to use the street depends on the circumstances existing at the time of the execution of the agreement.

Same—Grant of Right of Way—Sidings and Switches.

Where a property owner granted a right of way along the street in front of his property to a railroad company in consideration that it would make no unnecessary obstruction of the street, and make access to his lots as convenient as possible, it does not give the railroad company the right to utilize the street for as many tracks, sidings, and switches as it may deem necessary, where it, acting under the permission of the village that it might operate its track, has constructed a single track thereon in conformity with the map filed by it, in which its line in the street was marked by a single red line in the center.

Same—Location of Track—Sufficiency of Map.

Under the general railroad act of 1850 (Laws 1850, p. 211, c. 140), authorizing a railroad company to lay out and construct its road not exceeding six rods in width, and requiring it to make a map and profile of the route adopted, a map on which the proposed railroad is marked by a single red line, without any indication whether the line is the center or exterior line of the route, or of its width, or of the amount of land to be taken, is insufficient.

Same—Same—Additional Tracks.

Where the location of a proposed railroad is not definitely described upon the map filed by the company, nor in the instrument executed by an abutting property owner, conferring a right of way, the track, as established at the time the grant is made, is unchangeable, and the railroad company has no power, without the property owner's consent or by condemnation proceedings, to build additional tracks, switches, or sidings.

Same—Same—Injunction.

Where a railroad company, having a right to maintain only a single track in a highway, without permission of abutting owners or condemnation proceedings constructs switches and sidings, it is a trespasser, and can be enjoined therefor.

Same—Damages.

Where a property owner has consented to the location of a single-track railroad in an adjoining highway, he can recover damages where the railroad company without right builds additional tracks, so far as such damages can be separate from the injury caused by the operation of the single track.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by John J. Stephens against the New York, Ontario & Western Railway Company. From a judgment of the Appellate Division (70 N. Y. Supp. 1149) affirming a judgment for defendant entered on the report of referees, plaintiff appeals. Reversed.

The action was commenced in 1889 to restrain the operation of the defendant's road upon tracks opposite the plaintiff's premises on Second street, in the village of Fulton, until his interests were acquired through condemnation proceedings, and to recover the damages sustained by him in the past. The principal defense to the action was based upon a resolution of the trustees of the village permitting the defendant's predecessor, the New York & Oswego Midland Railroad Company, to lay the track of its railroad in the street, and upon an instrument in writing, and under seal, executed by the

Stephens v. New York, etc., Ry. Co

plaintiff and other abutting landowners, giving their consent to the operation of the railroad upon the street in front of their lots. The trial was had before a referee, who, upon findings, rendered a decision in favor of the defendant, and dismissed the complaint. Upon appeal the Appellate Division of the Fourth Department affirmed the judgment entered upon the referee's decision, and the plaintiff appealed to this court.

The facts, as they are established by the findings, show the defendant to be the successor in interest of all the rights, privileges, and franchises of the New York & Oswego Midland Railroad Company, which latter corporation was organized, prior to 1869, within this state. The plaintiff, at the time of the events in question, was the owner of certain lands on the northwest corner of Second and Cayuga streets, upon which were erected buildings, and his properties extended along on the west side of Second street and upon the south side of Cayuga street. The buildings were used for stores, residences, and an opera house. He owned the fee of the soil to the center of Second street. In May, 1868, application was made by the New York & Oswego Midland Railroad Company to the trustees of the village "to make, grade, and lay the track of its railroad, and to operate the same, within the village of Fulton and upon Second street," and such a permission, in terms, was granted by a resolution of the trustees on conditions, which were complied with. By an instrument bearing similar date to the resolution of the village trustees, a number of persons, under their hands and seals, consented to the construction and operation of the proposed road upon the street. The instrument was in the following form: "In consideration of one dollar to each of the subscribers in hand paid by the New York & Oswego Midland Railroad Company, the receipt of which is hereby acknowledged, and in consideration that the said company shall and do locate the line of their road along and through Second street in the village of Fulton in the county of Oswego, the subscribers severally owning lots lying on and bounded by Second street, we, the subscribers, severally consent to the location, construction and operation of such railroad along and through such street, in front of our respective lots, for no other or further payment for damages than the sums set opposite our respective names, and we severally agree to execute a deed of release upon reasonable notice, upon the payment of the said sums: provided, however, that the company shall do no unnecessary damage to or make no unnecessary obstruction of Second street and shall put the same in as good condition as can reasonably be done and shall also make the access to our respective lots as easy and convenient as practicable. We further agree and covenant that the said company may enter upon the said street and commence the construction of their road at any time after the formal execution of release, they doing no unnec-

clearly warranted by the licensor under the terms of his consent. If the instrument is construed as an agreement for an easement in land, then its operation would be limited to that which was actually the subject of the grant, and, if in general or indefinite terms, the situation and the contemporaneous acts of the parties would be referred to for the purpose of discovering their intention and of ascertaining if the instrument had been given a practical construction. Onthank v. L. S. & M. S. R. R. Co., 71 N. Y. 194, 27 Am. Rep. 35. In my opinion, this instrument was an agreement to give a release of the plaintiff's interest in the soil of the street, and, as such, equity would enforce it for the protection of the rights of the railroad company. Its consideration was that the company should locate the road in the street, and it was under seal. The terms of the obligation as to each party were plainly expressed, and the only indefiniteness in the instrument would be in the extent of the company's right to make use of the street for railway purposes. It was an agreement to release to the company the plaintiff's rights, and to permit it to construct and operate a railway upon the street in front of his premises. Its intent was that the right to use his land should pass to the company, and, while more formal words of grant would have been appropriate, nevertheless equity will construe it as effecting it. What dispute exists as to the limitation upon the easement granted with respect to the number of tracks which might be laid, or as to their location, is to be resolved by getting at the understanding of the parties. That is best done by considering the surrounding circumstances at the time when the instrument relied upon was obtained. Notwithstanding that the instrument bore date in May, 1868, effect is to be given to it as of the time when the plaintiff actually executed it, for only then did he agree to convey any right to burden his land. That was in the fall of 1869, and after the company had constructed a single track substantially in the center of the street. He then knew, or was chargeable with the knowledge, that the village authorities had formally permitted the railroad company to "make, grade, and lay the track of their railroad and operate the same" in Second street. The maps filed by the company delineated a single red line in the center of the street. But one track had been constructed, which was in the center of the street, and which left it still practicable for street uses on either side. By the terms of the instrument, the plaintiff's agreement was qualified by the added words of "for right of way in the street only," and the company was to make "no unnecessary obstruction of the street," and was "to make the access to plaintiff's lots as easy and convenient as practicable."

In the light of these facts, it is not easy to see how the company was in a position to claim that it had gained from the plaintiff the right to utilize the street for as many tracks or for such sidings or switches as it might deem necessary in the

accomplishment of its corporate purposes. Nor was it in any position to define the easement by the powers conferred by the general railroad act of 1850 (Laws 1850, p. 211, c. 140), and, under the consent, to take all such land as it might require for corporate purposes. While a railroad corporation is given the general power "to lay out its road, not exceeding six rods in width and to construct the same," it was required, before any work of construction, to make a map and a profile of the route adopted by it. The only attempt at compliance, in the present case, with the statutory condition as to a map, was to indicate upon the maps which were filed the proposed location of the railroad through Second street by a red line, appearing to be substantially in the center of the street. Such a map, in my opinion, was a defective compliance with the statute. Delineating the railway by a single red line furnished no indication whether the line was the center or an exterior line of the proposed route, nor of its width. The amount of land to be taken did not appear even inferentially. The object of the statute was to provide, by a public record, such information by maps as would disclose to all persons interested in the construction of the road its true location and boundaries. *Matter of N. Y. & Boston R. R. Co.*, 62 Barb. 85; *Matter of Boston, etc., R. R. Co.*, 10 Abb. N. C. 104; *N. Y. & Albany R. R. Co. v. N. Y., West Shore, etc., R. R. Co.*, 11 Abb. N. C. 386. The same principle would seem to have obtained in Massachusetts. *Housatonic Railroad Company v. Lee & Hudson Railroad Co.*, 118 Mass. 391. It is a necessary, if not a logical, inference that the map, which is to be filed before any construction, shall show something more definite and descriptive than a single red line. If nothing more definite appeared upon the map to show the railroad to be constructed, the plaintiff might reasonably infer that but one track was contemplated; which inference he might consider as confirmed by the actual construction at the time that his consent was sought. In consideration of the advantages which might accrue to him from the operation of such a railroad through his street, he might be willing to agree to such a use of his land, with provisos against unnecessary obstruction, and with the burden of but one track in the middle of the street. The representation upon the map, the language of the village consent, and the appearance of the constructed track, when considered with the wording of the plaintiff's agreement, negative the idea that he was granting the unlimited privilege to change or to add to the then existing track.

I reach the conclusion that, the location or route of the proposed railway being indefinitely described upon the map and by the plaintiff's agreement, the principle of construction which obtains in the cases of grants of easements made in general terms should govern here, and, applying it to the established facts, the court should hold that the track, as

Detroit, etc., Ry. v. Osborn

located in the center of Second street, was unchangeable, and that the railway could not be added to upon the plaintiff's land without his further permission, or the acquisition of the right through statutory condemnation proceedings. Washburn on Easements, 225, 240; Onthank v. Lake Shore & M. S. R. R. Co., supra; Jennison v. Walker, 11 Gray, 423. When the railroad company undertook to change and to add to its tracks in the ways described, it became a trespasser as to the plaintiff. It rendered itself liable to be restrained in its operations, and to a recovery of damages for any injuries sustained. So far as the ordinary and necessary operation of its railroad upon the one track through the street would cause annoyance, or constitute a nuisance, affecting the enjoyment and use of his property, the plaintiff could not complain. No recovery of consequential damages could be had which were occasioned by the injuries resulting therefrom. They would be the incidents of the right granted, as to which the defendant would be released. But, so far as it was a trespasser upon plaintiff's land, the defendant could be compelled to acquire further easements therein, if needed for its corporate purposes, by purchase or through condemnation proceedings, under the penalty of being restrained in its operations if it failed to do so; and, so far as damages had been sustained through defendant's wrongful acts, to the extent that they may be separately established as resulting therefrom, they can be recovered by the plaintiff. That any appreciable damage resulted from the slight change in the location of the passenger and freight depots is not apparent upon the proofs. They were necessary incidents to the operation of the railroad as authorized.

For these reasons, I advise a reversal of the judgment, and that a new trial should be ordered, with costs to abide the event.

PARKER, C. J., and MARTIN, CULLEN, and WERNER, JJ., concur. BARTLETT, J., concurs in result. HAIGHT, J., absent.

Judgment reversed, etc.

DETROIT, FORT WAYNE, & BELLE ISLE RAILWAY, Plff. in Err.,
v. CHASE S. OSBORN, Commissioner of Railroads.

(Argued January 15, 1903. Decided April 6, 1903.)

[23 Sup. Ct. Rep. 540.]

Error to State Court—Federal Question.

A decision of a state court refusing a petition for a writ of mandamus, in which relator claimed and set up a right under the Constitution of the United States, is tantamount to the denial of that right, and is therefore reviewable in the Supreme Court of the United States.

Street Railways—Equal Protection of Laws—Validity of Order Requiring Safety Appliances at Grade Crossings—Constitutional Law.

Neither due process of law nor the equal protection of the laws is

Detroit, etc., Ry. v. Osborn

denied a street railway company by an order of the commissioner of railroads made and issued under Mich. Pub. Acts 1893, act No. 171, § 5, requiring such street railway to pay one half of the expense of constructing and maintaining safety appliances at a grade crossing of a steam railroad which was not built until after the street railway had been constructed.

Constitutional Law.

An objection that a state statute violates the Federal Constitution because it does not provide for notice to those who may be affected by it is not available to a party who was in fact given notice, and who at the hearing objected to the action proposed to be taken under such statute.

In Error to the Supreme Court of the State of Michigan to review a judgment which denied a petition for a writ of mandamus to vacate an order of a railroad commissioner requiring a street railway company to pay a portion of the expense of constructing and operating safety appliances at a grade crossing of a steam railroad. Affirmed.

See same case below, 127 Mich. 219, 86 N. W. 842.

Statement by MR. JUSTICE McKENNA:

This case involves the legality of an order of the commissioner of railroads of the state of Michigan, requiring the plaintiff in error and the Union Terminal Association of Detroit, at their own cost and expense, to maintain and operate safety gates and derailing and signaling appliances at Clark avenue, in said city. The order is inserted in the margin.*

The order was made and issued under act 171 of the Public Acts of the State of 1893, § 5 of which provides as follows:

"The commissioner of railroads shall, as soon as possible after the passage of this act, examine the crossings of the tracks of railroads and street railroads then existing, and order such changes made in the manner of such crossings, or such safeguards for protection against accidents

*State of Michigan, }
Office of the Commissioner of Railroads. }

In Re Application of The Common Council of the City of Detroit for Additional Protection at the Clark Avenue Crossing of the Tracks of the Union Terminal Association, in the City of Detroit, County of Wayne, Michigan.

Application having been received by the commissioner of railroads from the common council of the city of Detroit, Wayne county, Michigan, for additional protection at the Clark avenue crossing of the tracks of the Union Terminal Association in said city of Detroit, Wayne county, Michigan;

And after a personal inspection of the premises aforesaid, and after hearing representations of the city officials of the city of Detroit, as well as the arguments of the representatives of the said railroad company above named in relation thereto, and having decided after due deliberation that the public interests required said additional protection at the said crossing;

Now, therefore, by authority vested in me by law, it is hereby ordered:

That within sixty days from date hereof, you, the said Union Terminal Association Railway Company, cause to be constructed and there-

Detroit, etc., Ry. v. Osborn

to be provided thereat, as in his judgment ought to be so made or provided; and shall apportion any expense incidental thereto between the companies affected, as he may deem just and reasonable."

The statute and order are attacked as depriving the plaintiff in error of its property without due process of law, because compliance with the order "will involve the expenditure of a large sum of money; first, in the construction of the said safety devices, and, if the same are constructed, in the maintenance and repair thereof."

The plaintiff in error is a street railroad company incorporated under the laws of Michigan, and operates a railroad on certain streets of the city of Detroit, including Clark avenue. It succeeded in ownership and operation a company known as the Fort Street & Elmwood Avenue Railway, which was also a street railway corporation. The latter company was authorized to construct its road on Clark avenue, and under its grant did construct and operate its road thereon. "At the time the track was constructed" (we quote from the opinion of the supreme court of the state) "on Clark avenue there was no railroad, or highway, street, lane, or alley, or crossing of any kind over Clark avenue between Fort street and the river road. In 1882 or 1883 the Wabash Railroad constructed a single track across Clark avenue and across petitioner's tracks. Up to that time there had been no crossing over Clark avenue, between Fort street and the river road, of any kind,—either that of a railroad or a public highway, a private way, road, street, or alley. In the year 1893, or thereabouts, the union station was opened at the corner of Third and Fort streets, in Detroit; and since that time said station has been used jointly by the Wabash, the Detroit, Lansing, & Northern, the Flint, & Pere Marquette, the Detroit & Lima Northern, and the Canadian Pacific railroads as a

after operated and maintained safety gates, and derailing and signaling appliances to be operated day and night by a watchman from a tower. Said tower to be constructed at the best point of vision at the said crossing, and so constructed that the said operator may have plain view of movements of all trains or cars on both of the respective lines. Derailers shall be provided and placed in the tracks of the Fort Wayne & Belle Isle Railway, not less than 75 feet from clearance point of crossing, and signals shall be placed on the tracks of the Union Terminal Association at a distance of not less than 600 feet from said crossing. Said derailleurs and signals to be operated by levers in said tower, and such levers to be properly interlocked.

And it is further ordered that cost and expense of the construction, maintenance, and operation of said gates, tower, and derailing and signaling appliance shall be borne by the Union Terminal Association and the Fort Wayne & Belle Isle Railway Company, equally, share and share alike. This appliance to be constructed in accordance with plans to be submitted to and approved by the commissioner of railroads within thirty days from date hereof, and such appliance to be further approved by the commissioner of railroads before being put into use. This order is subject to modification at any time when in the opinion of the commissioner of railroads the public safety will be more effectually secured.

terminal point, the tracks over Clark avenue at this point having been increased from one to three to accommodate the increased traffic. These tracks are used as approaches to the union station, and incoming and outgoing trains and cars of all the foregoing roads, except the Canadian Pacific Railroad pass over said tracks. There are thirty-eight regular daily passenger trains crossing Clark avenue upon these tracks. Besides this, the Canadian Pacific uses the station as an eastern terminus, connecting with the other roads for purposes of through east and west traffic."

In 1893 the legislature of the state passed the act hereinbefore set out, and under its authority the defendant in error made the order complained of.

The case was submitted upon the petition of relator (plaintiff in error) and the answer of respondent (defendant in error), and the mandamus prayed for denied. 127 Mich. 219, 86 N. W. 842. This writ of error was then sued out.

Messrs. John C. Donnelly and Michael Brennan for plaintiff in error.

Messrs. Fred A. Maynard and Horace M. Oren for defendant in error.

MR. JUSTICE McKENNA delivered the opinion of the court:

1. A motion is made to dismiss the writ of error on the ground that the record exhibits no Federal question. The motion is denied. The plaintiff claimed and set up a right under the Constitution of the United States, and the decision of the supreme court of the state was tantamount to the denial of that right. *Kaukauna Water Power Co. v. Green Bay & M. Canal Co.*, 142 U. S. 254, 35 L. Ed. 1004, 12 Sup. Ct. Rep. 173.

2. The argument of plaintiff in error on the merits is that it was the first to occupy Clark avenue; that at that time there was no public highway or street crossing at such avenue; that subsequently the steam railroads laid their tracks, the Wabash Railway Company being the first to do so, but installed no safety devices of any kind, "though it were the junior company;" that the tracks on the other railroads were subsequently constructed and are controlled by the Union Terminal Company. It is hence asserted that the plaintiff in error cannot be made liable for any part of the cost of safety devices, because it is the settled constitutional law of Michigan that its occupation constituted no additional burden upon the highway, but is simply a method of using the highway for the purpose of public travel and "in direct furtherance of the purpose for which the highway was established; that the street railroad company, in contemplation of the law, bears no different relation to the highway than that of any other person using the highway for the moving of vehicles or for any others method of public or private travel, and cannot,

as between others using the highway for like purposes, be required alone to bear the expense of installing and maintaining safety devices at steam railroad crossings designed for the protection of all the traveling public.”

And, further, it is also a well-established principle of the constitutional law of Michigan, that a junior road seeking to cross another cannot shift any portion of the expense of maintaining safety devices without compensation, though the senior company did not insist upon the installation of the devices or compensation at the time the tracks of the junior company were constructed. In other words, it is asserted that the dangerous condition arose, and yet arises, from the steam railroads, and on them alone can the cost of safety devices be legally imposed.

3. It is also insisted that the law is unconstitutional because it does not provide for notice.

(1) It was conceded by the supreme court of the state that it was the law of the state that the compensation for the damages caused by crossing the tracks of a railroad by another railroad or by a highway included the cost of making the highway safe. But the court said: “An examination of these cases will show they were all cases where it was sought to obtain a right of way either for a railroad across a highway or for a highway across a railroad, or a crossing for one railroad over the right of way of another; and none of the cases relate to the question involved here, as to who shall bear the expense of additional safeguards ordered upon roads which have crossed each other for a long period of time.”

And besides this element of time, the court said that there were other elements of damage which were either too remote or depended upon the relation of the roads to the state. Both elements are important. The conditions which exist to-day could not have been contemplated years ago, or be the measure of the rights and relations of the respective roads. Those rights and relations were necessarily determined at the time the crossings were made. What could not be foreseen could not have been made a ground of action, and if the growth of business and population can give rights to either of the bisecting roads it is not clear how the police power of the state can be limited in its control over either of them. The supreme court of the state recognized this, and fortified its views by Michigan cases.

In *Flint & P. M. R. Co. v. Detroit & B. C. R. Co.*, 64 Mich. 350, 31 N. W. 281, the court in an elaborate opinion expressed the rules of compensation when the right of one road to cross the tracks of another was sought by condemnation proceedings. In that case compensation was claimed, not only for the use of the crossing, but for the cost of maintaining signals or a cross system, cost of a watchman, and cost of stopping trains. These items were rejected. There was some uncer-

tainty in the evidence, and the item for maintaining signals or the crossing system were disallowed on that ground, but the court pointed out the difference between a "structural change in the property," for which compensation should be given, and those things which may be required by the legislature in the exercise of police regulations, as to which the roads "stand upon an equality before the law, and neither can levy tribute upon the other as a compensation for obedience to its requirements." And such regulations, it was observed, "are as binding upon an existing road as one newly organized." The court cited the case of *Massachusetts C. R. Co. v. Boston, C. & F. R. Co.*, 121 Mass. 124, where Mr. Justice Gray, then chief justice of the supreme judicial court of Massachusetts, expressed the law as follows:

"A railroad corporation across whose road another railroad or highway is laid out has the like right as all individuals or bodies politic and corporate owning lands or easements, to recover damages for the injury occasioned to its title or right in the land occupied by its road, taking into consideration any fences or structures upon the land, or changes in its surface, absolutely required by law, or in fact necessary to be made by the corporation injured, in order to accommodate its own land to the new condition. *Com. v. Boston & M. R. Co.*, 3 Cush. 25, 53; *Old Colony & F. River R. Co. v. Plymouth County*, 14 Gray, 155; *Grand Junction R. Co. v. Middlesex County*, 14 Gray, 553. But it is not entitled to damages for the interruption and inconvenience occasioned to its business; nor for the increased liability to damages from accidents; nor for increased expense for ringing the bell; nor for the risk of being ordered by the county commissioners, when in their judgment the safety and convenience of the public may require it, to provide additional safeguards for travelers crossing its railroad. *Proprietors of Locks and Canals v. Nashua & L. R. Co.*, 10 Cush. 385, 392; *Boston & W. R. Corp. v. Old Colony R. Corp.*, 12 Cush. 605, 611, and 3 Allen, 142, 146; *Old Colony & F. River R. Co. v. Plymouth County*, 14 Gray, 155."

It is, however, contended that a street railway has a different relation to a street than that which a steam railroad has; that the former "acquires a right to use the same in common with other members of the traveling public, and is not an additional burden upon the street, but is merely an adaptation of the highway to a particular means of travel, and does not constitute an additional servitude. A railroad is, on the other hand, an additional servitude, and if it is built across a highway it must do all things necessary to render the highway, for all its legitimate uses, as safe as it was before the railroad was built across it, or would be if such railroad were not built across it at all."

It may be that this difference is recognized as to abutting property owners or crossing railroads, but it cannot be recognized as limiting or effecting the power of the state to regulate

Morrison v. Thistle Coal Co

the management of the roads in view of the danger of their operation to the public. Whether electricity be the motive power, or steam be the motive power, there is enough danger in the operation of either to justify regulation. The record in this case shows that there are thirty-eight daily passenger trains crossing Clark avenue, and that the cars of the plaintiff in error pass every few minutes. It is manifest, as the supreme court of the state observed, that the crossing "is a place of unusual danger, not only to the passengers in steam cars, but also to the passengers in the electric cars," and that the danger is caused by both. In such situation the city is surely not powerless to act, nor before acting must it ascertain the exact quantum of damage caused by each road, and by that standard assign the cost of protecting the public.

See *Maine C. R. Co. v. Waterville & F. R. & Light Co.*, 89 Me. 328, 36 Atl. 453, 8 Am. & Eng. R. Cas., N. S., 756. It is also objected to the order that it deprives plaintiff in error of the equal protection of the laws. The argument to support this contention is an extension of that which claims that the use of the street by the plaintiff in error "is merely an adaptation of the highway to the particular means of travel." And it is deduced that an electric street railway has an equality of rights with ordinary vehicles. That we think there is a difference between ordinary vehicles and cars propelled by electricity, which may be recognized by the state in the exercise of its police power, we have sufficiently indicated.

(2) The objection that the statute does not provide for notice seems to be made for the first time in this court. It is not mentioned in the majority opinion nor in the dissenting opinion. It is not particularized in the petition for the writ of error nor in the assignment of errors. In the petition for this writ of error it is recited that the plaintiff in error in its application for mandamus claimed that the order of the railroad commissioners was invalid because it deprived plaintiff in error of its property without due process of law and denied it the equal protection of the laws. And also recited that on the "issue framed therein said cause went to a final hearing." The cause was submitted on petition and answer, and the petition alleged "that notice was given by respondent to relator and the Union Terminal Association, and the hearing had, at which relator's representative objected to the making of said order." It is, therefore, not open to the plaintiff in error to complain that the statute does not provide for notice.

Judgment affirmed.

MORRISON v. THISTLE COAL CO. et al.

(*Supreme Court of Iowa, April 8, 1903.*)

[94 N. W. Rep. 507.]

Railroads—Spur to Mine—Public Way—Condemnation.

Code, § 2028, providing that a person owning or leasing land and not having a private or public way thereto may have a public way to any

Morrison v. Thistle Coal Co

railway station, street, or highway over the land of another on or immediately adjacent to a division line, and section 2031, providing that any owner, lessee, or possessor of lands having mineral thereon, who has paid the damages assessed for roads established as above provided, may construct a railway thereon for the purpose of reaching and operating a quarry or mine on the land and transporting the products to market, are to be construed together, and it is only on a public way established under the first section that a railway may be established under the latter one.

Same—Same—Same.

A right of way for a railway to a mine may be a public way, though it cannot be used by the public for travel except by railway cars, as another mine owner may have the use of it without paying additional damages to the owner of the land through which it is constructed.

Same—Same—Same.

The right of way which a mine owner may have condemned over the land of another to his mine for the purpose of a railway is a public way, so that the statute authorizing it is not in violation of the Constitution, as allowing a taking of property for private use.

Same—Same—Division Line—Compliance with Statute.

The owners of a mine had the right of way for a spur track from the mine to a railroad located over the land of another in such a way that the spur was within 40 feet of a division line at the place where it entered the land, but diverged farther on, so that it was 287 feet from the line at the place of junction with the railway, in order that the curve necessary to make the connection with the railway should not be more than 12 degrees, this being as sharp a curve as is usual in good railroad construction. Had the spur been constructed along another division line, it would have reached the railroad without diverging more than 40 feet from the line, but this route was over rough and broken ground, and would have required a much longer spur: *held*, that the right of way as located was a substantial compliance with the requirements of the statute that it should be on or immediately adjacent to a division line.

Same—Same—Public Way—Statute.

Although a spur track from a mine came to a junction with a railway more than a mile from a station, yet, since the cars from the mine could be hauled over the railway to the station, the mine owner had a public way to the station within the meaning of the statute providing that a mine owner may have a public way to a station established for the purpose of building a railway thereon.

Appeal from District Court, Appanoose County; Robert Sloan, Judge.

The action was brought to enjoin defendants from constructing a railway track across plaintiff's land in pursuance of certain proceedings to condemn a right of way for such track from defendants' coal mine to a connection with a railroad which runs through plaintiff's land. A preliminary injunction was asked, but denied, and on final hearing plaintiff's petition was dismissed on the merits. Plaintiff appeals. Affirmed.

W. H. Sanders and Vermilion & Valentine, for appellant.

C. F. Howell, for appellees.

McCLAIN, J. The defendants Dinning and Steele are partners doing business under the name of the Thistle Coal Company, and engaged in mining coal from certain tracts of land on which they have a mining lease, with the privilege of exclusive occupancy of a four-acre tract, which does not abut

Morrison v. Thistle Coal Co

upon any highway. There was some question raised on the trial as to whether there was a private way from the highway to this four-acre tract, but we think the evidence shows that defendants had no such private way. Defendants desired a spur track connecting the four-acre tract, as to which they had surface rights, in conducting their mining operations under their lease, with a railway, the track of which was located through plaintiff's land, which adjoins the land covered by defendants' mining lease, and to construct this spur track defendants desired to have a right of way over plaintiff's land so far as to enable them to make connection with the railway. Defendants applied to plaintiff for permission to construct this spur track through her land, which was absolutely refused on the ground that they could not lawfully acquire a right of way over her land, and she refused to grant such right of way, although defendants offered her \$100 by way of compensation. Thereupon defendants proceeded, in reliance on Code, §§ 2028, 2031, to have a right of way condemned. The sections referred to are as follows:

"Sec. 2028. Any person, corporation or co-partnership owning or leasing any land not having a public or private way thereto, may have a public way to any railway station, street or highway established over the land of another, not exceeding forty feet in width, to be located on a division line or immediately adjacent thereto, and not interfering with buildings, orchards, gardens or cemeteries; and when the same shall be constructed it shall, when passing through inclosed lands, be fenced on both sides by the person or corporation causing it to be established."

"Sec. 2031. Any owner, lessee or possessor of lands having coal, stone, lead or other mineral thereon, who has paid the damages assessed for roads established as above provided, may construct, use and maintain a railway thereon, for the purpose of reaching and operating any quarry or mine on such land and of transporting the products thereof to market. In giving the notices required in such cases, the applicant shall state whether a railway is to be constructed and maintained on the way sought to be established, and, if it be so stated, the jury shall consider that fact in the assessment of damages."

These sections were incorporated into the Code from an act of the Fifteenth Gen. Assem. p. 26, c. 34, the first of them having been amended, however, by 25 Gen. Assem. p. 32, c. 18; and to meet a contention of appellee that section 2031 relates to the establishment of a right of way under the general sections relating to railroads, and is not subject to the limitations of section 2028, it is proper to say that we reach the conclusion that these two sections are to be construed together, and that it is only on a public way, such as is authorized to be located under section 2028, that a railway may be established under section 2031. A right of way for a railway may be a

Morrison v. Thistle Coal Co

public way, even though it is not so maintained as to be available for use by the public for travel otherwise than by the use of railway cars. Undoubtedly, it is public in such sense that another mine owner may make use of it without paying additional damages to the owner of the land through which it is constructed. Such a right of way is, by the express terms of the statute, not a private way, but public, and the statutory provisions authorizing it are not open to the objection that they provide for the condemnation of land for a private purpose. *Jones v. Mahaska County Coal Co.*, 47 Iowa, 35; *Phillips v. Watson*, 63 Iowa, 28, 18 N. W. 659. The substantial objections which plaintiff makes to the condemnation proceedings and to the claim by defendants to maintain a railway track on the right of way thus condemned through plaintiff's land are that the statutory conditions have not been complied with, first, because the strip of land condemned is not "on the division line, or immediately adjacent thereto," and, second, that it is not for a way "to any railway station, street, or highway." To understand the first of these objections it is necessary to have in mind the location of the strip of land condemned with reference to plaintiff's boundary lines, and, without setting out a plat, it will be sufficiently intelligible if we say that defendants' mining lease covers the south half of the northwest quarter of section 2, and that plaintiff's land is the northeast quarter of the southwest quarter of section 2. The four-acre tract on which defendants' mine is located is near the southeast corner of the southwest quarter of the northwest quarter of the section, and the line of railroad which defendants desire to reach by the spur runs substantially east and west through the north part of plaintiff's property, tending to the north just east of the section center; that is, the northeast corner of defendants' premises, where it crosses the half-section line. Defendants could reach the railroad by constructing their spur east and west along the north line of plaintiff's property, and join their track to the railroad track on that line at such an angle that in making the necessary curve the track would not be more than 40 feet from the division line. But the evidence shows that the surface of the land along that line is rough and broken, so that it would be necessarily expensive to construct their spur in that direction, and also that it would require a much longer spur to reach the railroad than to approach it from the north near the west line of plaintiff's land. As now constructed, the spur is within 40 feet of plaintiff's west line where it comes upon her property; but, instead of keeping within a 40-foot strip adjacent to plaintiff's west line, it departs to the east so that when it reaches a connection with the railroad track it is 287 feet from plaintiff's west line. Plaintiff's contention is that there is no authority to condemn any land for this spur outside of a 40-foot strip bounded on her west line, while defendants contend that the practical construction of the spur

Morrison v. Thistle Coal Co

for the purpose of connecting with the railroad without too great a curve renders it necessary that the proposed right of way depart near the connection with the railway to some extent from such 40-foot strip. An engineer who testifies for the plaintiff makes a theoretical plat, from which it appears that, if the spur were located to cross the half-section line west of plaintiff's northwest corner, it might, by the use of a 26-degree curve, join the railroad without coming further on plaintiff's land than 40 feet from her west line, and he testifies that a 26-degree curve is practicable on a spur used only for hauling cars to and from a coal mine, although the spur as constructed has only a 12-degree curve, and it appears that that is as sharp a curve as is usual in good railroad construction. It seems to us that it could not have been intended that the statute should be so interpreted as to make impracticable or inconvenient the connection of the railroad track authorized to be constructed on the right of way to a mine, and that, if the proposed right of way follows a division line as nearly as practicable, the statute is substantially complied with. We therefore reach the conclusion that defendants were not bound to follow the north line of plaintiff's premises for the purpose of reaching the railway in such way that the curve would not necessarily carry them beyond 40 feet from plaintiff's division line, such a route being impracticable; nor in following plaintiff's west line to make so sharp a curve as would prevent the safe and convenient hauling of cars on the line. We think the right of way as located was substantially in compliance with the direction of the statute that it should be on or immediately adjacent to a division line, and that plaintiff's objections on this ground are not well taken.

The objection that the right of way condemned does not lead to any railroad station, street, or highway is based on the fact that there is no railway station at the place where the spur from defendants' line joins the railway, but that, on the contrary, the nearest station is some mile or more distant from such junction. We see no merit in this objection. The spur does give an outlet from defendants' mine to a railway station, because by the use of it cars may be hauled from the mine to a station over the spur and the railway with which it is connected. It certainly could not have been intended that the right of way to be condemned should terminate at a station. It is evident access to a railway station by means of the right of way and any public way with which it may be connected that is contemplated, and the railway with which connection is made is, in a proper sense, a public way, whether it may be called a highway or not.

Our conclusion, therefore, is that the statutory provisions above referred to have been substantially complied with, and that the injunction should be denied. It is proper to say that since this condemnation proceeding Code, § 2028, has been amended (29 Gen. Assem. p. 51, c. 82) so as to eliminate the

Perrault v. Minneapolis, etc., Ry. Co

requirement that the right of way for the railroad furnishing an outlet for a mine shall be on a division line, or immediately adjacent thereto. Without holding that this is a legislative construction of Code, § 2028, we are content with the conclusion that prior to this amendment that section was to have a reasonable construction, and, as the question is not likely to again arise under that section, we do not think it necessary to further elaborate the reasons on which our conclusion is based.

Affirmed.

PERRAULT v. MINNEAPOLIS, ST. P. & S. S. M. RY. CO.

(*Supreme Court of Wisconsin, April 17, 1903.*)

[94 N. W. Rep. 348.]

Injuries to Stock—Sufficiency of Fence—Issues.

Where defendant railroad company's attorney moved for a verdict in a suit for injury to cattle because it conclusively appeared that defendant had constructed a sufficient fence at the point in question, defendant cannot urge on appeal that the court's ruling that the fence was insufficient was outside the issues made by the pleadings.

Same—Same—Question for Jury.

Rev. St. 1898, § 1810, requires railroad companies to erect and maintain good and sufficient fences to a height of 4½ feet to prevent cattle going on such railroad, and provides that, until this is done, companies shall be liable for damages from a failure to fence, and that "a barbed wire fence * * * of not less than five barbed wires," etc., four feet high, the details being particularly described, shall "be deemed a good and sufficient fence": *held*, that it was error to hold as a matter of law that a fence of four wires was insufficient, sufficiency being a question of fact.

Same—Defenses—Destruction of Fence by Trespassers.

Rev. St. 1898, § 1810, requiring railroad companies to erect and maintain sufficient fences for their rights of way, provides that, until this is done, the company shall be liable for all damages to cattle, etc., "occasioned in any manner, in whole or in part, by the want of such fences": *held*, that the destruction of even an insufficient fence by trespassers, so recently as to preclude repair, was a defense; the insufficiency of the fence not being the proximate cause of injury.

Same—Fences—Negligence and Contributory Negligence.

Under Rev. St. 1898, § 1810, making railroad companies failing to keep their rights of way fenced liable for damages occasioned thereby, the negligence of an owner in letting his cattle loose, when he knows the fences are down and they are likely to go on the track, is a defense to an action for their killing by a train.

Appeal from Circuit Court, Marinette County; Saml. D. Hastings, Jr., Judge.

Action by Johanna F. Perrault against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. Judgment for plaintiff entered on a directed verdict, and defendant appeals. Reversed.

Action to recover for cattle killed on defendant's railway track by one of its engines colliding with them. The claim of plaintiff as set forth in her complaint was that the cattle

Perrault v. Minneapolis, etc., Ry. Co

entered upon defendant's right of way at a point where it negligently permitted its fence to remain broken down and insufficient, and then went upon the track and were killed. There was an issue raised, distinctly, respecting negligence of defendant in permitting its fence to be out of repair, but not as to whether it was at fault in not having constructed a proper fence. The evidence was undisputed that the value of the cattle was \$90; that they entered upon defendant's right of way at a point where its fence was down, the same having been practically destroyed by trespassers; that it constructed and endeavored to keep in place at the location in question a four-wire fence, with three posts to the rod; that people had for a long time, without its permission, been accustomed to go upon the right of way at the locus in quo and for their convenience to break down the fence and leave it insufficient to turn cattle; that as often as defendant found the fence down it repaired the same; that it put in a middle post a few days before the occurrence complained of, as an extra precaution against the fence being made insufficient by trespassers; that it was repaired a day or two prior to such occurrence; that plaintiff, with knowledge of the fact that the fence was habitually kept open by trespassers, allowed her cattle to run at large regardless thereof. The evidence as to the fence being made of four wires came in without objection. There was no evidence as to whether such a fence was or was not reasonably sufficient to restrain cattle from going upon the right of way, and no evidence as to the height of the fence.

At the close of the evidence defendant's counsel moved for the direction of a verdict in its favor upon the ground that it conclusively appeared that a sufficient fence was constructed at the point in question; that it was down on the occasion of the cattle going upon the right of way, without actionable negligence on its part, and that plaintiff was guilty of contributory negligence. The motion was denied and the ruling excepted to.

The court then decided that defendant was guilty of having failed to construct such a fence as the statute provides shall be deemed sufficient, and was therefore liable as a matter of law for the value of plaintiff's cattle regardless of fault on her part. A verdict was directed accordingly. There was a motion to set the same aside as contrary to the evidence, which was denied and the ruling duly excepted to. Judgment being perfected upon such verdict, defendant took this appeal therefrom.

W. B. Quinlan and Alfred H. Bright, for appellant.

Chas. C. Daily and W. H. Hurley, for respondent.

MARSHALL, J. (after stating the facts). In the complaint respondent's cause of action was grounded solely on negligence of the appellant in respect to keeping its fence in repair. That inferentially admitted that but for such negli-

gence the cattle would not have gone upon the right of way and the damage been caused "in whole or in part" from want of compliance with the statutory duty as to fences. The point is made that on such state of the pleadings a recovery should not have been allowed on the ground of failure to construct a proper fence. However, it appears quite clearly from the record that appellant is in no position to successfully urge that point. At the close of the evidence the court assumed that insufficiency of the fence, waiving the question of want of repair, would sustain respondent's claim if it was otherwise within the statutory liability of appellant, and the latter's attorney not only did not except to that view, but expressly submitted the question of the sufficiency of the fence upon the undisputed evidence as a question of law.

There being no question upon the pleadings, as indicated, as to the sufficiency of the fence constructed, we must assume that the trial court, in deciding that the fence was insufficient upon the evidence, waiving the question of want of repair, looked merely to the proof that there were only four wires, presuming that otherwise the structure came up to the statutory standard, as there was no proof to the contrary except that it was made of four wires instead of five. If the learned trial court intended to hold, as appears to be the case, that no barbed-wire fence except one constructed according to all the specifications of the statute will do, and that such a fence in place is a condition precedent to exemption from the extraordinary statutory liability, a grievous error was committed. The statute, as has been held, is in derogation of the common law and must be strictly construed so as not to impair common-law principles further than is clearly manifest therein. *Cook v. M., St. P. & S. S. M. R. Co.*, 98 Wis. 624, 646, 74 N. W. 561, 567, 40 L. R. A. 457, 67 Am. St. Rep. 830. This language was there used, and to the idea there expressed we must adhere:

"The statute is in derogation of the common law. It is a penal statute. The validity of it rests wholly upon the police powers of the government, and it should be construed with reasonable strictness so as not to go beyond its plain letter and spirit."

That doctrine must have escaped the attention of the learned trial court, because, while the language of the statute upon which the right of plaintiff to recover depended is that a barbed-wired fence built according to the specifications named therein shall be deemed a good and sufficient fence, it was given the broadest possible meaning by applying thereto the maxim, "*Expressio unius, exclusio alterius.*" That is often a rule of liberal rather than strict construction. It cannot be legitimately applied so as to invalidate every attempt to comply with a penal law, merely because not strictly in line with what the law says shall be deemed sufficient to satisfy the requirements thereof. The presumed legislative intention, in

Perrault v. Minneapolis, etc., Ry. Co

a mere police regulation at least, is to indicate beyond reasonable probability of mistake the mischief dealt with and the means to be adopted to prevent it. Hence, when general language is used as to the latter element, leaving particulars as to performance more or less to the discretion of the individuals whose conduct is the subject of the regulation, so long as the efficiency thereof reasonably guards against the mischief sought to be prevented, a provision that performance in a particular way shall be deemed sufficient for that purpose does not imply that any other method sufficient therefor in fact shall not be deemed likewise sufficient in law. Words should not be read into a penal statute not there by necessary implication for the purpose of broadening the effect thereof in the impairment of common-law rights or the increase of responsibilities over those of the common law. This court has many times said that the meaning of such enactments must be judicially restricted to their plain letter and spirit. *Stone v. Lannon*, 6 Wis. 497; *Coleman v. Hart*, 37 Wis. 180; *State v. Huck*, 29 Wis. 202; *Crumbly v. Bardon*, 70 Wis. 385, 36 N. W. 19. Chief Justice Marshall, in the early case of *United States v. Wiltberger*, 5 Wheat. 76, 5 L. Ed. 37, declared the scope of judicial authority in administering a penal statute, which has been pretty uniformly accepted as correct, in effect thus: The letter of the statute should not be departed from at all except where necessary to effect a manifest legislative intention disclosed by the act, and then only in a plain case. Summing up the law concisely, the learned chief justice said:

“The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department.”

“Although penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the Legislature.”

“The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act.”

In the light of the foregoing it seems plain that the legislative declaration in section 1810, Rev. St. 1898, that a barbed-wire fence constructed in the particular way mentioned shall be deemed a good and sufficient fence, in connection with its context, does not warrant interpolation into the law of these words, or those of like effect: “And no other barbed-wire fence shall be deemed sufficient.” The reasonable view of the statute, it seems, is that the legislative purpose was to lay down specifications as to a barbed-wire fence which, when followed, would result in a structure sufficient as a matter of law, and if not so followed, yet the fence is con-

Perrault v. Minneapolis, etc., Ry. Co

structed according to the mandatory language of the statute, the sufficiency of the structure would be a matter of fact to be determined by the jury. Such mandatory language, and that part relating to barbed-wire fences, read together, omitting the language respecting cattle guards, are as follows:

“Every railroad corporation operating any railroad shall erect and maintain on both sides of any portion of its road (depot grounds excepted) good and sufficient fences of the height of four and a half feet, * * * to prevent cattle and other domestic animals from going on such railroad. * * * Until such fences * * * shall be duly made every railroad corporation owning or operating any such road shall be liable for all damages done to cattle, horses or other domestic animals, or persons thereon, occasioned in any manner, in whole or in part, by the want of such fences. * * * A barbed-wire fence consisting of not less than five barbed wires, with at least forty bars to the rod, firmly fastened to posts, well set, not more than sixteen and one-half feet apart, with one good stay between, the top wire not less than forty-eight inches high and the bottom wire not more than eight inches from the ground, and the spaces between the bottom and the second and second and third wires from the ground not more than eight inches each shall be deemed a good and sufficient fence.”

Thus it will be seen that the mandatory call for a fence of some suitable material 4½ feet high is modified as to barbed-wire fences, and such fences, when constructed otherwise, according to specifications named, are declared to be good as a matter of law to accomplish the purposes of the statute. That a barbed-wire fence may be constructed much more efficient for such purposes than one made according to the statutory specifications must be obvious to ordinary understanding. It would be a most unreasonable construction of the statute to hold that the better fence must be held insufficient as a matter of law because the inferior fence is declared sufficient as a matter of law. We find nothing in the record in this case showing how high the fence in controversy was. The complaint inferentially admits that it was high enough to comply with the statute. However, if that were not the case, it would not change the result here in any event, for we are of the opinion that a barbed-wire fence four feet high, if sufficient in fact to prevent domestic animals from going upon a railway track, will satisfy the calls of the statute. It would be unreasonable to hold that all the specifications as to a barbed-wire fence are essential as a matter of law to its sufficiency. Otherwise, however well a fence might be constructed and however efficient to turn cattle and other domestic animals, a departure from such specifications would necessarily be held sufficient to condemn the fence. In this case we think that, upon the pleadings and the evidence, it was a jury question as to whether the fence, if in a proper state of repair,

Perrault v. Minneapolis, etc., Ry. Co

was reasonably sufficient to prevent cattle and other domestic animals from going upon appellant's right of way.

Error is assigned on the ruling of the court that under the statute, if the fence as originally constructed was not sufficient to satisfy the calls of the law, appellant was absolutely liable for the value of the cattle, since the evidence showed that they entered upon the former's premises at a point where the right of way was required to be fenced. The ruling was wrong, tested by the very letter of the statute and by the decisions of this court thereunder as well. The penalty of the statute is not that the delinquent railway company shall be absolutely liable for the loss of domestic animals killed upon its track, that reach the same by way of a point where a sufficient fence should be in place to prevent such an entry, but that such liability shall exist if the damages are caused, in whole or in part, from failure to construct a fence as the statute requires. Such failure in any given case must at least contribute to produce the injury complained of, it will be seen, in order to render active the extraordinary liability under the statute. It must be alleged as a fact and established by the evidence. If such fact be left involved in reasonable doubt by the evidence, that doubt must be solved by the jury in favor of the plaintiff, else the rule of absolute liability will not apply. In *Cook v. M., St. P. & S. S. M. R. Co.*, supra, it was held that, notwithstanding it conclusively appeared that the horses entered upon the right of way where a fence should have been constructed but had never been in place, and were killed by the defendant's train, there could be no recovery of damages by the owners of the horses because the evidence conclusively showed that the failure to fence had no causal connection with the killing of the horses; that for want of such causal connection the case was not within the statute. The evidence was undisputed that if a fence had been constructed and maintained up to within a few hours of the entry of the horses upon the right of way, none would have existed at the time of the entry because, under the circumstances, it would have been inevitably destroyed so recently before such entry that the defendant could not reasonably have been charged with negligence in failing to restore it in time to prevent the occurrence complained of. In such circumstances it seemed plain and was held that the killing of the horses was not caused, in whole or in part, by the failure to fence.

The language of the statute manifestly makes failure by any railway company to perform the statutory duty as to constructing right of way fences sufficient to create an absolute liability for damages to the owner of domestic animals killed upon its tracks, if the entry of such animals thereon be by way of a point where a fence is required, only when such failure has some causal connection with the occurrence of the animals getting within the region of danger. In view of that,

Perrault v. Minneapolis, etc., Ry. Co

if it be held here that appellant's fence was not sufficient to satisfy the calls of the statute, and it yet be held under the circumstances of the case that such insufficiency had no proximate connection whatever with the cattle reaching the place where they were killed, because, regardless of the character of the fence in fact, or what it ought to have been, it would have been rendered useless by trespassers, so that such intervening cause would have furnished the opportunity for the cattle to go upon the track, then plaintiff was not entitled to recover, because such going upon the track in that state of the case would necessarily be referable, not to failure to fence, nor to failure to exercise ordinary diligence to keep the fence in a proper state of repair, but to the destruction of the fence by third persons, just as in *Cook v. M., St. P. & S. S. M. R. Co.*, supra, it was held referable to the fire, which, shortly before the horses entered upon the track, swept over the country, destroying everything of a combustible nature. There is strong evidence here that the acts of trespassers in destroying the efficiency of appellant's fence so broke the causal connection between the failure of duty on its part, if there was such failure, either in respect to the original construction of the fence or in exercising ordinary diligence to keep the same in repair, that the vital chain between the damage complained of and the incitive cause thereof wholly terminated before reaching such failure. There was an important question of fact on that branch of the case for solution by the jury.

In view of what has been said it is manifest that there was a third and fourth question which the jury should have been required to solve. The evidence, viewing the same as favorably as we reasonably can for the plaintiff (though it would be safe for the purposes of this case to view the same as favorably as we can for appellant), is susceptible of conflicting reasonable inferences as to whether appellant exercised reasonable diligence to keep the fence in repair, and whether respondent was guilty, either directly or by imputation, of contributory negligence. There was much evidence tending to show that appellant made diligent efforts to keep the fence efficiently in place, and was prevented by the lawless conduct of persons for whose acts it was in no wise responsible; and evidence that plaintiff, or those for whose conduct she was responsible, allowed the cattle to run at large with knowledge that the fence was out of repair or might probably be in such condition, and that the cattle could and might probably go upon the railway track. If it be a fact that the fence, as constructed, was sufficient to satisfy the statutory duty, then the rule of absolute liability, obviously, is out of the way, and appellant is liable only for damages caused proximately by failure to exercise ordinary care in keeping the fence in repair; and then only in case such failure was the proximate cause of the damage complained of, without any contributory

Pittsburg, etc., Ry. Co. v. Town of Crothersville

fault upon the part of respondent, either directly or by imputation. Section 1810, Rev. St. 1898, so provides. It has been repeatedly held by this and other courts, under similar statutes, that if the owner of cattle turns them loose where he knows or ought reasonably to know they are likely to go upon a railway track because of the right of way fence being out of repair, he is guilty of contributory negligence. *McCann v. C., St. P., M. & O. R. Co.*, 96 Wis. 664, 71 N. W. 1054; *Curry v. C. & N. W. R. Co.*, 43 Wis. 665; *Richardson v. C. & N. W. R. Co.*, 56 Wis. 347, 14 N. W. 176; *Peterson v. N. P. R. Co.*, 86 Wis. 206, 56 N. W. 639.

The result is that there was evidence produced from which the jury might reasonably have found either of these propositions in favor of defendant: (1) The fence as originally constructed was sufficient to satisfy the calls of the statute. (2) Defendant was reasonably diligent in keeping the fence in repair. (3) The entry of the cattle upon the right of way had no causal connection with either the failure to fence or failure to exercise ordinary diligence to keep the same in repair. (4) Respondent was guilty of contributory negligence. A decision in appellant's favor upon either the first or third propositions would have been fatal to respondent's case. A decision in respondent's favor upon both the first and second propositions, in connection with a decision in appellant's favor upon either the third or fourth proposition, would have been fatal to respondent's claim. So the conclusion must follow that the learned trial court committed several reversible errors before the ruling was made refusing to set the verdict aside and grant a new trial, and that further reversible error was committed in making such ruling.

The judgment of the circuit court is reversed and the cause remanded for a new trial.

PITTSBURG, C , C. & ST. L. RY. CO. v. TOWN OF CROTHERSVILLE *et al.*

(*Supreme Court of Indiana, Oct. 17, 1902.*)

[64 N. E. Rep. 914.]

Nuisances—Stockpens—Abatement—Injunction.

Plaintiff, seeking to enjoin the abatement of stockpens as a public nuisance, alleging that defendants had no authority to abate them, must, on the rule of clean hands, allege that they were not a public nuisance.

Same—Same—Same—Burden of Proof.

After plaintiff in a suit to enjoin abatement of stockpens as a nuisance had given all its evidence in chief, except that on the question of nuisance, its counsel stated to the court that he contended the burden of proof on the question of nuisance was on defendants, and that they contended it was on plaintiff, and he moved the court to rule the burden was on them: *held*, that the contrary ruling furnished plaintiff no ground for exception, there being nothing before the court for decision.

Same—Same—Same—Same.

Plaintiff in a suit to enjoin abatement of stockpens as a nuisance,

Pittsburg, etc., Ry. Co. v. Town of Crothersville

alleging that they, as maintained and used, the manner of which was set out, were not a nuisance, and the answer being only a general denial, has the burden of proof on the question of nuisance.

Same—Defenses.

Plaintiff in a suit to enjoin abatement of its stockpens as a nuisance may not prove the existence of hogpens in the immediate vicinity, and that they were kept in such a manner that stench arose therefrom: it being no justification or excuse that others were maintaining similar nuisances, or that the nuisance was caused by plaintiff and others acting together or independently.

Same—Abatement—Injunctions.

Plaintiff cannot come into equity to have abatement of its stockpens as a nuisance enjoined, they being shown to be a public nuisance, though defendants have no authority to abate them.

Appeal from circuit court, Jackson county; T. B. Buskirk, Judge.

Action by the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company against the town of Crothersville and others. Judgment for defendants. Plaintiff appeals. Affirmed.

S. Stansifer and M. Z. Stannard, for appellant.

J. A. Cox and C. H. Montgomery, for appellees.

MONKS, J. It appears from the record that appellees, the town of Crothersville, its board of health and marshal, were taking steps and threatening to remove appellant's stockpens in said town, on the ground that they were a public nuisance, and that this suit was brought to enjoin them from doing so. The complaint was in three paragraphs, the second and third of which were held by the court insufficient on demurrer for want of facts. Appellees filed a general denial to the first paragraph. The court heard the case, made a special finding of facts, stated conclusions of law thereon in favor of appellees, and rendered final judgment against appellant.

It is first insisted by appellant that the court erred in sustaining appellee's demurrer to the second and third paragraphs of complaint. Appellant's second paragraph of complaint proceeded upon the theory that, as there was a vacancy in the board of trustees of the town of Crothersville, the acts of the remaining trustees, acting as a board of health, in declaring appellant's stockpens in said town, as maintained and used, a public nuisance, and in ordering the abatement of the same, were void, and that for this reason they could be enjoined from abating them, even if they were a public nuisance. The theory of the third paragraph was that there was no power delegated to the board of trustees of a town, as such, or as a board of health, to declare that said stockpens were a public nuisance, and order the abatement thereof, or, if delegated, that such a law was in violation of the constitution, and that therefore they could be enjoined, although the stockpens, as maintained and used, were a public nuisance. It was shown in each of said paragraphs that it was claimed by appellees that said stockpens, as maintained and used, were a public

Pittsburg, etc., Ry. Co. v. Town of Crotheraville

nuisance, and that the board of trustees of said town, claiming to act as a board of health, had so declared and ordered, and were threatening their removal for that reason. The rule is that one who comes into equity must come with clean hands, or, as sometimes expressed, "He that hath committed iniquity shall not have equity." Fet. Eq. pp. 37-40; Bisp. Eq. pp. 61-63; 11 Am. & Eng. Enc. Law (2d Ed.) pp. 162, 163. To comply with this rule, in addition to the allegations in each of said paragraphs, facts showing that said stockpens, as maintained and used, were not a public nuisance, should have been averred. 10 Enc. Pl. & Prac. pp. 931, 932. With the facts already averred in said paragraphs, such allegations were necessary to show that appellant was not in fault; that it came with clean hands.

One of the causes assigned by the appellant for a new trial was that the court erred in ruling that "the burden of proof was upon appellant to prove that the stockpens were not a public nuisance." It was alleged in the first paragraph of complaint upon which the trial was had, among other things, that the stockpens, as maintained and used by appellant, were not a public nuisance, and the manner in which the same were maintained and used was specifically set forth. A general denial was the only answer filed by appellees. After all of appellant's evidence in chief, except that in support of the allegation that the stockpens were not a public nuisance, had been given, counsel for appellant stated to the court that he claimed "that the burden of proof on the question of whether or not the stockpens were a public nuisance rested upon appellees, while appellees contended that it was upon appellant; and thereupon counsel for appellant moved the court to rule that the burden was upon the appellees, which motion the court overruled" on the ground that the burden of proof on the question of whether the stockpens were or were not a public nuisance was upon appellant, after which appellant introduced its evidence in chief in support of the allegation in the complaint that the stockpens were not a public nuisance. This ruling of the court furnished appellant no ground for an exception, for the reason that there was nothing before the court for decision. If counsel for appellant was correct in his contention that appellant's case was made out without any evidence in support of the allegation in the complaint that the stockpens were not a public nuisance, and that the same was a matter of defense, appellees could not have given any evidence to show that they were a public nuisance, because no such defense was pleaded. In such case it would seem that neither party was entitled to give any evidence on that question of nuisance. If, however, counsel for appellant was correct in his contention that the question of whether or not the stockpens were a public nuisance was an issue in the case, and the burden of proof as to such issue was on appellees, then he should have rested his case in chief without

giving any evidence on that question; and, if appellees introduced any evidence on that issue, he should, after appellees had closed their evidence, have offered evidence to show that the same were not a public nuisance. If the court refused to admit such evidence on the ground that the burden as to that question was upon appellant, and that the same was necessary to make out appellant's case, and should have been given in chief, an exception to such ruling, and the assignment of the same as a cause for a new trial, would have saved the question. If this had been done, an assignment of error that the court erred in overruling appellant's motion for a new trial would have presented the question in this court. By the procedure adopted, appellant's counsel obtained the opinion of the court on the question, after which he acted in conformity therewith, instead of adhering to his own theory. The ruling of the court was the mere expression of an opinion, which could properly have been refused, and was in reference to a question not then before the court for decision. It is the opinion of the court, however, that, under the issues joined in the cause, the burden was upon appellant to prove that the stockpens as used and maintained by it were not a public nuisance.

During the progress of the trial the court refused to permit appellant to prove "the existence of hogpens in the immediate vicinity of the stockpens, and that they were kept in such a manner that stench arose therefrom." There was no error in this ruling of the court. The fact that other persons were at the time maintaining similar nuisances in that vicinity, or that the nuisance was caused by appellant and others acting together or independently of each other, was not a matter of justification or excuse. The acts of several persons acting together or independently of each other may constitute a nuisance, though the injury occasioned by the acts of any one would not have amounted to a nuisance. Gillett, Cr. Law (2d Ed.) § 643; 21 Am. & Eng. Enc. Law (2d Ed.) 690 (7), 719 (10); 28 Am. & Eng. Enc. Law (1st Ed.) 970, 971, note 1; 1 Wood, Nuis. (3d Ed.) §§ 168, 169, 448, 449, 558, and notes; Paper Co. v. Pope, 155 Ind. 394, 402, 57 N. E. 719, 56 L. R. A. 899; Dennis v. State, 91 Ind. 291; City of Valparaiso v. Moffitt, 12 Ind. App. 250, 39 N. E. 909, 54 Am. St. Rep. 522; City of New Albany v. Slider, 21 Ind. App. 392, 395, 52 N. E. 626; Rex v. Trafford, 1 Barn. & Adol. 874; Rex v. Neil, 2 Car. & P. 485, 12 E. C. L. 690; Thorpe v. Brumfitt, 8 Ch. App. 650; Blair v. Deakin, 57 Law Times (N. S.) 522; Crossley v. Lightowler, 2 Ch. App. 478; Hill v. Smith, 32 Cal. 166; Barrett v. Association, 159 Ill. 385, 42 N. E. 891, 31 L. R. A. 109, 50 Am. St. Rep. 168; Lockwood Co. v. Lawrence, 77 Me. 297, 52 Am. Rep. 763; Seely v. Alden, 61 Pa. 306, 100 Am. Dec. 642; Coal Co. v. Richards' Adm'r, 57 Pa. 142, 98 Am. Dec. 211; Chipman v. Palmer, 77 N. Y. 51, 33 Am. Rep. 566; Sullivan v. McManus, 19 App. Div. 167, 45 N. Y. Supp. 1079;

Pittsburg, etc., Ry. Co. v. Town of Crothersville

Comminge v. Stevenson, 76 Tex. 642, 13 S. W. 556; Harley v. Brick Co., 83 Iowa, 73, 48 N. W. 1000; Euler v. Sullivan, 75 Md. 616, 23 Atl. 845, 32 Am. St. Rep. 420, 423; Fertilizer Co. v. Malone, 73 Md. 268, 20 Atl. 900, 9 L. R. A. 737, 25 Am. Rep. 595; Hurlbut v. McKone, 55 Conn. 31, 10 Atl. 164, 3 Am. St. Rep. 17; Robinson v. Baugh, 31 Mich. 290; Meigs v. Lister, 23 N. J. Eq. 199; Iron Co. v. Barnes (Tenn. Sup.) 60 S. W. 593; Douglass v. State, 4 Wis. 387.

It appears from the special finding: That, for more than 35 years prior to 1901, appellant and those under whom it claimed had maintained and kept stockpens near the railroad track on real estate now included within the corporate limits of the town of Crothersville, which town was incorporated in 1892. That said stockpens have been used by appellant and those under whom it claims for confining stock brought in by shippers for transportation over said railroad, and for loading and unloading said stock. At the time said pens were built, there were no residences near the same on the west, and only a few houses on the east. That since said pens were built, twelve dwelling houses and one church have been erected in the neighborhood of said pens. The affairs of said town of Crothersville were administered by a body of three trustees. On October 10, 1900, there were only two members of said board of trustees; and they, acting as the board of health of said town, duly passed a resolution declaring the maintenance of said stockpens by appellant to be a public nuisance, endangering the public health and life, and ordered and required appellant to abate and remove the same on or before December 1, 1900. A copy of said resolution was duly certified and served upon appellant. On November 23, 1900, the state board of health approved said resolution. At the time of the commencement of this action, appellees were threatening to remove said pens on the ground that they were a public nuisance. The court stated its conclusions of law: (1) That "the maintenance of said stockpens by appellant, in the manner and under the circumstances, created and caused the continuance of a public nuisance; (2) that appellant could take nothing in this action." We have not stated the facts found as to the place, surroundings, and the manner in which the stockpens were kept by appellant; but it is sufficient to say that they clearly show that when this suit was commenced, and for three years or more prior to that time, the same were a public nuisance.

Appellant insists (1) that the two trustees had no power to act as a board of trustees or board of health until they appointed a trustee to fill the vacancy, as required by section 4334, Burns' Rev. St. 1901 (section 3312, Rev. St. 1881), and that the act of the two trustees on adopting the resolution served upon appellant was void; (2) that "no power, either expressly or by fair implication, is delegated to the board of trustees of a town, as such, as a board of health, to declare as

West Coast Naval Stores Co. v. Louisville & N. R. Co

in the resolution, or, if delegated, is in violation of the federal constitution." The view we take of this case renders it unnecessary for us to determine either of these contentions of appellant. It is a well-settled maxim that he who comes into equity must come with clean hands. Here appellant, under the facts found, seeks the aid of equity to enjoin the appellees from abating a public nuisance maintained by it, on the ground that they have no right to abate it. To grant such relief to appellant, who is maintaining the public nuisance, would be contrary to the well-settled principles of equity. Fet. Eq. pp. 37-40; Bisp. Eq. (6th Ed.) pp. 61-63; 1 Spell. Inj. & Extr. Rem. § 26; 11 Am. & Eng. Enc. Law (2d Ed.) pp. 162, 163; *Albertson v. Laughlin*, 173 Pa. 525, 34 Atl. 216, 51 Am. St. Rep. 777; *Unckles v. Colgate*, 148 N. Y. 529, 43 N. E. 59; *Cassady v. Cavenor*, 37 Iowa, 300; *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.* (C. C.) 25 Fed. 1; *Floral Co. v. Bradbury* (C. C.) 89 Fed. 393; *Board of Trade of City of Chicago v. O'Dell Commission Co.* (C. C.) 115 Fed. 574. To grant appellant the relief prayed for under the facts found would be to aid it in maintaining a public nuisance,—a crime under the laws of this state. It follows that, even if appellant's contention that appellees had no authority to abate said public nuisance is correct,—a question we need not and do not decide,—the conclusions of law are not erroneous.

Judgment affirmed.

WEST COAST NAVAL STORES CO. v. LOUISVILLE & N. R. CO.

(*Circuit Court of Appeals, Fifth Circuit, April 7, 1903.*)

[121 Fed. Rep. 645.]

Wharves—Construction by Railroad Company—Right of Public Uses.

A wharf built by a railroad company, in extension of a street, out into the deep waters of a harbor like that of Pensacola, where ships from all ports come in the carrying on of commerce, and where they load and discharge cargoes, on which wharf the company has laid its tracks, making it a quasi terminal for the transfer of goods between its own line and vessels owned by other carriers, is affected by a public use; and the company cannot permit its use by such vessels or carrying lines as it may select, and exclude others, to the encouragement of a monopoly and the hindrance of competition, but, where such use is permitted by any, it must be open to all on equal terms.

In Error to the Circuit Court of the United States for the Northern District of Florida.

By reason of rulings of the circuit court on demurrer, plaintiff in error was compelled to submit to judgment, and has sued out its writ for the reversal of that judgment. The errors assigned all have reference to rulings upon demurrers to pleas filed by defendant in error, and replications filed by plaintiff in error.

The declaration consists of two counts, but, as there is no substantial difference between them, it will only be necessary

to give the second count of the declaration, which alleges as follows:

“For that, to wit, before the institution of this suit, the defendant was, in the county of Escambia and state of Florida, a common carrier of goods, wares, and merchandise, for hire, by means of its cars drawn by locomotives over defendant's railways; and the plaintiff was then and there engaged in buying and selling, and shipping from Pensacola and other points in said county, naval stores, consisting of turpentine and rosin in barrels, which plaintiff conveyed to and from its yard, in said county and warehouse, in the city of Pensacola, by means of defendant's cars and locomotives, over defendant's railway, including a switch constructed by defendant for plaintiff from defendant's main line, running into the city of Pensacola, to and into the said yard; and the plaintiff in fact avers that the course of business dealing between plaintiff and defendant then and there was for plaintiff to transfer over said switch and defendant's railway, into the city of Pensacola, by means of defendant's cars and locomotives, plaintiff's turpentine and rosin, to and upon defendant's wharf, extending into the Bay of Pensacola, which wharf was and is conducted by defendant, and used by persons bringing goods over defendant's railway to and into Pensacola, to be shipped from said wharf, and at and upon said wharf to deliver plaintiff's turpentine and rosin to vessels, to be in and by such vessels carried to other ports in the prosecution of plaintiff's business, of which defendant had notice; and it was the duty of the defendant, as common carrier as aforesaid, and in the conduct of the wharf as aforesaid, which was and is a public wharf, for a reasonable compensation, which plaintiff was always ready and willing to pay to defendant, to give to the plaintiff the facilities aforesaid; and plaintiff further in fact avers that all of the services in fact rendered as aforesaid to it by the defendant was for hire, by the plaintiff to the defendant paid as and when required, and it was the purpose and intention of the plaintiff thereafter to continue to prosecute its business aforesaid, of which defendant had notice, and in the prosecution thereof to continue to use the facilities aforesaid, as defendant well knew, paying therefor reasonable and customary hire; and plaintiff had the means and ability, and had made necessary arrangements for the further prosecution of such business, as the defendant well knew; and the plaintiff in fact avers that in the midst of the prosecution of its said business, which, as plaintiff avers, was a large and lucrative business, the defendant notified plaintiff that it would refuse to permit plaintiff's turpentine and rosin, of which plaintiff then and there had on hand a large and valuable stock, as defendant well knew, and to which plaintiff was constantly adding, as defendant well knew, and from thence hitherto has continued to add in the prosecution of its said business, to be, at, from, or by means of defendant's said wharf, loaded upon or

delivered to certain vessels, with the managers of which plaintiff had contracted for the taking thereof from Pensacola to other ports to which plaintiff intended and had made arrangements to ship the same, of which defendant had notice, or to permit the said wharf and said railway of defendant to be used in the prosecution of plaintiff's business aforesaid, in so far as the prosecution thereof should involve the use of said vessels in shipment of plaintiff's said turpentine and rosin from Pensacola, by means whereof plaintiff sustained great loss and damage, to wit, five thousand dollars (\$5,000) for the difference between what it would have cost plaintiff to carry the same to and load it upon the said vessel by means of defendant's railway and wharf, and what it cost to do so by other means of conveyance and delivery, and in a sum of ten thousand dollars (\$10,000) for what it will cost plaintiff hereafter to make delivery to said vessels in excess of what it would cost to make such delivery by means of defendant's said railway and wharf, and in the sum of ten thousand dollars (\$10,000) on account of delays, annoyances, and embarrassments resulting from the plaintiff being compelled to carry on its business by transporting its goods in carts drawn by mules and horses for miles by said roads and streets, and then shipping the same out to said vessels by means of lighters, and the necessary and inevitable general immediate injury to the business of plaintiff by plaintiff having to carry on its business by such rude and primitive methods side by side with modern modes and facilities, thereby losing prestige in the business community, and being forced to compete with others who have and enjoy unrestricted use of defendant's railway and wharf facilities as aforesaid; and plaintiff is otherwise, by reason of the actings and doings of defendant aforesaid, greatly damaged in its business."

The first plea that the defendant in error filed was held bad on demurrer thereto, in an order which gave leave to plead further. The further plea was demurred to by plaintiff in error. Before any action was taken on this demurrer, defendant in error withdrew all further pleas, and filed three pleas numbered 1, 2, and 3. Plaintiff in error filed demurrers to pleas numbered 2 and 3. The court sustained the demurrer to the plea numbered 2, and overruled the demurrer to the plea numbered 3, which plea is as follows, to wit:

"(3) That the defendant has adequate depots and yards in the city of Pensacola for the receipt and delivery of all merchandise committed to it for transportation to and delivery at Pensacola. That neither its charter, nor any statutory law, has compelled or required, or compels or requires, it to construct or maintain the wharf mentioned in the declaration, but that it constructed the same at an expense to it of tens of thousands of dollars, for the purpose of providing facilities for the transaction of such business as it might desire with such vessels as it might permit to come to and lie at said wharf to take cargo.

That, in accordance with such purpose, it made and promulgated, upon the construction of said wharf, and more than five years prior to the bringing of this suit, rules and regulations by which it limited the use of its wharves, including the wharf mentioned in the declaration, 'to traffic handled by vessels in regular lines running in connection with the Louisville & Nashville Railroad, and vessels belonging to or consigned to Gulf Transit Company' (an agency of defendant), and making the use of said wharves 'for traffic in connection with vessels other than herein referred to' 'subject to special arrangement.' The said rules and regulations were in operation and enforced by defendant from the time of their promulgation as aforesaid up to and at the time of the refusal of the defendant to permit the naval stores of the plaintiff to be loaded from its wharf into the 'certain vessels' mentioned in the declaration, and still are in force and operation. That the said 'certain vessels' were not regular lines running in connection with the Louisville & Nashville Railroad, nor were they belonging to or consigned to Gulf Transit Company, nor had they made any special arrangements with the defendant for the use of the said wharf, but that said vessels constituted an independent line between New York and Pensacola, and New York and Mobile, Alabama, carrying merchandise between the said points, and would have come in competition with a line of steamers with which the defendant was then negotiating for regular service in the transportation of merchandise to and from New York and Pensacola in connection and under traffic arrangements, and was also in competition with the defendant itself, which was at said time, and had been for a long time prior thereto, engaged in a like business between said points, carrying goods by its line of railroad from Pensacola and Mobile to River Junction, Florida, Cincinnati, Ohio, and Montgomery, Alabama, and there delivering the same to a connecting carrier and other carriers connecting therewith, transporting goods to the city of New York, and receiving from said connecting carriers at the points aforesaid, and transporting to Pensacola and Mobile, goods shipped from New York to Pensacola and Mobile. That the defendant has not either notified plaintiff that it would carry plaintiff's naval stores, nor refused to transport plaintiff's naval stores over its railway mentioned in the declaration, to and on its wharf also mentioned in the declaration. That it has at all times so transported them when requested so to do by the plaintiff. That the defendant has refused to permit the certain vessels mentioned in the declaration to take goods and merchandise from its said wharf to be transported by them to the port of New York as aforesaid, but that such refusal was solely because the said vessels were not of either of the classes provided for by the rules aforesaid, nor had made special arrangements with the defendant, and would have been, as aforesaid, in competition with the lines of vessels

West Coast Naval Stores Co. v. Louisville & N. R. Co

connecting with the defendant running to and from New York, and was, as aforesaid, in competition with the defendant itself in its rail transportation aforesaid to and from New York City, and that the defendant was then, and at all times had been, ready and willing to give, and did give, to the plaintiff, the same facilities for shipping naval stores to New York or any other port, over defendant's said wharf, as it gave to any and all other shippers."

The action of the court in overruling demurrer to plea numbered 3 is the subject of the first assignment of errors.

Plaintiff in error then filed five replications to pleas numbered 1 and 3, to all of which replications defendant in error filed demurrers. Plaintiff in error insists here only upon replication 5, "That said wharf is an extension of a street of the city of Pensacola, abutting on and bounded by the Bay of Pensacola," demurrers to which the Circuit Court sustained by order. This is the subject of the second assignment of errors.

Plaintiff in error filed further replications, 6 and 7, as follows:

"(6) That the said wharf is the extension of a street of the city of Pensacola into the Bay of Pensacola to a distance of more than five hundred (500) yards, all within the limits of the city of Pensacola, and maintained by the defendant by authority and permission of the said city, and that the defendant was, at the time of the happening of the matters and things in the declaration mentioned, a railroad company, incorporated and organized under and by virtue of the laws of the state of Kentucky, and had not before the institution of this suit filed in the office of the Secretary of State of the state of Florida a copy of its charter or reorganization.

"(7) That the said wharf is the extension of a street of the city of Pensacola into the Bay of Pensacola to a distance of more than five hundred (500) yards, all within the limits of the city of Pensacola, and maintained by the defendant without legal authority, other than that conferred by the provisions of an act of Legislature of the state of Florida entitled 'An act to grant the water front of the city of Pensacola,' approved June 2, 1899, otherwise designated as chapter 4802, p. 191, of the Laws of Florida, and that the defendant was, at the time of the happening of the matters and things in the declaration mentioned, a railroad company incorporated and organized under and by virtue of the laws of the state of Kentucky, and had not before the institution of this suit filed in the office of the Secretary of State of the state of Florida a copy of its charter or reorganization."

Plaintiff in error insists only upon the sixth, of which the latter portion will be eliminated as not essential to the point to be argued here. Defendant in error filed a demurrer to the sixth replication. The circuit court made an order sustaining the demurrer, which action is the subject of the third assignment of errors:

"The court erred in making the order on the 28th of November, 1902, whereby the court ordered and adjudged that defendant's demurrers filed November 17, 1902, to plaintiff's replications numbered 6 and 7, filed November 13, 1902, should be, and were, sustained."

Jno. C. Avery, for plaintiff in error.

W. A. Blount, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). The case shows that the Louisville & Nashville Railroad Company is in the possession of a large wharf, built at its own expense on the extension of a public street in the city of Pensacola into the deep waters of the harbor of the city, on which street and wharf it has laid railroad tracks connecting with its main line and depot in the city, over which tracks the railroad company carries and transports goods ordered and intended for shipment by water, making a quasi terminal of said wharf; and the question is whether this wharf is a public wharf, or, if not public, but a private wharf, is it so located and used that the public has a right to have goods intended for shipment by water beyond Pensacola carried to said wharf, and have ships moored at said wharf, and there take on its said goods?

"Piers or landing places, and even wharves, may be private, or they may be in their nature public, although the property may be in an individual owner, or, in other words, the owner may have the right to the exclusive enjoyment of the structure, and to exclude all other persons from its use, or he may be under obligation to concede to others the privilege of landing their goods or of mooring their vessels there upon the payment of a reasonable compensation as wharfage; and whether they are the one or the other may depend, in case of dispute, upon several considerations, involving the purpose for which they were built, the uses to which they have been applied, the place where located, and the nature and character of the structure." *Dutton v. Strong*, 1 Black, 23, 32. 17 L. Ed. 29.

In the same case it is held that riparian proprietors have a right to erect bridge piers and landing places on the shores of navigable rivers, lakes, bays, and arms of the sea, if they conform to the regulations of the state, and do not obstruct the paramount right of navigation, but the right to make such erections terminates at the point of navigability. And of such improvements it is said that the riparian proprietor may construct any one of them for his own exclusive use and benefit; and, if not located in a harbor or other usual resting place for vessels, and if found within a shore of the sea or the unnavigable waters of the lake which had not been used, or held out as intended to be used, by others, the public have no right to make use of the same.

West Coast Naval Stores Co. v. Louisville & N. R. Co

The structure in this case is located in deep water, in a harbor where many ships lie at all seasons of the year; it was built, as shown by the plea, for the purpose of providing facilities for the transaction of such business as the railroad company might desire with such vessels as it might permit to come and lie by said wharf to take cargo; and it limits the use of the wharf to traffic handled by vessels in the regular lines running in connection with the Louisville & Nashville Railroad, and vessels belonging to or consigned to the Gulf Transit Company (an agency of the railroad), and to traffic in connection with other vessels subject to special arrangement; in short, the use of the wharf is limited by the railroad company to vessels of connecting lines, and to such others as the company sees fit to permit.

In *Indian River Steamboat Company v. East Coast Transportation Company*, 28 Fla. 387, 10 South. 480, 29 Am. St. Rep. 258, where was involved questions very similar to those herein, the Supreme Court of Florida held:

“A railroad corporation, under the laws of Florida, has the right to erect and maintain docks, wharves, and piers, as incidents to its business, and to hold or dispose of them as may be deemed proper; but such corporation engaged in the business of common carrier has no right to lease the terminal point of its railroad track and terminal facility on a navigable stream to a steamboat company, and thereby defeat the ingress and egress to and from said railroad track on the part of other competing lines of steamboat companies.”

And in the opinion said:

“The real question presented here is, can complainant corporation, engaged in carrying freight and passengers on the Indian river by means of steamboats, rent from a railroad common carrier its dock on said river on which its track and terminal facilities are located, and exclude others from landing at said terminal point for the purpose of delivering and receiving freight and passengers to and from said common carrier? This question, we think, must be answered in the negative. If it be competent to sustain such a contract, the common carrier can select one connecting line of boats, and exclude all others from doing business with it. Such a doctrine would lead to the legalizing of a monopoly, and the sanction of an unfair and unjust preference between connecting and competing lines of transportation. We do not understand that a common carrier ever had such power as this.”

In *Barrington v. Commercial Dock Company* (Wash.) 45 Pac. 748, 33 L. R. A. 116, the right of the owner of a wharf located on the shore of Commencement Bay, in the city of Tacoma, where the water at the outer edge of the wharf was of the depth of eight feet below tide—the same situated on a waterway approachable from the sea and the waters of Puget Sound—and where certain vessels approved by the owner of the wharf, competing in business with other vessels, were

permitted to land, to exclude certain other vessels in the same competing business, not approved by the wharf owner, was much considered, and the court said:

"The main contention of appellant is that its wharf is a private wharf, and under the control of the owner, and that it has a right to determine for itself with whom it will do business; and counsel confidently cites section 2136, Hill's Ann. St. & Codes, in support of this position. * * * The section, as a whole, while it recognizes the right of private ownership in wharfs, cannot be construed to mean that such private property may not be devoted to such use as will, in contemplation of law, make it partake of the nature of a public wharf. Upon this question it was said by the Supreme Court of the United States in *Dutton v. Strong*, 66 U. S. 32, 17 L. Ed. 32, that 'piers or landing places, and even wharves, may be private, or they may be in their nature public, although the property may be in an individual owner, or, in other words, the owner may have the right to the exclusive enjoyment of the structure, and to exclude all other persons from its use, or he may be under obligation to concede to others the privilege of landing their goods or of mooring their vessels there upon the payment of a reasonable compensation as wharfage; and whether they are the one or the other may depend, in case of dispute, upon several considerations, involving the purpose for which they were built, the uses to which they have been applied, the place where located, and the nature and character of the structure.' In *Gould, Waters*, § 119, the author lays down the proposition, and supports it by a great array of authorities, that, 'when wharves belonging to individuals are legally thrown open to the use of the public, they become affected with a public interest, and the wharfage must be reasonable.' The proof in this case shows that numerous steamers landed at appellant's wharf daily, discharging passengers and baggage, as well as freight, from different ports in the waters of Puget Sound and elsewhere; and it also shows that the appellant receives the sum of 25 cents per ton for every ton of freight going out or coming in over said wharf. We think that the language of the court in *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77, is applicable here, viz., that appellant stands 'in the very "gateway of commerce," and takes toll from all who pass.' In the *Kate Tremaine*, 5 Ben. 60, Fed. Cas. No. 7,622, it is said: 'A wharf is a necessity of modern navigation, and of navigation alone. The sole object of its erection is to facilitate the transportation of passengers and freight upon navigable waters. * * * Every vessel has a license to use, for her safety or convenience, any public wharf on navigable waters, upon paying reasonable wharfage.' We think that, in determining the character of appellant's wharf, regard should be had to the use to which it has been devoted, rather than its private ownership, and that, upon the facts found, the position of the appellant

cannot be maintained. As well might the proprietor of a stage coach claim the right to discriminate upon the ground that the property employed in his business was private property. The doctrine, if maintained, would tend to promote and further monopolies, which is not the policy of our law to favor."

The foregoing well-considered cases seem to furnish sufficient authority for holding that a wharf built out into the deep waters of a harbor like that of Pensacola, where ships coming from and going to all parts, land, lie, moor, and anchor for rest and loading and unloading, and which is used by the owner for his own business, and for such ships of others engaged in competing business as the owner may see fit to permit, is, by its location and use, open to all ships whose traffic calls them to take goods therefrom.

When the case goes further, and we consider that, in addition, the wharf is a quasi railroad terminal, where all goods, as ordered, are carried, and to which all consignees of goods ought to have access, the reasons are decidedly more potent for holding that such wharf, located in public waters which are free to all, is affected with a public use, and cannot lawfully be farmed out to a small portion of the shipping public, to the encouragement of a monopoly and the hindrance of competition. And the monopoly in the instant case at the wharf is not the only resulting evil. Controlling the wharf, as it claims the right to do, gives the railroad company the entire control at nearly all points on its line as to shipment of goods destined to water transportation beyond Pensacola, both as to route and rates.

The learned counsel for defendant in error has briefed a very plausible argument in favor of the right of the railroad company to discriminate against shippers and competing vessels for business at the wharf in question, and in favor of such competing vessels as it sees fit to permit, and, with much industry, has collated numerous authorities on the propositions submitted by him. On the proposition that a common carrier may hold itself out to the public as willing to serve it, and every member of it, just as far as it pleases, and its liability will be coextensive with such holding out, he cites *Dickson v. Great Northern Railway Co.*, L. R. 18 Q. B. Div. 176; *Johnson v. Midland Railway Co.*, 4 Ex. 367; *Hosea v. McCrory*, 12 Ala. 349; *Whitemore v. Steamboat Caroline*, 20 Mo. 513; *Lake Shore, etc., v. Perkins*, 25 Mich. 329, 12 Am. Rep. 275. That a common carrier may devote portions of its facilities to its own use, or to the use of particular individuals, and thus refuse to be a common carrier as to those facilities: *People v. Railway Co.*, 57 Ill. 437, and *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story, 16, Fed. Cas. No. 2,730; *Hutch. on Carriers*, 75. Counsel also announces the proposition that one common carrier has no right, independent of charter or contract, to use the terminals of another

Yazoo & M. V. R. Co. v. Darden

carrier; citing *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. R.*, 110 U. S. 667, 4 Sup. Ct. 185, 28 L. Ed. 291, 16 Am. & Eng. R. Cas. 57; *Gulf, Colorado & S. F. Ry. v. Miami Steamship Co.*, 30 C. C. A. 142, 86 Fed. 407, 416, 422; *Little Rock & Memphis R. Co. v. St. Louis Ry. Co.*, 11 C. C. A. 417, 63 Fed. 775, 781; *Little Rock & Memphis R. Co. v. St. Louis, I. M. & S. Ry. Co. (C. C.)* 59 Fed. 404. Again, that a transportation company operating a railway and a line of steamboats connecting it at the company's wharf is not required by the third section of the interstate commerce act of February 4, 1887, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155] to permit the boats of a competitor to land at such wharf: *Ilwaca Ry. & Navigation Co. v. Oregon Short Line, etc.*, 6 C. C. A. 495, 57 Fed. 673. Counsel also cites cases too numerous to mention as to the proposition that a railway company has a right to discriminate between draymen, hackmen, etc., desiring to use depot and like facilities of the railroad. These authorities are said to be collected in *Donovan v. Pennsylvania Co. (C. C. A.)* 120 Fed. 215. None of these propositions are, in our opinion, applicable to the present case, and the only one of the adjudged cases cited which seems to bear upon propositions here involved is *Ilwaca Railway Navigation Co. v. Oregon Short Line, etc.*, supra. An examination of that case shows that the Oregon Short Line & Navigation Company controlled both the railway and the steamship line connecting with the wharf in question, and we find nothing decided therein to conflict with our views of the present case. If the wharf involved in this case, although in the deep waters of a navigable harbor, was used by the railroad company solely for its own carrying business in connection with its own lines, a different case would be presented; and we have herein quoted from *Indian River v. East Coast Trans. Co.*, supra, to that effect.

As we hold to the views herein expressed, we are called on to reverse the judgment of the Circuit Court and remand the case, with instructions to sustain the demurrer to the third plea, and otherwise proceed according to law. And it is so ordered.

YAZOO & M. V. R. CO. v. DARDEN.

(*Supreme Court of Mississippi, May 18, 1903.*)

[34 So. Rep. 386.]

Railroads—Injuries to Lands—Damages—Crops.

Where the construction of a railroad caused water to collect on a portion of plaintiff's land, which, by reason thereof, could not be cultivated, plaintiff was not entitled to recover the value of land, and, in addition, damages to crops not planted.

Appeal from Circuit Court, Jefferson County; J. A. Ramsey, Special Judge.

Chicago & E. I. R. Co. *v.* Clapp

Suit by Mrs. C. F. Darden against the Yazoo & Mississippi Valley Railroad Company to recover for injuries to certain lands and crops. From a justice's judgment in favor of plaintiff, affirmed by the circuit court, defendant appeals. Reversed.

The suit was brought in a justice of the peace court on the following itemized statement of damages: "Damages to crop of 1901, \$20.00; damages to crop of 1902, \$25.00; damages to land, \$35.00." From a judgment for plaintiff for \$70, defendant appealed to the circuit court. On the trial in the circuit court the evidence showed that the construction of defendant's railroad through plaintiff's lands had caused water to collect and pond on about three-quarters of an acre of plaintiff's land; that this land had not been cultivated at all, and that the pond had been on the land for about 20 years; that the land was worth \$7.50; and there was evidence introduced to show the value of crops that could have been raised on the lands for the years 1901 and 1902 if it had not been covered in water.

Mayes & Harris, for appellant.

R. S. Field, for appellee.

CALHOON, J. The verdict for \$65 is plainly excessive. The value of the three-quarters of an acre of land was shown to be \$7.50, and was not, and had never been, in cultivation. One may not recover for the value of the land rendered unfit for cultivation, and also damages to crops not planted. *I. C. R. R. Co. v. Miller*, 68 Miss. 760, 10 South. 61.

Reversed and remanded.

CHICAGO & E. I. R. Co. *v.* CLAPP.

(*Supreme Court of Illinois, Feb. 18, 1903.*)

[66 N. E. Rep. 223.]

Right of Way—Abandonment—Effect.

Const. 1870, art. 2, § 13 (Starr & C. Ann. St. [2d Ed.] p. 113), providing that the fee of land taken for railroad tracks without the owner's assent shall remain in such owner, gives a railroad company only an easement in such land, and the property reverts to the original owner on abandonment by the railroad company.

Same—Same.*

To constitute abandonment of a right of way, there must be not only an actual relinquishment of the property, but an intention to abandon it.

Same—Same.

Where a railroad company had ceased to operate a branch to a coal mine after the mine was exhausted, had taken up the tracks and nearly all the ties, removed all the crossing signs and all the cattle

*As to what constitutes an abandonment of a railroad right of way, see note appended to *Scarritt v. Kansas City, etc., Ry. Co.* (Mo.), 15 Am. & Eng. R. Cas., N. S., 809.

Chicago & E. I. R. Co. v. Clapp

guards but two or three, taken out the switch ties and bridge timbers, allowed the right of way to grow up with weeds, and failed to keep the fences in repair, it was proper to submit to the jury whether there was an intention on its part to abandon the branch.

Same—Same.

On the issue whether a railroad right of way had been abandoned, it was competent to show that the road was built merely for hauling supplies and coal to and from a mine since exhausted.

Same—Same—Intention—Evidence.

Where, in ejectment against a railroad company, the chief engineer of the road, after having testified that, as to the company's intention to abandon the road, his only knowledge was what the president had told him, was allowed to state that the president had said he did not want to abandon the road, had instructed him to ask the company's attorney if taking up the rails would constitute abandonment, and afterwards told him he did not want the track taken up, as they might want to use it, an objection that he was not permitted to state the company's intention as to the abandonment of the road was untenable.

Same—Same—Same—Same.

The expression of an intention on the part of a railroad company not to abandon a right of way is not conclusive evidence of such intent, but is to be considered in connection with the acts and conduct of the company.

Same—Ejectment—Parties.

Section 6 of the act in regard to ejectment (2 Starr & C. Ann. St. [2d Ed.] p. 1610) provides that the party in possession shall be made defendant. Section 17 (2 Starr & C. Ann. St. [2d Ed.] p. 1614) provides for notice by the tenant to the landlord when so sued, and section 18 provides for making the landlord defendant: *held* that, where it appears that there was an arrangement with the railroad company originally obtaining a right of way, whereby another company operated and was in possession of the road, it is not necessary to make the former defendant to a suit for ejectment brought on account of an abandonment of the road.

Same—Abandonment—Intention—Instruction.

An instruction that abandonment of a right of way will entitle the owner of the fee to the possession of the premises was not misleading because omitting to expressly mention the element of intention. where the court, in other instructions, clearly charged that there could be no abandonment without an intention to abandon.

Appeal from circuit court, Vermilion county; F. Bookwalter, Judge.

Action by Daniel Clapp against the Chicago & Eastern Illinois Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action of ejectment, brought by the appellee against the appellant company to recover the possession of a strip of land 66 feet wide off of the south side of the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 11, town 19 N., range 13 W. of the second principal meridian in Vermilion county, of which the declaration alleges that the appellee is the owner in fee simple. To the declaration the plea of the general issue was filed. The case was tried before the court and a jury. The jury returned a verdict finding the defendant guilty, and that the plaintiff was the owner in fee simple, entitled to the possession of said strip. Motion for new trial was overruled, and judgment was rendered on the verdict. The present appeal is prosecuted from such judgment.

Chicago & E. I. R. Co. v. Clapp

An affidavit was made by appellee, the plaintiff below, that he claimed title through a common source with the appellant company, the defendant below. The affidavit stated that appellee claimed title from one William P. Makemson, and that the appellant claimed title from Makemson. Upon the trial, appellee, Daniel Clapp, introduced a warranty deed from William P. Makemson and wife to himself, conveying said 40 acres, which said deed contained the following words: "Subject to a lease of the right of way of the C. & E. I. R. R. off of the south side of the above-described land." Appellee also introduced the proceedings in a certain condemnation case of the Danville Coal Belt Railroad Company against John A. Clapp, William Makemson, and others, begun on July 19, 1893. The petition for condemnation recites that the Danville Coal Belt Railroad Company is duly organized under the laws of Illinois, and authorized to construct, own, and operate a line of railroad in Vermilion county, beginning at a point on a branch of the Chicago & Eastern Illinois Railroad, the appellant herein, and running thence to a coal mine called the "Glenburn Coal Mine." In the condemnation proceeding William P. Makemson, who was defendant, filed a cross-petition for damages to other property, owned by him, than that sought to be condemned. A verdict was returned allowing to Makemson for land taken, and damages to land not taken, the sum of \$238; and on August 3, 1893, an order was rendered upon the verdict that the petitioner, upon the payment of \$238, use, possess, and enjoy said strip off the south side of the N. E. $\frac{1}{4}$ of said N. W. $\frac{1}{4}$, belonging to William Makemson, for the purpose of maintaining and operating thereon a railroad. It is conceded that the Danville Coal Belt Railroad Company paid the costs in the condemnation proceedings, and to the county treasurer the compensation and damages allowed to Makemson and other defendants. The appellant, defendant below, introduced in evidence the articles of incorporation of the Danville Coal Belt Railroad Company.

H. M. Steely (W. H. Lyford, of counsel), for appellant.

Lawrence & Lawrence, for appellee.

MAGRUDER, C. J. (after stating the facts). Upon the trial of the case at bar the appellee claimed title to the property in question by warranty deed executed to him by William P. Makemson. The interest of the appellant in the strip of land in question is also derived from William P. Makemson through a condemnation proceeding instituted by the Danville Coal Belt Railroad Company against William P. Makemson, the owner of the 40 acres, of which the strip in question, 66 feet wide, was a part. The road passed into the possession of the appellant company, and was operated by it through an arrangement made by appellant company with the Danville Coal Belt Railroad Company. Section 13 of article 2 of the Constitution of 1870 of Illinois provides that "the fee

Chicago & E. I. R. Co. v. Clapp

of land taken for railroad tracks without consent of the owners thereof, shall remain in such owners subject to the use for which it is taken." Starr & C. Ann. St. (2d Ed.) p. 113. Therefore, by the condemnation proceeding, the petitioning railroad therein only acquired an easement over the strip in question 66 feet wide, with the right to use the same for railroad purposes. After the condemnation the fee of the land included within the strip remained in William P. Makemson, and passed to his grantee, the present appellee, subject to the easement therein of the railroad company, and subject to the right of the latter to use the strip for railroad purposes. In this state, where land is condemned for railroad purposes, only an easement is taken, and the fee remains in the original owner, who may use the land for every purpose not incompatible with the use for which it has been appropriated by the railroad company. 10 Am. & Eng. Ency. of Law (2d Ed.) p. 1197, and cases in notes. Appellee bases his right to a recovery in this case upon the ground that the strip in question was abandoned by the railroad company. The contention of the appellee is that the right and title of the railroad company to the use of the strip were conditioned upon its use for railroad purposes, and that when that use was abandoned its right to hold the land ceased, and the property reverted to the original owner, or his grantee, the appellee in this case. The law is that "when a corporation, in the exercise of the right of eminent domain, acquires for a public purpose a mere easement in land, its right and title to the property so acquired are dependent upon the use of the property for public purposes, and when such public use becomes impossible, or is abandoned, its right to hold the land ceases, and the property reverts to its original owner." 10 Am. & Eng. Ency. of Law (2d Ed.) p. 1198; Kansas Central Railroad Co. v. Allen, 22 Kan. 285, 31 Am. Rep. 190; Helm v. Webster, 85 Ill. 116. In Kansas Central Railroad Co. v. Allen, supra, it was said: "An easement merely gives to a railroad company a right of way in the land; that is, the right to use the land for its purposes. This includes the right to employ the land taken for the purposes of constructing, maintaining, and operating a railroad thereon. * * * The former proprietor of the soil still retains the fee of the land, and his right to the land for every purpose not incompatible with the rights of the railroad company. Upon the discontinuance or abandonment of the right of way the entire and exclusive property and right of enjoyment revert in the proprietor of the soil. After the condemnation and payment of damages, the soil and freehold belong to the owner of the land, subject to the easement or incumbrance, and such landowner has the right to the use of the condemned property, provided such use does not interfere with the use of the property for railroad purposes." In Helm v. Webster, supra, which was an action of ejectment, brought by Webster against Helm to recover the south half of

Chicago & E. I. R. Co. v. Clapp

a certain street in the city of Quincy, it was held that, where a party, in conveying land to a city for a street, provides in his deed that, when the same shall cease to be used as a street, or the street shall be abandoned or vacated, it shall revert to the grantor, his heirs or assigns, on vacation of the street the land will pass back to the grantor or his assigns by virtue of such clause, and also, upon general principles, without such a reservation; and in that case it was said: "It cannot be denied that by virtue of Holmes' deed to appellee of November 18, 1865, appellee became vested with all the rights reserved by Holmes in his deed of August 24, 1855: but, without that reservation in this deed, Holmes, on general principles, would have been remitted to his title on the abandonment of the street by the city. * * * The street having been vacated and abandoned by the city on March 14, 1876, from that time the fee reverted to appellee, and is in him, and the court decided correctly."

1. The material question in the case, therefore, is whether there was an abandonment of the strip of land in question by the railroad company. At the close of appellee's case upon the trial below, and again at the close of all the evidence, the appellant asked the court to give to the jury a written instruction that the evidence, taken as a whole, was not sufficient to support a verdict in favor of the plaintiff, and directing the jury to return a verdict finding the issues for the defendant. This instruction was refused, and its refusal is assigned as error by appellant. To constitute an abandonment there must be not only an actual relinquishment of the property, but an intention to abandon it. The intention of the party whose rights are alleged to be abandoned is the important fact to be ascertained in determining whether or not there has actually been an abandonment of the property. This question of fact is one for the determination of the jury, depending upon all the facts and circumstances disclosed by the evidence. *Keane v. Cannovan*, 21 Cal. 293, 82 Am. Dec. 744; *Wyman v. Hurlburt*, 12 Ohio, 81, 40 Am. Dec. 464, and notes; *McGoon v. Ankeny*, 11 Ill. 558. In *Keane v. Cannovan*, supra, it was said by Mr. Chief Justice Field: "The charge to the jury on the subject of abandonment was correct. The charge was that the question of abandonment was one of intention, of which the jury were to judge exclusively, and that, in order to do so, they must take into consideration all the facts and circumstances before them. The question was correctly stated. It was plainly one of intention to be gathered from the facts." In the case at bar the railroad constructed upon the strip in question was built from a branch of the appellant company for a distance of about three miles to a coal mine called the "Glenburn Coal Mine," and was, indeed, but a spur or branch of appellant's railroad. It was operated exclusively for the purpose of hauling coal from the coal mine in question, and for the purpose of hauling supplies and timbers,

Chicago & E. I. R. Co. v. Clapp

known as "coal props," to be used in connection with the mine. The railroad was used for the purpose of thus hauling coal from the mine and coal supplies to the mine for about seven years after its construction in 1893. In 1899 the coal mine was abandoned. In the language of one of the witnesses, "the mine played out in 1899." The railroad shortly thereafter, and, according to some of the witnesses, in November, 1900, ceased to operate the road, and completely dismantled it. The testimony shows that the tracks were taken up; that nearly all the ties were taken out; that the cattle guards, except two or three wooden ones, were removed; that the switch ties and bridge timbers were taken out; and also that the signs at the railroad crossings were removed. The rails taken up by the appellant company were used by it in the construction of another road, which the appellant was building in the southern part of the state. The right of way was allowed to grow up with weeds, and, while the fences along the right of way were left, they were not kept in repair. Since the coal mine was abandoned, and since the dismantling of the road in the manner thus stated, the road has not been operated for railroad purposes. By the instructions given by the court to the jury upon the trial below it was left to the jury to determine from the evidence in the case, and, from all the facts and circumstances thus detailed, whether or not it was the intention of the railroad company to abandon the road for railroad purposes. Certainly, the evidence was sufficient to submit that question to the determination of the jury, and they have found against appellant.

Appellant insists that the evidence in the case was insufficient to show an intention to abandon upon the part of the appellant company. It is true that nonuser for a definite fixed period is not of itself sufficient to establish an abandonment, but when "the nonuser is accompanied by acts on the part either of the owner of the dominant or servient tenement, which manifest an intention to abandon, and which either destroy the object for which the easement was created or the means of its enjoyment, an abandonment will take place." *Keane v. Cannovan*, supra; *Wyman v. Hurlburt*, 40 Am. Dec. 464, and notes; *Davis v. Gale*, 32 Cal. 27, 91 Am. Dec. 554; *Canny v. Andrews*, 123 Mass. 155. In support of its contention upon this point, appellant refers to the case of *Durfee v. Peoria, Decatur & Evansville Railway Co.*, 140 Ill. 435, 30 N. E. 686, which was not an action of ejectment where the question of intention was submitted to the jury, but was a proceeding in chancery. In the latter case it was said that the railroad company did not lose its right of way from a failure to occupy the land acquired for that purpose for a period of years, and it was also said that, where a railroad company had entered into a contract with another company for the use of a part of its tracks, the taking up of the rails from a part of the track and removing them to a new track did not constitute

Chicago & E. I. R. Co. v. Clapp

an abandonment. In the case at bar, however, there was something more than mere nonuser, and something more than a taking up of the rails from a part of the track. The whole road was completely dismantled by the taking up not only of the rails, but of the ties, of the bridge timbers, of the signs, and of everything else that constituted a railroad fit for operation. It was, therefore, proper to leave it to the jury to say whether there was, in view of the facts and circumstances, an intention to abandon.

2. Appellant claims that the court below erred in permitting evidence to be introduced for the purpose of showing how the road had been operated; that is to say, what kind of trains and freight had been hauled over the same. We think that it was competent to show that the road was built merely for the purpose of hauling coal from the coal mine and of hauling supplies to the coal mine. As it was a road built and constructed to haul coal from this mine, and for no other purpose, then, when the coal mine ceased to be fit for use, and was abandoned, there was no longer any business for the road. The fact that the road was built merely as a coal mine road, and for no other purpose, in connection with the abandonment of the coal mine, was a circumstance to be considered by the jury in determining whether it was the intention of the appellant to abandon the road for the railroad purposes to which it had been applied. The fact that the road was limited to the carrying of one particular kind of freight, to wit, coal, together with the fact that the supply of coal became exhausted, and naturally left the road without any business, would tend to indicate an intention to abandon the road.

3. Appellant complains that the court below refused to allow the chief engineer of the appellant company, when he was a witness upon the stand, to testify as to what was the intention of the company in regard to the abandonment of the road. It is true that at one sitting the court declined to allow the witness to state what the intention of the company was upon this subject, but indicated his willingness to change his mind, if counsel at a subsequent sitting should produce authorities in favor of their position. At a subsequent sitting the authorities were produced, and the witness was then allowed to state what the president of the road said upon this subject. The witness testified that he knew nothing about the intention of the company in regard to an abandonment of the road, except what was said to him by the president. He then went on to say that the company was building another road in the southern part of the state, and was unable to obtain rails sufficient to construct the track, and that it determined to take up the tracks from this spur or branch road here in controversy, and carry them to the southern part of the state, to construct the road there being built; and this was done. He furthermore says that when the president of the appellant company was consulted as to whether the rails

Chicago & E. I. R. Co. v. Clapp

should be taken up or not, he said: "He did not want to abandon it, and instructed me to see our attorney, * * * and ask if taking up the rails would abandon it. I did see him, and he said it would not constitute an abandonment. * * * When I asked him [the president] about it, he said he did not want them taken up, because we might want to use the track again." The witness further says that the taking up of the track was under his charge, and that he told the men who were engaged in the work "to leave the fence, as we did not want to abandon the right of way." What the president said, as testified to by this witness, was substantially that they did not intend to abandon the road, and therefore the witness was permitted finally to say what on a previous occasion he was not permitted to say. In *City of Chicago v. Chicago, Rock Island & Pacific Railway Co.*, 152 Ill. 561, 38 N. E. 768, where the question was what the intention of a railroad company was as to the dedication of certain land to the public use, we said (page 570, 152 Ill., and page 772, 38 N. E.): "The rule in this state, and perhaps generally, is to allow the owner to testify to what his intention actually was, to be considered in connection with all the other facts and circumstances in the case." Here the appellant company was permitted to introduce proof as to what its intention was in regard to the abandonment of the road. But in *City of Chicago v. Chicago, Rock Island & Pacific Railway Co.*, supra, it was further said: "The rule doubtless is that the intent testified to, not to dedicate, will not be permitted to prevail against unequivocal acts and conduct on the part of the owner inconsistent with such intent, and upon which the public had a right to rely. * * * And where the owner swears to what his intention was he can be contradicted by his acts and conduct or declarations." So here there was before the jury testimony as to what the expressed intention of the appellant company was in regard to the abandonment, and over against this expressed intention were certain acts and conduct of the appellant company tending to show that there was an intention to abandon the road. The declarations of the company and its acts and conduct were all before the jury to be considered by them in determining the question. The expression of an intention not to abandon is not conclusive evidence upon the subject, but is to be considered in connection with the acts and conduct of the party using such expression. Hence the rule laid down in the *Rock Island Case*, supra, was observed here.

4. Complaint is also made by the appellant that the Danville Coal Belt Railroad Company was not made a party defendant to the ejectment suit. The company, which was in possession of the premises in controversy, was the appellant. The Danville Coal Belt Railroad Company was not in possession of the premises. The proof discloses that some sort of an arrangement, the precise nature of which is not made to appear by the testimony, existed between the Dan-

Chicago & E. I. R. Co. v. Clapp

ville Coal Belt Railroad Company and the appellant, by which the appellant was permitted to operate the road. It would seem to be a fair conclusion from the evidence that the appellant was either lessee, assignee, or grantee, holding under the Danville Coal Belt Railroad Company. "Ejectment is a possessory action, and determines none but possessory rights, and hence, at common law, as a general rule, must be brought against the person who is in possession of the premises in controversy, and who wrongfully withholds them from the plaintiff." 10 Am. & Eng. Ency. of Law (2d Ed.) p. 524. Section 6 of the act in regard to ejectment provides that, "if the premises, for which the action is brought, are actually occupied by any person, such actual occupant shall be named defendant in the suit; and all other persons claiming title or interest to or in the same, may also be joined as defendants." Section 17 of the same act provides that "every tenant who shall, at any time, be sued in ejectment by any person other than his landlord, shall forthwith give notice thereof to his landlord, or to his agent or attorney, under the penalty of forfeiting two years' rent of the premises in question," etc. Section 18 provides that "the landlord, whose tenant is sued in ejectment, may, upon his own motion or that of the plaintiff, be made defendant in such action, upon such terms as may be ordered by the court." 2 Starr & C. Ann. St. (2d Ed.) pp. 1610, 1614. While the appellee may have had the right to make the Danville Coal Belt Railroad Company a defendant in the suit below, yet it was not actually obliged to make any other person defendant than the appellant company. The appellant did not make any motion asking that the Danville Coal Belt Railroad Company be made a defendant in the suit. In *Keane v. Cannovan*, supra, it was said: "The action of ejectment lies only against the occupant of the premises, and to him the plaintiff must look for compensation for their use." In *Hanson v. Armstrong*, 22 Ill. 442, in construing the first clause of section 6 of the ejectment act, as above quoted, we said (page 445): "By the provisions of this section the action of ejectment can only be brought against the person in possession of the premises if they are occupied. * * * When occupied, persons not in possession cannot be made defendants to the action. When a recovery is had against the occupant, the judgment binds not only him, but all persons under whom he occupies, together with all persons in privity of estate or possession with himself. When a recovery is had against a tenant, the landlord is bound by it." See, also, *Stribling v. Prettyman*, 57 Ill. 371.

The evidence in this case shows that, as soon as this road was constructed to the coal mine, the appellant company began to operate it, and continued to operate it up to the time the coal mine was closed, with the exception of a short period, when a railroad company known as the "Calumet & Blue

Chicago & E. I. R. Co. v. Clapp

Island Company," was permitted, under contract with the appellant company, to haul coal from the mine in question for some steel company. Indeed, one of the witnesses says that "the Chicago & Eastern Illinois built in from its main line to the curve." It seems that a road about a mile and a quarter long had already been built from a place called "Oakwood" to the Glenburn mine. This road from Oakwood to the Glenburn mine was actually conveyed by the Glenburn Coal Company to the appellant. The road built by the Danville Coal Belt Railroad Company extended from a branch of the appellant to connect with this road running from Oakwood to the mine, and it is the part of the road so extended that one of the witnesses states was actually built by the appellant, although it stood in the name of the Danville Coal Belt Railroad Company. One of the witnesses for the appellant in the court below, and an official of the appellant, states that, after the road in question was constructed, it was operated by the Chicago & Eastern Illinois Railroad Company, the appellant herein, by an arrangement between the appellant and the Danville Coal Belt Railroad Company. The evidence thus establishes a privity between the Danville Coal Belt Railroad Company and the appellant. Hence, under the authorities already referred to, it cannot be said that appellant established an outstanding title in a third person.

Undoubtedly, the defendant in an ejectment suit may show that either the legal title or right to possession is in a third person, and so defeat the action. In other words, an outstanding title in a third person, superior to that of the plaintiff, is, as a general principle, sufficient to defeat a recovery in ejectment, although the defendant may not be able to connect himself with that title. But a defendant who sets up an outstanding title for a third person as a defense to an action for the recovery of possession of real property must show that such title is still a living and effective title, not void or ineffectual. Such outstanding title must be one which would enable the third party himself to maintain an action for the possession of the land in controversy against both the plaintiff and defendant. 10 Am. & Eng. Ency. of Law (2d Ed.) p. 532; Newell on Ejectment, pp. 652, 653; 3 Wait's Actions & Defenses, pp. 109, 110. The claim on the part of appellant that it has here shown an outstanding title in the Danville Coal Belt Railroad Company as a third person, and that such title is superior to that of the plaintiff, cannot be sustained. There is a privity of interest between the Danville Coal Belt Railroad Company and the appellant, and consequently a judgment against the appellant, as the occupant of the premises, will bind the Danville Coal Belt Railroad Company in view of the relation existing between them. The defense of an outstanding title in a third person cannot be set up here, because, even if it be admitted that the Danville

Chicago & E. I. R. Co. v. Clapp

Coal Belt Railroad Company acquired an easement by virtue of the condemnation proceeding, the question still remains whether it abandoned the interest so acquired by it by the dismantling of the road and the failure to operate it. The fee-simple title is in appellee, subject to the right of user for railroad purposes. Hence only the right of possession is here involved, and this right of possession depends upon the question whether or not the use of the premises has been abandoned for railroad purposes.

5. Complaint is also made by the appellant that the court erred in giving the third instruction which it gave on behalf of the appellee. This instruction was as follows: "The law provides that, in case of abandonment of said right of way for the purpose of maintaining and operating thereon a railroad, the right to the use and possession of it reverts to the one having the fee simple title thereto." The objection made to the instruction is that it omits the element of intention to permanently abandon the strip of land in question. The idea of intention is embodied in the idea of abandonment. There could be no abandonment by appellant without an intention to abandon. The jury could not have been misled by the instruction in view of the fourth instruction, which was given for the appellee. The fourth instruction was as follows: "While, under the law, there cannot be an abandonment without an existing intent to abandon, yet you are the sole judges, from the evidence, whether there was such intent on the part of the defendant. In reaching a conclusion either way upon the question, you should carefully consider all the evidence and all the facts and circumstances shown by the evidence." The latter instruction stated clearly to the jury that there could not be an abandonment without an intention to abandon. The same objection is made to the fifth instruction given for the appellee, and the same answer is applicable. The court also gave two instructions for the appellant at its request, which told the jury distinctly that the appellee must prove by a preponderance of the evidence that there was an intention to permanently abandon said strip of land as a right of way for a railroad. There was no contradiction between the instructions thus given for the appellant and those given for the appellee.

Appellant also complains that the court erred in refusing to give the instructions asked by it numbered 4 and 6. These instructions were properly refused, because they substantially told the jury that there was an outstanding title in the Danville Coal Belt Railroad Company in view of the condemnation proceeding in question, and that the existence of this outstanding title was a defense to the action of the appellee. For the reasons already stated, the defense of outstanding title in a third person was not established. The judgment of the circuit court is affirmed.

Judgment affirmed.

BAILEY *v.* BOSTON & P. R. CORP. *et al.*
JOHNSON *et al.* *v.* SAME.

(*Supreme Judicial Court of Massachusetts, Suffolk, Feb. 25, 1903.*)

[66 N. E. Rep. 203.]

Eminent Domain—Damages to Land Not Taken—Loss of Business.

In the absence of special statutory provision, the loss of business, as such, arising from the taking of property adjoining that on which the business was conducted, for a railroad right of way, cannot be considered; the damages being limited to the diminution in value of the real estate, estimated by reference to the uses to which it is adapted.

Same—Railroad in Street—Injury to Abutting Property.

Where, by reason of the taking of a part of a street for a railroad right of way, the rental value of plaintiff's abutting property was diminished, or its value for the uses to which it was adapted was diminished, such damages, in so far as it was special, as distinguished from that suffered in a greater or less degree by the public generally, is recoverable.

Same—Same—Same—Temporary Injuries.

Where an abutting property owner suffered special damage by the construction of a railroad in a street condemned for a right of way, the fact that the injury continued only while the work of construction was in progress was immaterial.

Report from superior court, Suffolk county; Henry N. Sheldon, Judge.

Actions by S. Marie Bailey and William J. Johnson and others against the Boston & Providence Railroad Corporation and others. On report from the superior court after verdict in favor of plaintiffs for less than the relief demanded. Remanded for judgment on the verdict or for a new trial.

Petitions for the assessment of damages for the taking of land by respondent railroad, and for damages for the laying out and making of its road. The two cases were heard together before an auditor, and tried to a jury. Petitioner Bailey was at the time of the taking of the land the owner in fee of certain land and buildings situated at the corner of Harrison avenue and Way street, in the city of Boston, bounded on the west by Harrison avenue, and on the north by Way street, subject to the easement of a public highway. Petitioners William J. Johnson and others were lessees under a 10-year lease, beginning March 1, 1896, of the whole of the above-mentioned land and buildings, and were partners doing a mercantile business on the premises under the firm name of Johnson & Co. Way street was parallel to, and about 25 feet southerly from, the location of the Boston & Albany Railroad Corporation, and Harrison avenue crossed such location by a bridge, which was a few feet above the general grade of the avenue. The Boston & Providence Railroad Corporation was authorized by Acts 1896, c. 516, to take land for the purpose of connecting its tracks with the south terminal station, and under this act respondent on March 17, 1898, took land up to, and somewhat beyond the middle line of, Way street, including the fee of a portion of the northerly part of the

Bailey v. Boston & P. R. Corp

leased premises, and thereafter constructed its roadbed on the land taken. The extension of the bridge at its former grade over the newly constructed roadbed involved a change of grade of Harrison avenue at or near the corner of Way street, and also of Way street in front of said premises. By the construction of respondent's railroad, which included the lengthening of the bridge across the tracks of the Boston & Albany Railroad, across the tracks of the respondent, the raising of the grade of Harrison avenue and Way street along the front of the leased premises, and the construction of a wall along the side of such premises along the part of Way street taken, the petitioners were put, during the period of construction, extending for 12 months, to an actual expense of \$1,214 in handling their goods, made necessary by the shutting off of access of teams through Way street, and for a portion of the time through Harrison avenue, and the volume of their business was so lessened by the work of construction as to cause a further loss of \$1,500. The court instructed the jury that these items were not recoverable, as a matter of law, to which the petitioners excepted.

Wm. A. Munroe and Henry H. Sprague, for petitioners.
J. H. Benton, Jr., for defendants.

KNOWLTON, C. J. The principles of law applicable to these cases have long been well established in this commonwealth, whatever difficulties may have arisen in the application of them. Under statutes like that before us, in the absence of any peculiar provision, persons damaged in their real estate are to receive compensation for all such damages as are direct and proximate, as distinguished from those that are remote and consequential, if they are, at the same time, special and peculiar, as distinguished from common and general. When real estate is used in carrying on a business, the damage to be assessed for the diminution in value of the real estate is estimated in reference to the uses to which it is adapted, and not for loss in the business. *Maynard v. Northampton*, 157 Mass. 218, 31 N. E. 1062; *Edmands v. Boston*, 108 Mass. 535; *Williams v. Com.*, 168 Mass. 364, 47 N. E. 115; *N. Y., N. H. & H. R. R. Co. v. Blacker*, 178 Mass. 386, 59 N. E. 1020. Loss to business, as business, is too remote and consequential a damage to be allowed in estimating damage to the real estate on which it is conducted. Nor does it furnish a correct criterion by which to determine the diminution in value of the estate for the uses to which it is adapted. The business might chance to be exceedingly profitable at the time of the taking, so that an interruption of it from an interference with the full use of the real estate might cause a loss far greater than the reasonable rentable price of the property, or it might then be going on at a loss, so that the interruption would cause no damage to the business, notwithstanding that the interference with the use of the real estate was such as

Cadiz R. Co. v. Roach

would cause a great diminution of its rentable value. In these cases there was an interference with the use of the petitioners' property for about 12 months. So far as this interference diminished its rentable value, or its value for the uses to which it was adapted, and so far as the damage was special and peculiar, as distinguished from that suffered in greater or less degree by the public generally, it was an element properly to be considered by the jury. The fact that it continued only while the work of construction was going on, if it was properly incident to the construction, is immaterial. *Edmands v. Boston*, 108 Mass. 535, 549; *Penny v. Com.*, 173 Mass. 507, 53 N. E. 865, 73 Am. St. Rep. 312.

In the form in which the items are stated—one being for money paid for handling goods which could not be taken by teams on account of the work of construction, and the other being for a money loss to the business from diminution in its volume—it is plain that the jury were rightly instructed that they were not recoverable. In the first place, they both appear to be for expense or loss in the business, and therefore they were not recoverable. Consequently, if we interpret the language strictly, and if we consider whether the items represent, in whole or in part, diminution in the value of the real estate for use, it would appear that the shutting off of access referred to was only access through the streets as lines of travel, which was an interference affecting in greater or less degree the whole public, and so not a special and peculiar damage, but only a general damage, for which there can be no recovery. If the damage was caused by shutting off access to the street, as distinguished from access through each of the neighboring streets, the damage may be special and peculiar. See *Davenport v. Dedham*, 178 Mass. 382, 59 N. E. 1029; *Davenport v. Hyde Park*, 178 Mass. 385, 59 N. E. 1030.

There was a difference of understanding between counsel, at the argument, as to whether the jury were permitted to give damages for diminution of the value of the property for use, caused by the obstructions which were special and peculiar, as distinguished from the interference with the use of the street in its longitudinal course by the general public. There is some uncertainty as to the construction to be given to this part of the report, and we are of opinion that the report should be discharged, and the superior court left to enter the judgment prescribed by the report, or to grant a new trial, as justice requires.

So ordered.

CADIZ R. CO. v. ROACH.

(*Court of Appeals of Kentucky, Feb. 25, 1903.*)

[72 So. Rep. 280.]

Right of Way—Donation—Consideration—Location of Depot.

Where plaintiff, with a number of other landowners, agreed to donate land as a railroad right of way, and it appeared that it was three miles

Cadiz R. Co. v. Roach

and a half from his residence to the nearest depot, and that the building of the new railroad would provide a depot within a mile and a half, the necessary increase in the value of plaintiff's land was a sufficient consideration for his agreement.

Same—Same—Same—Estoppel.

Where a landowner agreed to donate land to a railroad company for a right of way, and thereafter the railroad commenced work upon its road, and graded the roadbed to a point near the grantor's land, who, then, for the first time, repudiated his grant, he was estopped from denying the obligation of his agreement on the ground that it was without consideration.

Same—Same—Same.

The partial building of a railroad in reliance on a promise to donate a right of way was a sufficient detriment to the promisee to constitute a good consideration for the promise.

Appeal from circuit court, Trigg county.

"To be officially reported."

Action by C. J. Roach against the Cadiz Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Sims & Thomas and Sims, Garnett & Burnett, for appellant.

Kelly & Son and D. P. Smith, for appellee.

SETTLE, J. The appellant railroad company undertook to construct and operate a railroad between Cadiz and Gracey, in Trigg county, Ky., for which purpose it received subscriptions in money, and donations of right of way over the lands of divers citizens of that county. The appellee, C. J. Roach, gave such right of way over his land, evidenced by the following writing, signed by him and one L. A. Miller, who had likewise given appellant the right of way over his land: "Office of Cadiz Railroad Company. Cadiz, Ky., Feb'y 21st, 1901. I hereby donate to the Cadiz Railroad Company a 60-foot right of way through my farm, according to surveys. L. A. Miller. C. J. Roach." It appears from the record that the route for the railroad had previously been surveyed through appellee's land, and marked by stakes. After the execution of the writing mentioned, appellant began the work of constructing its road; and, while engaged in cutting and removing timber and undergrowth from the right of way through appellee's land, the latter met the foreman in charge of appellant's workmen, and forbade the doing of any further work on his land, and soon thereafter instituted this action to obtain a cancellation of the writing whereby appellant had been granted the right of way over his land, upon the alleged ground that it had been procured by fraud. The original petition avers, in substance, that appellee was induced to execute the writing upon the false representation made by appellant's agents at the time that all of the neighbors had donated to appellant the right of way over their lands for its road, and in fact that the right of way had been donated from Cadiz to appellee's farm. It is further averred

Cadiz R. Co. v. Roach

that this statement was false, but that he, being unaware of its falsity, was induced thereby to execute the writing, which he would not otherwise have done. Afterwards an amended petition was filed, in which it was alleged that the writing in question was and is without consideration, and consequently void. The answer of appellant specifically denies the allegations of fraud and want of consideration contained in the petition as amended, and avers that the work of building its line of railroad was undertaken by the citizens of Trigg county upon subscriptions of money and donations of lands for the right of way, that appellee's grant of the right of way over his land was made pursuant to this undertaking, and that appellant, relying upon these subscriptions and donations, including that of appellee, had commenced the construction of its line of railroad, and proceeded with the same to the extent of expending \$15,000 or \$20,000 in grading and otherwise preparing its roadbed for laying ties and rails. The answer further avers that the subscriptions and mutual undertaking of the parties to construct the railroad constituted a good and sufficient consideration for the subscriptions made, whether of money or right of way, and, in addition, that appellant's land will be greatly enhanced in value by the building of the railroad and the erection of a depot, which will be only a mile and a half from his residence. By consent of parties the evidence on the issues formed by the pleadings was heard orally by the court, and the trial resulted in a judgment in favor of the appellee, from which, and the refusal of the lower court to grant it a new trial, appellant prosecutes this appeal.

It is proper to say that the charge of fraud in the procurement of appellee's signature to the writing executed by appellee was wholly disproved on the trial, and the only remaining question for this court to determine is as to the plea of no consideration.

We find that appellee, when asked by appellant's agents, Street & Gaines, to give the right of way, said he "wanted the road." In thus expressing himself, appellee seems to have been actuated by the general desire that inspired his neighbors and friends to contribute to the one common object that was expected to benefit the people of the county, which was the securing of a railroad. The undertaking originated with the citizens of Cadiz and vicinity, for they alone seem to have furnished by subscription the capital necessary to the success of the enterprise—some giving money, and others the right of way over their lands. "Where several promise to contribute to a common object, desired by all, the promise of each may be a good consideration for the promise of the others." Parsons on Contracts, vol. 2, page 452; *Twin Creek & Colmanville T. P. Road Co. v. Lancaster, etc.*, 79 Ky. 552; *Stovall v. McCutchen & Co. (Ky.)* 54 S. W. 969, 47 L. R. A. 287. But whether we are to regard appellee's grant to appel-

Cadiz R. Co. v. Roach

lant of the right of way over his land as binding, upon the principle of mutuality, or not, we cannot regard it as a mere gift of his property to a public charity, for by the building of the road he will derive profit from the increase in the value of his land. Besides, it appears that it is three and a half miles, or more, from his residence to the nearest depot, whereas the building of the new railroad will provide a depot within a mile and a half of his residence.

There is yet another ground which we think, in all fairness, should operate as an estoppel to the plea of no consideration made by appellee. We find from the record that no work had been done by appellant in constructing its road at the time appellee executed the writing granting the right of way over his land, which was February 21, 1901, but after that date work was begun, and continued down to June or July, 1901, during which time the roadbed had been graded from Cadiz, a distance of seven miles, to a point near appellee's land; and, as it then became necessary for appellant's servants to grade and construct the roadbed on appellee's land, they went upon the same for that purpose, and had about finished clearing the roadway thereon of timber and other obstructions, when appellee met them, and for the first time advised them of his purpose to repudiate the writing granting the right of way, and by his command the work was then and there stopped. We know of no reason why the law of equitable estoppel should not be made to apply to a case like this. Indeed, we are told in the very admirable work of Thompson on the Law of Corporations, vol. 4, sec. 5279, that it may be applied "where a landowner encourages, actively or passively, the appropriation of his land by a corporation for public use"; and we may add that a greater reason exists for its application where the landowner has, in writing, expressly consented to such use of his land.

There is yet another rule of law which holds that "any advantage to promisor or prejudice to promisee" is a sufficient consideration to support the contract. *Stapp v. Bacon's Ex'r*, 1 A. K. Marsh. 538. Applying this rule to the facts of the case at bar, we find that appellant, relying in good faith upon the subscriptions and donations made in aid of its undertaking, including the donation from appellee of the right of way over his land, began the construction of its road, and completed the roadbed to appellee's land, expending, as alleged, \$15,000 or \$20,000 in so doing. We think, therefore, that in view of the labor and expense thus incurred by appellant, superinduced, as it was, in part, by the grant from appellee of the right of way over his land, it would greatly prejudice its rights to permit appellee to withdraw the permission given to it to run its railroad over his land.

For the reasons herein given, the judgment of the lower court is reversed, and cause remanded, in order that appellee's petition may be dismissed.

BAKER *et al.* v. SELMA STREET & SUBURBAN RY. CO.

(*Supreme Court of Alabama, Feb. 12, 1903.*)

[33 So. Rep. 685.]

Street Railways—Right of Abutter to Enjoin Construction of Road.

Where a street railway, having a right, by consent of the city, to construct its lines in a certain street, undertakes to lay its tracks in a portion of the street not designated in its charter, an abutting property owner, not suffering any injury, cannot complain.

Same—Same—Same.

Owners of property abutting on a street, in which it is proposed to lay an electric railway, are not entitled to restrain its construction because of threatened dangers in the ingress and egress to and from their premises, obstruction of the street, noise, dust, and vibration; but if they suffer damages from the operation or construction of the road, they have a remedy at law therefor.

Same—Same—Same—Nuisance.*

In order to entitle owners of property abutting on the street in which it is proposed to lay an electric railway to restrain the construction of the same, it is incumbent on them to show a nuisance in fact, and that they would suffer special injury, different from that sustained by the general public.

Appeal from city court of Selma; J. W. Mabry, Judge.

Suit by Joseph M. Baker and others against the Selma Street & Suburban Railway Company. From the decree sustaining demurrers to the complaint, complainants appeal. Affirmed.

The material averments of the bill are shown by the opinion.

The defendant interposed demurrers to the bill, upon the following grounds, in substance: (1) That it does not appear from the bill that complainants or either of them will be damaged by the construction or operation of said railway, in any manner of which they have a right to complain; (2) that it appears therefrom that defendant had and has a right to construct and operate said railway along said street; (3) that it appears from the bill that complainants have no right to require defendant to condemn a right of way over said street or to pay complainants any compensation therefor; (4) that it appears from said bill that said street railway will not be a public nuisance of which complainants have a right to complain; (5) that it appears from said bill that complainants will not suffer such special damage, by reason of the construction and operation of said street railway, as will entitle them to maintain this suit.

Pettus, Jeffries & Partridge, for appellants.

Mallory & Mallory and A. D. Pitts, for appellee.

HARALSON, J. It is not averred in the bill, or denied, that the defendant company was regularly and legally incorporated.

*See foot-note appended to *Nagel v. Lindell Ry. Co. (Mo.)*, 1 R. R. R. 691, 24 Am. & Eng. R. Cas., N. S., 691.

Baker v. Selma Street & Suburban Ry. Co

The demurrer to the bill as amended questions the complainants' right to maintain it, on the ground that it does not appear that complainants or either of them will be damaged by the construction and operation on Union street between Selma and Dallas streets, of defendant's street railway, in any manner in which they have a right to complain.

The bill avers, that the part of Union street between Dallas and Selma streets is occupied solely for residences and dwellings; that that part of Union street is extremely narrow, to wit, 60 feet; that the dwelling and residence of complainant, Joseph K. Baker, is near to the west side of said Union street, between said points, being about 6 feet from said street; that said house as it now stands, has stood for many years, to wit, 20 years; that the stable of complainant, Mary Baker Parrish, is near said street, and her residence is, to wit, about 50 feet from said street, and as it now stands, has stood for many years, to wit, for 20 years; that the sidewalks on each side of said street take up about 12 feet; that said company is proceeding to erect poles near the edge of the sidewalks, from which wires, to operate the road are to be strung, which "will materially obstruct said street as a highway for wagons, carriages, drays and other vehicles for which purpose it has been and is now used by the public, and thereby constitute a public nuisance in said street"; "that the noise, dust and vibration caused by the running of the cars over and upon said street and the danger of injury and damage to property of complainants, in ingress and egress to and from their stables, outhouses and dwellings by the same, will render said property undesirable for residence or dwelling property, and will greatly diminish the value of the same in, to wit, the sum of \$5,000." These seem to be conclusions of the pleader. Such objections have all been made the subject of judicial investigation and decision. Mr. Booth in his work on Street Railways, section 82, states the doctrine, that "a street surface passenger railway constructed at street grade in the usual manner and operated by animal power is not per se a public or a private nuisance, nor is it a new servitude imposed upon the land for which the owners of the fee are entitled to compensation." The same principle applies to such roads when operated by electricity. As to this, the author says: "After full consideration of the various objections raised to the use of electricity, every court of last resort to which the question has been submitted has held, that the electric street railway does not constitute a new servitude, and that the use of this motive power when duly authorized does not entitle abutting owners to compensation." Section 83; Joyce on E. Law, § 341. "Streets and highways," says Mr. Joyce, section 278, "are dedicated to the use of the traveling public, and street railways, which are for the purpose of facilitating travel, impose no additional burden upon the abutting owner, and are a public use." The same author, section 335, in speaking of the

Baker v. Selma Street & Suburban Ry. Co

difference between horse and electric railways says, "The following facts have been presented to the courts in various cases, for holding that electric street railways are an additional burden,—that poles and wires are erected in the streets, constituting an exclusive possession of the same, so far as the space occupied is concerned; that the wires are dangerous to the life and safety of the traveling public; that loud and unpleasant noises result, such as the buzzing sound produced while the car is in motion, and by the sounding of the gong, and that on account of the speed of the car there is much more danger, than in horse street railways. * * * They are all doubtless true to some extent." He proceeds then to show, by the adjudications on the subject, that they are, so far as the right of the owner of the fee to complain is concerned, without merit, on the ground that such uses are no more than the drawing of any other vehicle on the streets. They all create noise, dust and vibrations, and are attended with some danger to life and property; but such uses are legitimate and within the original dedication of streets for the benefit of the public. Joyce on E. Law, §§ 336-341; Birmingham T. Co. v. B. R. & E. Co., 119 Ala. 141, 142, 24 South. 502, 43 L. R. A. 233; Baker v. Railroad, 130 Ala. 474, 30 South. 464.

In the case of the Birmingham T. Co. v. B. R. & E. Co., supra, this court said: "It has been adjudicated with practical unanimity throughout the country for many years, that street railways operated by horse power, though the cars were confined to fixed tracks built upon the surface of the street for their special use, were, so far as the right of the owner of the fee to complain was concerned, no more than the drawing of any other carriage or vehicle upon the streets, and were therefore legitimate uses of the streets, which the municipality was authorized to permit without violating any right of the owner of the fee. * * * The electric railways, such as we are now considering, are a comparatively recent development, yet, as is of common knowledge, they have practically superseded all systems of street railway enterprise (saving the cable systems in the larger cities), and their nature and modes of construction and operation, as affecting or not the legitimate use of streets within the implied contemplation of the dedication, have been subjects of frequent adjudication by courts of last resort in this country; and it may be said, that there is almost unanimity in the adjudications that such uses are legitimate uses of streets, by the permission of municipalities, without any right of the owner of the fee to compensation." Many authorities are collated to support the text. Baker v. S. S. & S. R. Co., 130 Ala. 474, 30 South. 464.

The bill shows that the company had the consent and authority of the municipality of the city to construct its line and operate its cars on Union street; and if it be conceded that the charter of the company did not designate that por-

Atchison, etc., Ry. Co. v. Kansas City, etc., Ry. Co

tion of said street between Selma and Dallas streets, upon which they propose to lay their track, erect poles and operate their line of road, the complainants suffered no injury of which they can complain.

If such alleged obstructions as complainants set up to enjoin the construction and operation of this road are held to be sufficient to that end, it would be difficult for any such line to be built and operated in any city or town.

To entitle the complainants to an injunction against the construction and operation of this road, it was incumbent on them, to show by averments that it would be a nuisance in fact, and that they would suffer special injury different in kind from that sustained by the general public. 1 High on Inj. §§ 762, 827, 828; First Nat. Bank v. Tyson (Ala.) 32 South. 148.

If complainants suffer damage caused by improper construction or negligent or unskillful operation of the road, they have their remedy, and defendant would be liable in damages. Booth on S. Railways, § 97. The bill is obviously without equity, and we have been unable to discover wherein the court erred in sustaining the demurrer to it.

Affirmed.

ATCHISON, T. & S. F. RY. CO. v. KANSAS CITY, M. & O. RY. CO. *et al.*

(*Supreme Court of Kansas, Dec. 6, 1902.*)

[70 Pac. Rep. 939.]

Eminent Domain—Right to Condemn Railroad Land.*

One railway corporation may, under the general statutes of eminent domain, condemn for its right of way real estate belonging to another railway corporation not in actual and necessary use for railway purposes.

Railroad Commissioners—Powers.

Section 14, c. 286, Laws 1901, confers jurisdiction upon the board of railroad commissioners only in case of the crossing of the tracks of one railroad by those of another and the uniting of the tracks of two railway companies upon the grounds of one of them; and does not extend such jurisdiction to the impinging of the right of way of one railway upon the grounds of another in such manner as not to involve an intersection or union of tracks, or to the taking of the grounds of one railway for the right of way of another to the entire exclusion of the established road from the territory taken.

Burch and Johnson, JJ., dissenting.
(Syllabus by the Court.)

In banc. Error from district court, Lyon county; Dennis Madden, Judge.

Action by the Atchison, Topeka & Santa Fe Railway Company against the Kansas City, Mexico & Orient Railway Company and others. Judgment for defendants, and plaintiff brings error. Affirmed.

The Atchison, Topeka & Santa Fe Railway Company com-

*See foot-note appended to *Seattle & M. R. Co. v. Bellingham Bay & E. R. Co.* (Wash.), 5 R. R. R. 160, 28 Am. & Eng. R. Cas., N. S., 160.

menced an action against the Kansas City, Mexico & Orient Railway Company to enjoin the latter from appropriating for right of way purposes a part of the Santa Fe Company's real estate. The petition alleged that the plaintiff is a corporation under the laws of the state of Kansas, engaged in the operation of a line of railroad, and in the business of a common carrier, and as such the owner of extensive track and roundhouse and other railroad facilities constructed on real estate in and near the city of Emporia, which it had acquired for railway purposes; that the lands so acquired were all necessary for the proper fulfillment of the public duties pertaining to plaintiff's business as a common carrier, and were all actually devoted to such uses; and that their condemnation by the Orient Company would interfere with its roundhouse, storage tracks, and other property, to its great and irreparable injury. The petition contained a further allegation as follows: "The plaintiff further says that the defendant, the Kansas City, Mexico & Orient Railway Company, has never by a proper exercise of the rights of eminent domain under the laws of the state of Kansas acquired any right to go upon the lands of said plaintiff company hereinbefore described, or any of them, or to cross, intersect, or unite, or in any manner interfere with the tracks, roundhouses, buildings, and other property of the plaintiff located upon the premises owned by said plaintiff, and hereinbefore described, or any part thereof." The answer pleaded the incorporation of the defendant as a railway company under the laws of Kansas, and set forth a condemnation of the land described in the petition for railway purposes under the general law relating to that subject, and the assessment of damages therefor by commissioners appointed by the judge of the district court of the proper county. It denied that the land taken was acquired for railway purposes; that it was necessary for such uses, or that it was devoted in good faith to such uses. It further charged a vexatious obstruction of the Orient Company in its efforts to establish a line of railroad by the hasty building of useless tracks from worn-out material athwart the course of the Orient road through land unused by the Santa Fe Company for many years, and prayed for an injunction against interference and molestation. The reply denied the allegations of the answer inconsistent with those of the petition. On the trial a large volume of evidence was produced tending in some measure to sustain the claims of each contestant. It did appear that the proposed right of way of the Orient Company included a coal trestle and certain tracks adjacent to the roundhouse of the Santa Fe Company, previously established, actually in use, and essential to its business. The Orient Company, however, disclaimed any intention of obstructing or interfering with such property, and an injunction was granted against it so doing. The further restraint of the Orient Company was denied, and the Santa Fe Company was

Atchison, etc., Ry. Co. v. Kansas City, etc., Ry. Co

enjoined from interfering with the Orient Company in its appropriation of all other land involved, which consisted of three portions, aggregating about two acres, cut from extremities of the Santa Fe Company's tract. The Santa Fe Company asks for a reversal of the judgment enjoining it, and refusing further relief against the defendant company. The relation of the Orient Company's proposed right of way to the Santa Fe Company's property, excepting one of the small portions mentioned, may be seen from the following plat.

A. A. Hurd and Robert Dunlap, for plaintiff in error.

J. McD. Trimble, John A. Eaton, and J. G. Eagan, for defendants in error.

BURCH, J. The questions arising from the record in this cause relate to the right of one railway company to take the land of another for a right of way, and their solution depends upon the construction to be given to the statutes granting the power of eminent domain to railway corporations. Such statutes are sections 47, 81, and 87 of chapter 23, Laws 1868, and section 14, c. 286, Laws 1901, which reads as follows: "Any railroad company authorized to operate a railroad in this state desiring to cross or unite its track with any other railroad upon the grounds of such other railway corporation shall make application in writing to the board of railroad commissioners, stating the place of crossing or intersection; whereupon the board of railroad commissioners shall fix a day for the hearing of such application, and notify the railway corporations interested, at which time, unless further time be granted by the board, the corporations interested shall be heard in regard to the necessity, place, manner, and time of such crossing or connection; and upon such hearing either party, or the board, may call and examine witnesses in regard to the matter; and the board shall, after such hearing and a personal examination of the locality where a crossing or connection is desired, determine whether there is a necessity for such crossing or not, and, if so, the place thereof, whether it shall be over or under the existing railroad, or at grade, and in other respects the manner of such crossing and the terms upon which the same shall be made and maintained; provided, that no crossing shall be made through the yards or over the switches or side-tracks of any existing railroad if a crossing can be effected at any other place that is practicable." Plaintiff in error contends that the Orient Company should have proceeded in its attempted condemnation under the provisions of the act of 1901; that the board of railroad commissioners has special jurisdiction over cases of this character, and that the statute creating that tribunal supersedes all others relating to the same subject-matter. It will be observed, however, that section 14 of that act refers only to crossings of one railroad by another and to the uniting of tracks. A railway crossing is said to be "an intersection of

railway tracks." Cent. Dict. The word "track," as applied to a railroad, is defined to be "the two continuous lines of rails on which the railway cars run," and "to cross" means "to pass from side to side of it." Id. In order, therefore, to unite tracks, their rails must be joined, and one railroad cannot be said to cross another unless the rails of one extend over that rail of the other which is farthest from the side of approach. In this view the phraseology of the law does not include the impinging of the right of way of one railroad upon the grounds of another in a manner not involving their tracks, and the broad construction necessary to sustain the claim of plaintiff in error is forbidden.

The sections of the act in juxtaposition with section 14, relating to switch connections and systems of interlocking or automatic signaling apparatus, further seem, to some extent, to confine the operation of the law within the limits stated. But the crossings and connections provided for are to be upon the grounds of the railroad which is already established. Its proprietorship is not to be destroyed, or its use of the place of contact cut off. Such, however, was not the purpose of the Orient Company's proceeding. It sought no connection and desired no common crossing with the Santa Fe. It desired to condemn and appropriate to its own exclusive use the land located as its right of way, and to oust the Santa Fe Company from such territory altogether. No mutuality of occupation was intended to remain, and hence the act appealed to could have no room for application. This interpretation of the law is supported by the judgments of other courts. In *Appeal of Pittsburgh Junction R. Co.*, 122 Pa. 511, 6 Atl. 564, 9 Am. St. Rep. 128, the opinion reads: "Upon exceptions to the master's report, the court below held that the act of 1871 had no application, for the reason that it referred to railroad crossings alone, while this was not a case of crossing at all, in the proper sense of the term. In this, we think, the learned judge was clearly right. The act of 1871 relates 'to crossings of lines of railroads by other railroads.' There was no attempt here to cross the line of plaintiff's road. It was an attempt to run through the plaintiff's yard, and the crossing of some of its yard tracks and switches, which were merely incident to the use of its main line. As was well observed by the court below: 'The attempt was not simply to cross the yard and tracks with a common use, but absolutely to take from plaintiff a portion of their yard for the sole use of the defendant. The issue is not, in what mode the defendant should cross plaintiff's property, but solely whether it can cross at all.'" So in the case of *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S. 667, 668, 4 Sup. Ct. 185, 28 L. Ed. 291, it was held: "The provision in the constitution of Colorado that 'every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad,' only implies a mechanical union

of the tracks of the roads so as to admit of the convenient passage of cars from one to the other, and does not of itself imply the right of connecting business with business." In *State v. New Haven & Northampton Co.*, 45 Conn. 331, it was decided that the location of a railroad for two miles close beside a turnpike, the traveled path of which was in some places changed to make room for the road, did not constitute an "intersecting" of the highway by the railroad; that term applying only to the case of a railroad crossing a highway. See, also, *St. Louis, A. & T. H. R. Co. v. City of Belleville*, 122 Ill. 376, 12 N. E. 680. Hence the board of railroad commissioners had no jurisdiction to determine the rights of the parties to this suit.

It is further argued by plaintiff in error that the general law of eminent domain did not authorize the taking by the Orient Company of the property sought to be condemned, because it was already devoted to an equally urgent public use by another railroad company, and was necessary to such use. In 1 Lewis, *Em. Dom.* (2d Ed.) § 267, it is said: "The general authority to locate and construct a railroad from one point to another does not authorize the taking of property already devoted to railroad uses. In one of the cases cited the court says: 'A charter to build and maintain a railroad between certain points, without describing its course and direction, but leaving that to be determined and established by the corporation, as provided by the general laws, does not prima facie give any power to lay out the road over land already devoted to, and within the recorded location of, another railroad. It is not to be presumed that the legislature intended to allow land thus devoted to one public use to be subjected to another, unless the authority is given in express words or by necessary implication. And such implication can only be found in the language of the act, or from the application of the act to the subject-matter, so that the railroad could not be laid, in whole or in part, by reasonable intendment, on any other line.' The legislature may authorize one railroad to take the property of another, and, as indicated in the opinion just quoted, this may be done by express words or by necessary implication. These general rules are undoubted, but their application to particular cases is often attended with much difficulty, as will appear from the following sections." But the mere fact that land is owned by one railroad company does not forbid its acquisition by another. Exclusiveness of right must depend upon reasonable requisiteness. One occupation justly may be reduced to the subservience of another paramount in its importance. Hence the character and extent of the use of its real estate by one railway company are always open to inquiry when sought to be taken by another under the power of eminent domain. In the same section of the work quoted the author says: "The general

rule above stated does not apply to prevent one railroad taking the property of another, which is not in use for railroad purposes, and not necessary to the proper exercise of the corporate franchises." It follows from this that in all cases in which an appropriation of land for the purposes of a railroad about to be constructed is desired it may proceed to take any real estate necessary for its own use, not already absorbed in the necessary satisfaction of similar wants. The condemning company must, in the first instance, determine the relative requirements of the two roads for itself. It does this by laying out its road, procuring an assessment of damages, and proceeding to build. If obstructed in its operations, it may invoke the aid of a court of equity, and, if the company through whose land the new road passes feels aggrieved, it may resort to the same forum for redress. The issues in such cases lie within the realm of fact, and the judgment of the trial court upon them is conclusive to the same extent as in other cases. In the case at bar issues of the precise character described above were framed by the pleadings. Upon the hearing the district court had before it all the facts which each party could urge in its own favor. Enough having been produced to sustain the judgment rendered, this court cannot interfere.

The writer is of the opinion that the views expressed in the foregoing discussion relating to the scope of the act of 1901 are too narrow. Separating the most pregnant parts of the first sentence of section 14 by punctuation marks, the law reads as follows: "Any railroad company authorized to operate a railroad in this state desiring to cross, or unite its tracks with, any other railroad, upon the grounds of such other railway corporation, shall make application in writing to the board of railroad commissioners, stating the place of crossing or intersection." In construing this language it is not necessary that a railroad should be reduced to a track. The title of the act reads, "An act concerning railroads and other common carriers," and, if the same condensing process were applied to the word as used there, the law would fail. In the Century Dictionary, under the title "Railway," the following description is given: "The parts of an ordinary passenger and freight railway proper are the roadbed, ballast, sleepers, rails, rail chairs, splices, spikes, switch mechanism, collectively called 'permanent way,' and the signals; but in common and accepted usage the meaning of the terms 'railway' and 'railroad' has been extended to include not only the permanent way, but everything necessary to its operation, as the rolling stock and buildings, including stations, warehouses, roundhouses, locomotive shops, car shops, and repair shops, and also all other property of the operating company, as stocks, bonds, and other securities." Therefore the legitimate meaning of the statute properly may be held to be: "Any rail-

road company authorized to operate a railroad in this state desiring to cross another railroad's grounds, or unite its track with any other railroad upon the grounds of such other railway corporation, shall make application," etc. At the time of the passage of the act of 1901 the law of 1868 was the only one in force upon the statute book. Section 47 of that law, which left the conduct of contending railway companies to be governed, in the first instance, by the golden rule, was evidently deemed to be insufficient. Whenever one railway company desired to enter upon the grounds of another, it usually selected "seeling night" or the Sabbath day as the time for its operations. The approach of one railroad to another led to a system of fortification and depredation, raid and reprisal, born probably of other motives than simple zeal for the public good. Every railroad company is as tenacious of its grounds as it is of its track. These may be crossed from point to point without an intersection of tracks. Roundhouses, coal trestles, and other structures are as important to the company as tracks themselves, and may be interfered with, and no good reason appears why the jurisdiction of the board of railroad commissioners should be forbidden to attach until two tracks are about to cross. The same evils arise in each case, and require the same remedy. The board of railroad commissioners is better equipped than a court of equity for the determination of all such controversies. The questions themselves are really administrative in character, and not judicial, though involving the exercise of sound and expert judgment. The procedure prevents trespass by determining the question of necessity before any entry is made, and the ward can do substantial justice to all the interests of both roads, general and local, and thereby to the public as well. All this was in the purview of the legislature with respect to tracks, and why not with respect to the ground a few feet from the ends of the ties as well as to that between the rails? I am satisfied the legislature used the word "railroad," in the section under consideration, in a sense large enough to include grounds used for railway purposes, and that the board of railroad commissioners were intended to have jurisdiction over all conflicts arising from the crossing of one company's property by another road.

MR. JUSTICE JOHNSTON concurs with me in these views. However, the majority of the court being of a contrary opinion, the judgment of the district court is affirmed.

DOSTER, C. J., and SMITH, CUNNINGHAM, GREENE, and POLLOCK, JJ., concur.

COVERT *et al.* v. PITTSBURG & W. Ry. Co. *et al.**(Supreme Court of Pennsylvania, Jan. 5, 1903.)*

[54 Atl. Rep. 170.]

Railroads—Adverse Possession—Title to Land.*

Where a railroad, having the right to exercise eminent domain, took land as a purchaser from one holding adverse possession, its title became good when the combined adverse possession of the railroad company and its grantor exceeded 21 years.

Appeal from superior court.

Action by Hezekiah Covert and L. M. Covert against the Pittsburg & Western Railway Company and Thomas M. King, receiver. Judgment for plaintiffs was affirmed by the superior court, and defendants appeal. Reversed.

The evidence tended to show that the land in dispute was a strip of land which the defendant claimed as a portion of its right of way under a deed from a mere intruder on the land. The trial judge refused to instruct that the railroad company could tack its possession to the possession of its grantor, and thus acquire a good title by 21 years' adverse possession.

Argued before McCOLLUM, C. J., and MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

R. P. Scott, for appellants.

John H. Wilson, Leo McQuiston, and J. C. Vanderlin, for appellees.

BROWN, J. The single question raised here is, not whether a railroad company, possessing the right of eminent domain, can acquire title to land by 21 years' adverse possession of it, but whether, as a purchaser of the same for railroad purposes from one holding adverse possession, its title is good, if the combined adverse possession of vendor and vendee exceed 21 years. The appellant offered testimony tending to prove that John Winter had been in adverse possession of the land in dispute for several years prior to November 9, 1877, when he entered into an agreement with the railroad company, whose successor the appellant became, for the sale of it for railroad purposes. The agreement was followed by a deed for the land on July 23, 1879. This suit was brought December 8, 1897, but the common pleas and superior court were both of opinion that the railroad company could not avail itself of the act of limitations of March 26, 1785, even if the combined adverse possession of Winter, its vendor, and itself had been of the character required by the law, and had continued for more than 21 years. The trial judge instructed the jury that, "if John Winter had occupied and had possession of this land for twelve years, and had sold to some per-

*As to whether a right of way for a railroad can be required by adverse possession, see foot-note appended to *Southern Cal. R. Co. v. Slauson* (Cal.), 2 R. R. R. 520, 25 Am. & Eng. R. Cas., N. S., 520.

son not a corporation like a railroad company, and that person had held nine years longer, then the title would have gone, and the two possessions would have come together; but our law does not give a railroad company that right where it enters unlawfully, where it enters without authority of law." The superior court seems to have adopted the same view. In it we cannot concur. The appellant is not claiming a right of way over the land and resisting payment of damages under the plea of the statute of limitations. It stands upon what it asserts is its title to the fee, acquired by purchase, just as a private person might have acquired the land. We need not consider the cases holding that a railroad company, possessing the right of eminent domain, cannot set up adverse possession for the statutory period, when the real owner of the land undertakes to assert his rights in it. The reason that adverse possession cannot be set up in such a case is that the law presumes, when a railroad company takes land for its corporate purposes, it does so under its high right of eminent domain, and not as a willful trespasser, whose trespass may grow into a title. Its enjoyment of the easement so acquired is upon the condition that proper compensation to the land owner will be made whenever demanded. The law regards such occupancy of the land as by its permission, on the condition stated, and not as the act of a mere trespasser, to whom statutes of limitations may give rights. The simple question now before us is whether a railroad company may purchase land for railroad purposes from one whose inchoate title rests upon adverse possession.

If Winter had owned the land on a title by deed, it would not be contended that he could not have sold to the railroad company, or that it could not have purchased from him; and it seems to be conceded that, if he had been in adverse possession for more than 21 years on November 9, 1877, or July 23, 1879, the railroad company would have taken a good title from him. It seems to be still further conceded—and, if not, it is the law—that if an individual had purchased from Winter during his adverse possession of less than 21 years, he could afterwards count such possession as part of the 21 years upon which he could safely rely as his title against another having a better one, but lost by delay in asserting it. "I have no manner of doubt that one who enters as a trespasser, clears land, builds a house and lives in it, acquires something which he may transfer to another; and, if the possession of the two, added together, amounts to twenty-one years, and was adverse to him who had the legal title, the act of limitations will be a bar to his recovery." Tilghman, C. J., in *Overfield v. Christie*, 7 Serg. & R. 173. The purchaser from a trespasser may tack the latter's adverse possession to his own, so as to give title by the statute of limitations. *Hughes v. Pickering*, 14 Pa. 297. But the contention of the appellees is that, though this is the law as to others, a railroad company can-

Kidd v. State of Alabama

not acquire any rights from a trespasser selling his inchoate title. Why not? The reason of the law in the case of a simple taking by a railroad company possessing the right of eminent domain does not exist when it becomes a purchaser, and "cessante ratione legis, cessat lex." What Winter sold to the railroad company was all he could convey in the land; and, whether his title was good or bad, the law permitted him to transfer it. *Overfield v. Christie*, supra. If he could transfer it to an individual, why not to a corporation possessing the power to purchase? It is true that when he sold he conveyed simply a sprouting title, liable to be cut down by the holder of the better one, but just as certain not to be felled by the blow of any man, if allowed to spread its roots and fully mature after a growth of 21 years. Such was the title purchased by this appellant, and which it claims should now shelter it. The risk was assumed that this title might never become perfect, but the chances were also taken that to the years of Winter's adverse possession of the land the company might be able to add its own uninterrupted ones, until 21 of them would stand in the way of any, save the commonwealth, who should attempt to enter upon the land. If the testimony offered by the defendant was to be credited by the jury, the railroad company's chances of ultimately acquiring a good title were successfully taken, and the fourth point submitted by it should have been affirmed.

The judgment of the superior court is reversed, as is that of the court below, and a venire facias de novo awarded, that on another trial the view herein expressed may be followed.

LOUISA V. KIDD, as Executrix of the Will of H. B. Tulane,
Deceased, Plff. in Err., v. STATE OF ALABAMA.

(Submitted January 27, 1903. Decided February 23, 1903.)

[23 Sup. Ct. Rep. 401.]

Constitutional Law—Equal Protection of the Laws—Taxation of Stock of Foreign Railroads—Exemptions.

The equal protection of the laws is not denied by the provisions of Ala. Code 1886, § 453, cl. 13, and Code 1896, § 3911, cl. 14. for the taxation of railroad stock, because of the exemption of stock in domestic railroads and in others that list substantially all their property for taxation.

In Error to the Supreme Court of the State of Alabama to review a judgment which affirmed a judgment of the Circuit Court of Elmore County in favor of the State in a suit for taxes on stock in foreign railroads. Affirmed.

The facts are stated in the opinion.

Mr. W. A. Gunter for plaintiff in error.

Messrs. Francis G. Caffey, John C. Breckinridge, A. A. Wiley, Gordon Macdonald, and John G. McNeel for defendant in error.

Kidd v. State of Alabama

MR. JUSTICE HOLMES delivered the opinion of the court:

This is an action for taxes brought by the state of Alabama against the executrix of the will of a citizen of Alabama. It appears on the record that the property in dispute is stock in railroads incorporated in other states than Alabama, and that the objection was taken seasonably by plea and by requests for instructions to the jury that the tax was unconstitutional under the 14th Amendment, because no similar tax was levied on the stock of domestic railroads or of foreign railroads doing business in that state. Demurrers to the pleas were sustained, there was a verdict for the plaintiff, and judgment, which latter was affirmed by the supreme court of the state without discussion, on the authority of its decision at an earlier stage. (*State v. Kidd*, 125 Ala. 413, 28 So. 418), and the case is brought here by writ of error.

The statutes levying the tax in question are the Code of 1886, § 453, cl. 13, and the Code of 1896, § 3911, cl. 14. They are general clauses, which need not be set forth, as their effect is not disputed under the construction given to them by the supreme court of the state. The exemption by the Code of 1886 of stock in domestic railroads, and in others that list substantially all their property for taxation (*Sturges v. Carter*, 114 U. S. 511, 522, 29 L. Ed. 240, 244, 5 Sup. Ct. Rep. 1014), is not denied, and while it is denied by the defendant in error that there is a similar exemption by the Code of 1896, for the purposes of decision we shall assume, without examination, that it is granted. *State v. Kidd*, 125 Ala. 413, 422, 28 So. 418. On this assumption the argument for the plaintiff in error is that if foreign stock is treated for purposes of taxation as present by fiction in the domicil, it must be treated as present also for purposes of protection; that the tax is a tax on values, and that net values of similar articles must be treated alike. It is said that you cannot look further back.

If the argument went further and denied the right to tax on fiction at all, and therefore denied the right to tax foreign stocks, it would seem to us to have more logical force, although we are far from implying that it would be unanswerable, or that it can be regarded as open. Very likely such taxes can be justified without the help of fiction. *Sturges v. Carter*, 114 U. S. 511, 29 L. Ed. 240, 5 Sup. Ct. Rep. 1014; *Dwight v. Boston*, 12 Allen, 316; *Dyer v. Osburne*, 11 R. I. 321, 23 Am. Rep. 460. But the argument does not go to that extent, and, limited as it is, the proposition that the plaintiff in error is denied the equal protection of the laws for the reason which we have stated strikes us as wholly without force. We see nothing to prevent a state from taxing stock in some domestic corporations and leaving stock in others untaxed on the ground that it taxes the property and franchises of the latter to an amount that imposes indirectly a proportional burden on the stock. When we come to corporations formed and

Kidd v. State of Alabama

having their property and business elsewhere, the state must tax the stock held within the state if it is to tax anything, and we now are assuming the right to tax stock in foreign corporations to be conceded. If it does tax that stock, it may take into account that the property and franchises of the corporation are untaxed, on the same ground that it might do the same thing with a domestic corporation. There is no rule that the state cannot look behind the present net values of different stocks. See *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, 45 L. Ed. 102, 21 Sup. Ct. Rep. 43.

We say that the state in taxing stock may take into account the fact that the property and franchises of the corporation are untaxed, whereas in other cases they are taxed; and we say untaxed, because they are not taxed by the state in question. The real grievance in a case like the present is that, more than probably, they are taxed elsewhere. But with that the state of Alabama is not concerned. No doubt it would be a great advantage to the country and to the individual states if principles of taxation could be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided. But the Constitution of the United States does not go so far. *Coe v. Errol*, 116 U. S. 517, 524, 29 L. Ed. 715, 718, 6 Sup. Ct. Rep. 475; *Knowlton v. Moore*, 178 U. S. 41, 44 L. Ed. 969, 20 Sup. Ct. Rep. 747; *Dyer v. Osborne*, 11 R. I. 321, 327, 23 Am. Rep. 460; *Cooley*, Taxn. 2d Ed. 221n. One aspect of the problem was touched in the case of *Blackstone v. Miller*, at the present term, 187 U. S. —, ante, p. 277, 23 Sup. Ct. Rep. 277. The state of Alabama is not bound to make its laws harmonize in principle with those of other states. If property is untaxed by its laws, then for the purpose of its laws the property is not taxed at all.

It is said that the state may not tax a man because by fiction his property is within the jurisdiction, and then discriminate against him upon the fact that it is without. The state does nothing of the kind. It adheres throughout to the fiction, if it be one, that the stock, the property of the plaintiff in error, is within the jurisdiction. There is no inconsistency in the state's recognizing at the same time that the property of the corporation, that which gives the plaintiff's stock its value, is taxed or untaxed, as the case may be. There is no inconsistency in recognizing that it is not taxed because it cannot be reached. Shares of stock may be within a state, and the property of the corporation outside it.

We need not repeat the commonplaces as to the large latitude allowed to the states for classification upon any reasonable basis. *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 351, 352, 35 L. Ed. 1035, 1039, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 155, 41 L. Ed. 666, 668, 17 Sup. Ct. Rep. 255; *Nicol v. Ames*,

Minneapolis, etc., R. Co. v. Lindquist

173 U. S. 509, 521, 43 L. Ed. 786, 793, 19 Sup. Ct. Rep. 522; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. Ed. 909, 19 Sup. Ct. Rep. 609; American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. Ed. 102, 21 Sup. Ct. Rep. 43. What is reasonable is a question of practical details, into which fiction cannot enter.

Practically, the law before us, in the broad aspect in which alone we are asked to consider it, seems to us to work out substantial justice and equality, if we leave on one side the probable taxation by other states, which does not affect the state of Alabama's rights.

Judgment affirmed.

JUSTICES HARLAN and WHITE dissented.

Note.—No. 157. Kidd v. Alabama. This case was to abide the result of the foregoing.

Judgment affirmed.

MINNEAPOLIS & ST. L. R. Co. v. LINDQUIST, Treasurer
of Webster County, *et al.*

(*Supreme Court of Iowa, Jan. 24, 1903.*)

[93 N. W. Rep. 103.]

Local Assessments—Front-Foot Rule.

Code, § 819, providing that a portion of the cost of a sewer may be assessed on abutting property by the front-foot rule, is constitutional.

Same—Same—Harmless Error.

Code, § 819, required that property abutting on a storm sewer should be assessed by the front-foot rule: *held* harmless error to assess such property by the square foot, where all the lots were the same depth.

Same.

It was not prejudicial error to assess separately the two sides of a lot divided by a railway, the whole lot belonging to the railway company.

Same—Benefits.

By Code, § 819, the council of a city is required, for the purpose of assessment, to determine the proportionate benefits received by different properties adjacent to a storm sewer: *held* that, where all the items taken into consideration by a council in making the assessment for a certain sewer were not shown, it did not imply error that the council considered the areas of the various properties, since the areas might, under some circumstances, be material.

Same—Same.

Under Code, § 819, property adjacent to a storm sewer was to be assessed in proportion to benefits received. In an action to enjoin the enforcement of such an assessment, testimony was introduced to prove that a certain lot did not need artificial drainage, and would not sell for a dollar more on account of the sewer: *held* not to necessarily show that the lot should not have been assessed for benefits received, since future and indirect benefits from the improvement of its surroundings were to be considered.

Same—Waiver of Objections.

Code, § 823, provides for notice of the assessment by the council of the cost of sewers, and allows all parties aggrieved by such assessments to file objections. Section 824 provides that "all objections to errors, irregularities, or inequalities, * * * not made before the council" shall be waived, except where fraud is shown; and section 839 permits an appeal to the district court on questions not waived, and which touch

Minneapolis, etc., R. Co. *v.* Lindquist

the validity or amount of the assessment: *held* that, where property owners neither appeared before the council nor appealed from its decision, an objection to an assessment of lots on the ground that they had received no benefit could not be raised by injunction to restrain its collection.

Railroad Property—Ownership of Fee.

Where the pleadings in an injunction proceeding, brought by a railway to restrain the sale of certain lots under a special assessment, show merely that the company owns the lots, the purpose of their purchase not being disclosed, it will be considered to own the fee therein, though its tracks cross such lots, and though a conveyance for a right of way may give but an easement.

Local Assessments—Railroad Property.*

Under the Code, § 819, providing that a portion of the cost of a sewer may be assessed against "the property abutting" thereon "in proportion to the number of linear front feet in each parcel," lots owned in fee by a railroad are subject to assessment, though the right of way be situated thereon.

Same—Same—Sale for Assessments.†

Code, § 840, provides that special assessments for street improvements made against "any railway" shall be a debt due from the railway, which may be enforced by action at law, or the lien thereof enforced by an equity action against the property on which the assessment has been levied: *held*, that assessments for sewers may, nevertheless, be levied and enforced against parcels of land owned by a railroad, and not used in carrying on business peculiar thereto, in the same manner that is provided for any other property.

Same—Same—Same.

Under Code, § 840, property of a railroad, the loss of which would dismember the road as a line of travel, could not be sold under special assessment as ordinary property.

Appeal from district court, Webster county; S. M. Weaver, Judge.

The petition alleged plaintiff's ownership of lots 1, 2, 3, 4, and 5 in block 67, and lots 1, 2, and 3 in block 68, in Town Company's addition to Ft. Dodge; that in 1899 the city constructed a storm sewer in the alley intersecting block 67 south of the lots mentioned therein, turning south in Third street, which separates them; that the cost thereof was assessed against said lots according to the number of square feet in each, without regard to the benefits conferred; that said improvement was of no benefit to said lots; that the statutes authorizing assessments were unconstitutional; that said assessments have been duly certified to the auditor of the county, who has placed the same on the tax lists, and the county treasurer has advertised the same for sale, and will

*As to whether railroad property is liable to local assessments, see foot-note appended to *Village of River Forest v. Chicago, etc., R. Co.* (Ill.), 4 R. R. R. 853, 27 Am. & Eng. R. Cas., N. S., 853.

†See foot-note appended to *Pittsburgh, C., C. & St. L. Ry. Co. v. Fish* (Ind.), 2 R. R. R. 391, 25 Am. & Eng. R. Cas., N. S., 391; *Connor v. Tennessee Cent. Ry. Co.* (C. C. A.), 3 R. R. R. 417, 26 Am. & Eng. R. Cas., N. S., 417; *City of Philadelphia v. Philadelphia, etc., R. Co.* (Pa.), 35 Atl. Rep. 610, 5 Am. & Eng. R. Cas., N. S., 720; *Kansas City, P. & G. Ry. Co. v. Board of Waterworks* (Ark.), 20 Am. & Eng. R. Cas., N. S., 265; *Chicago, etc., Ry. Co. v. Forest County* (Wis.), 70 N. W. 77, 6 Am. & Eng. R. Cas., N. S., 796.

Minneapolis, etc., R. Co. v. Lindquist

sell them unless enjoined. In an amendment to the petition plaintiff averred that its railroad intersected the lots in block 67, and that its right of way had been assessed illegally. A restraining order was prayed, and a decree, on final hearing, declaring the assessments null and void. The defendants responded by admitting the construction of the sewer, asserting the assessment of the lots as directed by statute, and that the treasurer was proceeding in a lawful manner to collect the same. Hearing on the merits, and decree as prayed. The defendants appeal. Reversed.

M. J. Mitchell, for appellants.

R. M. Wright, for appellee.

LADD, J. The storm sewer was constructed along the alley intersecting block 67 of the Town Company's addition to Ft. Dodge immediately south of plaintiff's lots. Next east of this block, with Third street between them, is block 68, which, as the sewer turns south, is adjacent, but does not abut the property. All abutting lots were assessed for the payment of the cost of the sewers according to the front-foot rule. The point decided by the trial court was that the statute authorizing this was unconstitutional, relying on *Village of Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443. That case has been subsequently explained, and a contrary conclusion reached. *Hackworth v. City of Ottumwa* (Iowa) 87 N. W. 424.

2. Appellee argues that the assessment was according to the number of square feet in each lot. The number of square feet in each lot seems to have been computed and written over the corresponding lot as it appeared on the plat. But as to abutting property this made no difference, for all such lots seem to have been the same length. The assessment against lot 1, block 67, was separately computed as to parts on opposite sides of the railroad, but, as the petition alleged and the answer admitted plaintiff's ownership of the entire lot, this can make no difference. It simply involved the addition of the two amounts. There was no issue before the court as to whether any part of it belonged to another. Adjacent property is to be assessed, under the statute, according to actual benefits. The method of ascertaining these is not prescribed. No claim is made that the city council did not in fact take the assessment. Just what it took into consideration in reaching the result does not appear. It would seem important, however, in arriving at a just conclusion, to know the size of the parcel of ground affected, and, if all are similarly situated, the area of each might furnish a just basis for estimating proportionate benefits. One witness testified that under present conditions, because of the natural drainage, the lots in block 68 did not need artificial drainage, and would not sell for a dollar more. But permanent improvements are not made solely with reference to present conditions. They

Minneapolis, etc., R. Co. v. Lindquist

are for the future as well as the present, and benefits to be derived therefrom should be estimated accordingly. Even though a drain may not be required for a particular parcel of land, the fact that it is necessary to and improves that surrounding may work an indirect benefit to it in the way of accessibility, convenience, and sanitary improvements. This evidence certainly fails to show said lots to have derived no advantage. But, even if it did, the remedy was not by injunction, but by appeal to the district court. The statute expressly conferred upon the city council the authority to assess the costs of the improvements against adjacent as well as abutting lots, and, as no question is made with respect to the regularity of prior proceedings, said council had jurisdiction to estimate the benefit. If it made a mistake with reference thereto, the statutes point out the remedy. Section 823 of the Code provides for notice, and allows all parties aggrieved to file objections with the city council. The next section reads: "All objections to errors, irregularities or inequalities in the making of said special assessments, or in any of the prior proceedings or notices not made before the council at the time and in the manner herein provided for, shall be waived except where fraud is shown." Section 839 allows an appeal to the district court, "where all questions touching the validity of such assessments, or amount thereof, and not waived under the provisions of this chapter, shall be heard and determined." The plaintiff failed to avail itself of either remedy. As they were entirely adequate to the adjustment of the amount, if any, to be levied, another and especially collateral remedy in its nature could not be resorted to. *Plymouth Co. v. Moore*, 114 Iowa, 700, 87 N. W. 662; *Van Fleet, Coll. Attack*, 5; *Suth. St. Const.* § 399. The vice in appellee's argument, as seen, lies in the assumption that the assessment was made on a basis not authorized by law, and to that point the decisions cited tend. See *Hassan v. City of Rochester*, 67 N. Y. 529; *Hayes v. Douglas Co.*, 92 Wis. 429, 65 N. W. 482, 31 L. R. A. 213, 53 Am. St. Rep. 926. This, as seen, is not correct.

3. The plaintiff's line of railroad crosses the lots in block 67, and it contends that no part of the cost of the improvement may be assessed against that portion of the right of way. This is based on two grounds: (1) That the right of way is a mere easement; and (2) that a fragment of the right of way, with its ties and tracks, cannot be sold in order to pay the assessment. But there was no easement in these lots. Ownership thereof is distinctly alleged in the petition and admitted in the answer. Under these circumstances its title must be treated as absolute, regardless whether occupied by tracks or not. True, as urged by appellee, the conveyance of land for right of way purposes has been held to pass an easement only. *Brown v. Young*, 69 Iowa, 625, 29 N. W. 941; *Skillman v. Railway Co.*, 78 Iowa, 404,

Minneapolis, etc., R. Co. v. Lindquist

43 N. W. 275, 16 Am. St. Rep. 452. The object originally had in obtaining these lots is not disclosed by the records, and we must assume, in view of the pleadings, that they were so acquired as to pass the fee title. In this respect the case is to be distinguished from *Chicago, R. I. & P. Ry. Co. v. City of Ottumwa*, 112 Iowa, 300, 83 N. W. 1074. There the majority held that a right of way, when a mere easement, was not assessable with the cost of the improvement, under the statute involved; following, as is said, *City of Muscatine v. Chicago, R. I. & P. Ry. Co.*, 88 Iowa, 291, 55 N. W. 100. The latter case seemed to hold that land to which the company had title must bear its burden of the cost of improvement, and I do not understand any departure therefrom to have been intended. Certainly it was so decided in that case when first before the court. *Id.*, 79 Iowa, 645, 44 N. W. 909. Section 819 of the Code, after authorizing payment of the cost, or any part of it, from the district sewer fund, city sewer fund, or from the general revenue, reads: "And the portion thereof not so paid, and not in excess of \$3 per linear foot of sewer, shall be assessed against the property abutting on the sewer in proportion to the number of linear front feet in each parcel thereof and upon the adjacent property in proportion to the benefit thereto." It is apparent, without differentiating between this statute and that under consideration in the *Ottumwa Case*, that the lots of plaintiff come clearly within the language of this section.

4. Appellee also contends that right of way cannot be sold to pay the assessment. The conflict in the authorities on this subject was recognized in *Chicago, R. I. & P. Ry. Co. v. City of Ottumwa*, *supra*, and many of them cited, though the point was not decided. In view of the provisions of section 840 of the Code, we shall not determine it now. That reads: "All special assessments made under this chapter against any railway or street railway shall be a debt due personally from such railway. Such special assessment and each installment thereof, and certificates issued therefor when due, may be collected in the district or superior court by action at law, in the name of the city or town against such railway or street railway, or the lien thereof enforced against the property of such railway or street railway, on or against which the same has been levied, by action in equity, by the election of the plaintiff; and in action at law where pleadings are required, it will be sufficient to declare generally for work and labor done, or materials furnished, on the particular street, avenue, alley or highway, the levy of tax and the non-payment of same; and in any action in equity it shall be sufficient to aver the same matters, together with a particular description of the property, or parts thereof, against which such lien is sought to be enforced." It will be time enough to determine whether the roadbed may be sold when a lien thereon is sought to be established and enforced against it

Fair Haven & W. R. Co. v. City of New Haven

under this statute. Assessments are to be levied on parcels of land aside from that made use of in carrying on business peculiar to railroading by virtue of section 825 of the Code, and these sold like the property of any other corporation or individual under section 829. As to such claims the statute quoted seems to afford an additional remedy, though we do not so decide, as the question is not before us. It could hardly have been intended by the legislature, however, that the roadbed or right of way or other property so connected with the operation of the railroad as that its loss by conveyance or sale would necessarily dismember and break up the entirety and utility of the road as a line of travel and commercial intercourse, thereby interfering with the paramount interest of the public in these purposes, should be seized in small parts abutting local improvements in the numerous cities and towns traversed by the lines, and these separately exposed for sale by the several county treasurers, and conveyed upon the failure of the companies to promptly meet their tax burdens. This, we do not think, was contemplated by section 829 of the Code, but that the remedies available in such cases are those provided by the statute quoted. Two-thirds of the lots in controversy were not used by the plaintiff in carrying on its business of railroading, and to this extent these were, therefore, subject to assessment and sale, the same as property belonging to individuals. As against such property, then, the county treasurer was authorized to proceed, but could not properly expose the right of way or roadbed for sale. These may not be seized (if at all) save by virtue of a judgment or decree of court.

Reversed.

FAIR HAVEN & W. R. CO. v. CITY OF NEW HAVEN.

(Supreme Court of Errors of Connecticut, Jan. 20, 1903.)

[53 Atl. Rep. 960.]

Local Assessments—Street Railways—Statute.

Sp. Acts 1895, p. 565, authorizes a city to issue bonds, and use the avails in paving, and provides that the paving shall be laid on the credit and under the direction and control of the city; that the city may assess a portion of the cost on abutting owners, and that on streets occupied by the tracks of a railway company, it shall be assessed the cost of paving for a width of nine feet for every line of track therein; and that all assessments on the abutting landowners and railway companies shall be payable as the city council may provide: *held*, that the provision as to amount of assessment on railway companies was not repealed by Sp. Acts 1899, p. 181, which provides, by section 1, that the city shall lay a tax for paving, and by section 2 that benefits and damages shall be laid and assessed for or against all property abutting on or adjoining the streets in which pavements shall be laid, which assessment of benefits shall not exceed a certain amount per foot of frontage, and by section 3 that an assessment of benefits and damages for pavements already constructed in the city shall be laid in accordance with the act of 1899; the assessment against abutting property, but not against railway companies, being based on benefits.

Fair Haven & W. R. Co. v. City of New Haven**Same—Same—Paving.***

Under the state's power of highway regulation, which is part of the police power, a street railway occupying a street may be required to pay to the city the cost of paving nine feet of its width for every line of track therein.

Same—Same—Power to Amend Charter.

Sp. Acts 1895, p. 565, requiring a street railway company to pay the cost of paving nine feet of the width of a street for every line of its track therein, is within the power of the state to amend its charter.

Same—Notice.

Where a street railway company is duly notified of the inception of paving assessment proceedings before the city officials, which proceedings, from their beginning to their conclusion, form one continuous proceeding, and later becomes a party thereto, it cannot object that the assessment is without notice to it.

Appeal from superior court, New Haven county; Milton A. Shumway, Judge.

Statutory application by the Fair Haven & Westville Railroad Company for relief from an assessment made by the common council of the city of New Haven against plaintiff on account of the construction of a pavement in a street. There was a judgment reducing the assessment, and defendant, the city, appeals. Reversed.

Leonard M. Daggett and E. P. Arvine, for appellant.

George D. Watrous, Harry G. Day, and Talcott H. Russell, for appellee.

PRENTICE, J. The plaintiff operates a double-track electric street railway through West Chapel street, in the defendant city, and did so at the time of the improvement in question. In October, 1895, the court of common council ordered said street to be paved for a considerable distance with sheet asphalt. The work of construction began in June and ended in October or November, 1897. This pavement replaced crushed stone and Belgian block pavements which had been laid in portions of the street in the years 1873 and 1874, and for which the plaintiff had been assessed. The work was done under a contract between the city and the contractor at a certain price per square yard, and the city paid therefor. The city thereupon assessed against the plaintiff the sum of \$36,879 on account of said improvement and expenditure. This sum purported to represent the actual cost to the city of laying so much of said pavement as was embraced within the space covered by the plaintiff's tracks and two feet on each side without. The trial court rejected the rule employed by the city in arriving at the plaintiff's share of the burden of the improvement, which was one claimed by virtue of the provisions of Sp. Acts 1895, p. 565, and adopted a radically different and much less favorable rule, derived from Sp. Acts 1899, p. 181, which imposed an assessment of only \$5,823.

*As to the liability of railroad companies for local assessments, see *Louisville & N. R. Co. v. Nehan (Ky.)*, 23 Am. & Eng. R. Cas., N. S., 201, and foot-note.

Fair Haven & W. R. Co. v. City of New Haven

This rule arrived at its result by treating each side of the plaintiff's tracks as frontage, and assessing it at the rate of 60 cents per lineal foot. The real question between the parties is as to the correctness of the defendant's claim as to the rule to be applied.

As the question involved is primarily one of statutory construction, we can best approach it by an examination of the statutory situation. When the work was ordered and constructed, chapter 169 of the Public Acts of 1893 and the special act of 1895 (p. 565) were both in force. The former act provided that it should "be the duty of every street railway company to keep so much of the street or highway as is included within its tracks and a space of two feet on the outer side of the outer rails thereof in repair to the satisfaction of the authorities of the city, town or borough which is bound by law to maintain such street or highway." The act further provided that upon notice, and failure to comply, the municipal authorities might do the work, and recover the expense from the company. The latter act authorized the defendant to issue its bonds to an amount not exceeding \$500,000, the avails of which should be used in paving construction only, and provided that all pavements laid by authority of the act should be laid upon the credit of the city, and under its direction and control. It further provided that the city might assess a portion of the cost upon abutting landowners, and another portion upon street railway companies. The latter provision was in the following language: "On all streets occupied by the track or tracks of any railway company or companies, said company or companies shall be assessed and shall severally pay to the city the cost of paving and repaving the full length and nine feet wide for each and every line of track of such railway now existing or that may hereafter be laid in any street of said city." The act then proceeded as follows: "All such assessments on the hereinbefore described abutting landowners and railway companies shall be payable at such time or times as may be determined by the court of common council." After the pavement in question was laid, and pending proceedings to assess in the manner provided in the act of 1895, another act, found in Sp. Acts 1899, p. 181, was passed and went into effect. The first section of this act provided that the city of New Haven should lay a tax of one mill on the dollar for the paving of streets, and that the receipts therefrom, and from all other assessments resulting from the construction of street pavements, should be expended for the original construction of pavements. The second section provided that "benefits and damages" should be laid and assessed for or against all owners of property abutting upon or adjoining the streets in which the pavement was laid, which assessment of benefits should not exceed a certain amount per lineal foot of frontage, varying according to the character of the pavement, and being 60 cents per foot for

Fair Haven & W. R. Co. v. City of New Haven

asphalt. The fourth section provided that all the pavements should be laid upon the credit of the city and under its direction, and that the assessments should be collectible and payable, and liens laid to secure them, in the same manner and at the same time as the city taxes. The fifth section provided for a right of appeal from assessments; the sixth, that the act should be regarded as an amendment to the city charter, and that all inconsistent acts should be repleaded; the seventh, that nothing in the act should prevent the city from issuing bonds for street pavement in accordance with the act of 1895; and the eighth, that the act should not affect the liability of street railway companies under the general laws. The third section was as follows: "An assessment of benefits and damages to be laid for the pavements already constructed and laid in the city of New Haven upon * * * and West Chapel streets shall be laid in accordance with and under the provisions of this act and the property shall be assessed in accordance therewith irrespective as to whether or not brick gutters have been laid on side streets."

One of the controlling questions in this case is as to the effect of the act of 1899 upon the provisions of that of 1895. The plaintiff contends that the latter act repealed the former; the defendant, that it did not. This difference of view explains the situation disclosed by the case. The city bases its claim to the larger sum assessed by it upon the rule of recovery laid down in the act of 1895. The railway company claims to limit its liability, at least to the smaller sum assessed by the court, upon the strength of the rule of assessment prescribed in the act of 1899, as interpreted by the court and accepted by the company.

It will be noted that the act of 1899 contains no negative words, and no express repeal of the former act. The only repeal expressed is one of inconsistent acts and parts of acts. Such a repeal would have arisen by implication. *City of Hartford v. Hartford Theological Seminary*, 66 Conn. 475, 34 Atl. 483; *Braman v. City of New London*, 74 Conn. 695, 51 Atl. 1082. The rule of repeal by implication extends still farther. Wherever a later statute is repugnant in its provisions to those of a prior one, there is a repeal to the extent of the repugnancy; and wherever a later statute is exclusive (that is, when it covers the whole subject to which it relates) the former is repealed. *City of Hartford v. Hartford Theological Seminary*, *supra*; *U. S. v. Claffin*, 97 U. S. 546, 24 L. Ed. 1082, 1085. Even where the two acts are not in express terms repugnant, yet if the later one covers the whole subject of the former, and embraces new provisions, plainly showing that it was intended as a substitute for the former, it will operate as a repeal of the former. *U. S. v. Tynen*, 11 Wall. 88, 20 L. Ed. 153.

By the side of these principles stand others which are of importance when repeals by implication are claimed. Such

Fair Haven & W. R. Co. v. City of New Haven

repeals are not favored, and will not be extended beyond the reason therefor, nor presumed where the old and the new may stand together. *Bank v. Himes*, 55 Conn. 433, 12 Atl. 517; *Bissell v. Dickerson*, 64 Conn. 61, 29 Atl. 226; *Kallahan v. Osborne*, 37 Conn. 488; *Appeal of Central Ry. & Electric Co.*, 67 Conn. 197, 35 Atl. 32. If both the earlier and the later statute can be reconciled, they must stand and have concurrent operation. *Goodman v. Jewett*, 24 Conn. 588; *Kallahan v. Osborne*, 37 Conn. 488; *Talcott v. Town of Glastonbury*, 64 Conn. 575, 30 Atl. 764. The repugnancy between the two statutes must be clear and manifest, to warrant a court in holding that the later repeals the former. *Hartford Bridge Co. v. Town of East Hartford*, 16 Conn. 149; *City of Middletown v. Railroad Co.*, 62 Conn. 492, 27 Atl. 119. A statute is not repealed by a later affirmative one containing no repealing clause, unless there is irreconcilable conflict, or the later statute is clearly intended as a substitute for the earlier. *Red Rock v. Henry*, 106 U. S. 596, 1 Sup. Ct. 434, 27 L. Ed. 251; *In re Henderson's Tobacco*, 11 Wall. 652, 20 L. Ed. 235. Repeals by implication extend to only so much of the prior statute as is within the reason of the repeal. They are never extended further than the inconsistency compels. *New Haven and Fairfield Cos. v. Town of Milford*, 64 Conn. 568, 30 Atl. 768. This rule applies where there is an express repeal of inconsistent acts. *People v. Durick*, 20 Cal. 94. A statute expressly repealing inconsistent acts will not be held to affect pending cases unless the intention to do so is apparent. *In re Uwchlan Tp. Road*, 30 Pa. 156; *In re Hickory Tree Road*, 43 Pa. 139. It might be added, apropos of the facts in this case, that a repeal will not be implied, without plain evidence of intention, where the repeal would tend to deprive parties of rights, relying upon the faith of which they have acted to their injury in case of repeal.

The act of 1899 contains two entirely severable parts. All its sections, save the third, deal exclusively with future paving construction. The third section alone attempts to deal with that which has been completed. We have no need to inquire whether the act of 1899 took away from the city the power to thereafter lay new pavements under a bond issue, and distribute the expense thereof as provided in the act of 1895. The sole question before us is whether the act of 1899 deprived the city of the right to collect from the railway company a share of the expense of the completed work upon West Chapel street in the manner provided by the act of 1895. It is clear that there is nothing whatever in the first-named act, outside of section 3, upon which a claim of repeal to this extent can be based. If there is any inconsistency or repugnancy between any of the provisions of the act of 1899 and those of the act of 1895, in so far as they relate to any work constructed, or if the first-named act so exclusively deals with such work or its incidents as to make manifest an intention to

Fair Haven & W. R. Co. v. City of New Haven

substitute its provisions for those of the prior act upon that subject-matter, this repugnancy or this exclusive treatment must be found within the provisions of said section 3. There is but one provision in this section, and that a simple one. It is that any assessment of benefits and damages for the already constructed pavement on West Chapel street (among others) should be laid and the property owners assessed under the provisions of the act. That here is a repeal of certain of the authority contained in the act of 1895 to distribute some of the expense of the West Chapel street improvement is manifest. In so far as this section reaches, it creates an irreconcilable inconsistency between its provisions and those of the earlier act. But how far does it reach? It reaches, of course, only to the constructed pavements enumerated, of which that in question is one. It reaches only to "assessments of benefits and damages." Do these terms, as used, include the charge which the city was by the act of 1895 authorized to make against and collect of the railway company? Whether we look at the natural meaning of the language employed, or interpret it in the light of all the provisions of the act, the conclusion arises that this section, in common with the balance of the act, exclusive of its last section, professing as it does to treat exclusively of assessments of benefits and damages upon property, and in the second section defining the benefits and damages as those accruing to owners of property abutting the street, makes no attempt to deal with the burden to be borne by the corporations enjoying a public franchise in the street, and operating a portion of their respective systems over its surface. It treats of benefits from the improvement as incident to the ownership of adjoining land specially benefited. The charge to be made against the railway companies is regarded as having quite another foundation and character. It is impossible to read the two acts of 1895 and 1899 together without coming to the conclusion that the purpose of section 3 was to alleviate the burden imposed by the earlier act upon adjoining landowners for the improvements completed, and that there was no intention to change the burden imposed upon the railway companies therefor. The act of 1895 was careful to distinguish between the burden to be imposed upon the railway companies and that to be placed upon abutting landowners. The two classes of burdens were imposed by distinct provisions, and later described by apt distinguishing language. The act of 1899, so far as its language goes, deals only with assessments of benefits and damages. Section 2, which prescribes the scope of the act, not only confines its application to such assessments, but also qualifies the assessments as assessments to be made "for or against all owners of property abutting upon or adjoining the streets." Nowhere in the act are railway companies named. Nowhere are apt words used to describe them, or any share of the expense which they were

Fair Haven & W. R. Co. v. City of New Haven

to bear. It is strange if, with the act of 1895, and its distinguishing provisions necessarily called to the attention of the legislature, it lost sight of the distinction between landowners abutting the street and railway companies occupying it, and the nature of the relations of each to the contemplated improvements, and concealed the companies' identity as responsible parties in the descriptive terms of "owners of property abutting upon or adjoining the streets in which the pavements are constructed." We are bound to assume that the legislature used its language intelligently, and it is fair to assume that the use was in the ordinary and commonly accepted sense, and to conclude that, when it spoke of assessments of benefits upon abutting property owners, it did not intend to embrace within the description parties who were not the owners of land near the improvement, and whose property ownership was limited to the rails, ties, poles, wires, etc., which lie in or extend along or over the highway. It is scarcely to be credited that the legislature had the intention of freeing the railway companies from all liability for the cost of the several paving improvements which had been completed under and upon the faith of the act of 1895, and yet this was the result of the act of 1899, if the plaintiff's construction of it is to be adopted, unless, indeed, its language be given a most liberal and strained construction. The situation is, we think, susceptible of a simple explanation. The act of 1899 is to be taken in its natural meaning. Its provisions relating to assessments were intended to deal only with assessments of benefits and damages in favor of or against owners of land whose land adjoins the street in which the pavement is laid, by reason of some benefit or damage received affecting its value. The railway companies were not meant to be, and are not to be regarded as, within their scope. No change in the burden already upon them for the completed work was intended to be effected. It follows from these observations that there is no such clear and manifest repugnance between the provisions of section 3 and those of the act of 1895 authorizing the rule of assessment claimed by the defendant as compels the latter to give way, and that the controlling fact of intention to repeal does not appear. The defendant was therefore right in its claim as to the rule which the general assembly had directed should be applied to the situation.

The plaintiff further objects to the application of the rule of assessment against it provided for in the act of 1895, upon the ground that the provisions of that act authorizing the defendant to charge against the plaintiff, and collect from it, the cost of the prescribed portion of any new pavement, if in force, would be unconstitutional and void. This objection comes rather late in the history of legislation of this general character, and is, we think, not well founded. Plaintiff's counsel discuss the question chiefly as one involving the assessment of benefits by reason of public improvements.

Fair Haven & W. R. Co. v. City of New Haven

We need not stop to inquire whether the objection in this form is one which would be well taken, since it is quite evident, as we have already had occasion to observe, that the legislation in question did not regard the charge to be imposed upon the plaintiff as one of that character, and since constitutional justification for the legislative attempt to impose upon the plaintiff the burden of a definite portion of the cost of the highway improvement can be otherwise so easily found. The establishment, maintenance, and regulation of highways is within those powers of the state which are commonly designated as "police powers." *New Orleans Gas & Light Co. v. Louisiana Light & Heat Producing & Manufacturing Co.*, 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; *Jones v. Brim*, 165 U. S. 180, 17 Sup. Ct. 282, 41 L. Ed. 677; *North Hudson Co. R. Co. v. Mayor, etc., of City of Hoboken*, 41 N. J. Law, 71; *In re Goddard*, 16 Pick. 504. In the exercise of this power of highway regulation, the state may of itself, and directly or through its authorized municipal or other agencies, decide what repair or improvement public comfort or safety requires, and determine upon whom the burden thereof should reasonably fall. The power of the state in these matters, as in all others involving the exercise of the police powers, is, of course, not unrestricted. The regulations must be reasonable, and the burdens must be reasonably cast. The action must not be arbitrary, oppressive, partial, or unequal. *Woodruff v. Catlin*, 54 Conn. 295, 6 Atl. 849; *Appeal of New York & N. E. R. Co.*, 58 Conn. 532, 20 Atl. 670; *In re Goddard*, 16 Pick. 504; *Borough of Greensburg v. Young*, 53 Pa. 280; *North Hudson Co. R. Co. v. Mayor, etc., of City of Hoboken*, 41 N. J. Law, 71; *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385. Within reasonable limits, however, the legislative department is the judge of what the circumstances demand. To this end it is vested with a large discretion, and no legislative utterance will be invalidated, unless in a clear case. The constitutionality of such legislation will be presumed, and where no reasons are apparent for holding the decision arbitrary, oppressive, partial, or unreasonable, the courts will refuse to interfere. *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385; *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992, 32 L. Ed. 253.

In this case the legislation, and the action under it, called for the not unusual proceeding of paving a city street with asphalt. It cast a portion of the attendant burden upon abutting property owners, and another portion upon the corporation which enjoyed the exclusive public franchise of operating a street railway in the street to be paved. The extent of the latter burden was limited to the actual cost of the pavement laid upon that portion of the street which was peculiarly appropriated to the special use of this corporation. Here is

Fair Haven & W. R. Co. v. City of New Haven

no such apparent injustice as to warrant us in saying that constitutional powers have been transgressed. The constitutional power which upholds this legislation and the municipal action thereunder, is that which has been so frequently appealed to to justify legislative action similar in character, whereby the burden of constructing sidewalks, curbs, and gutters has been cast upon abutting property owners (*Borough of Greensburg v. Young*, 53 Pa. 280; *Paxson v. Sweet*, 13 N. J. Law, 196; *City of Lowell v. Hadley*, 8 Metc. [Mass.] 180; *Bonsall v. Town of Lebanon*, 19 Ohio, 418; *Lewis v. City of New Britain*, 52 Conn. 568); whereby property owners have been required to keep the sidewalks in front of their premises clean and free from snow and ice (*In re Goddard*, 16 Pick. 504; *Kirby v. Association*, 14 Gray, 249, 74 Am. Dec. 682; *North Hudson Co. R. Co. v. Mayor, etc., of City of Hoboken*, 41 N. J. Law 71); whereby street railway companies have been compelled to keep their tracks watered (*City & S. Ry. Co. of Savannah v. Mayor, etc., of City of Savannah*, 77 Ga. 731, 4 Am. St. Rep. 106).

That the act required the plaintiff to pay a specific portion of the cost, or, rather, the cost of a specific portion of the work, and not an amount to be subsequently ascertained or assessed, is no objection to its legality. *Appeal of New York & N. E. R. Co.*, 58 Conn. 532, 20 Atl. 670; *Doolittle v. Selectmen*, 59 Conn. 402, 22 Atl. 336. Neither is the fact that the act did not provide that the plaintiff should first have an opportunity to itself lay the 18-foot strip of pavement, but was required to pay to the city the cost of that construction by the latter. Such is frequently the case, as to one, at least, of the parties, where the work is of such a nature as to be best done as an entirety. *New York & N. E. R. Co. v. City of Waterbury*, 60 Conn. 1, 22 Atl. 439; *State's Atty. v. Selectmen*, 59 Conn. 402, 22 Atl. 336.

Again, the plaintiff is a quasi public corporation, having a franchise from the state to operate a street railway in the street in question, among others. Aside from the powers impliedly reserved as incidents of the so-called police power, the state has expressly reserved to itself the power to amend, alter, or repeal the plaintiff's charter. This power of amendment is, of course, not an unlimited one. What its limits are, it is perhaps impossible to precisely define; but it is clear that the power extends so far as to authorize legislation imposing reasonable regulations and requirements upon a corporation operating a railway in a public street, as to the manner in which the street may be used by it, the precautions to be observed by it for the public safety and welfare, the condition of repair in which the street shall be kept, the improvements which shall be made therein for the convenience of public travel, and the share of any burden incident thereto which shall be borne by the corporation. The recognized rule upon this subject is well stated in *Inland Fisheries Com'rs v.*

Fair Haven & W. R. Co. v. City of New Haven

Holyoke Water Power Co., 104 Mass. 446, 6 Am. Rep. 247: "It is sufficient now to say that it is established by adjudications which we cannot disregard, and the principles of which we fully approve, that it at least reserves to the legislature the authority to make any alteration or amendment in a charter granted subject to it that will not defeat or substantially impair the object of the grant, or any rights which are vested under it, and that the legislature may deem necessary to secure either that object, or other public or private rights." See *Holyoke Water Power Co. v. Lyman*, 15 Wall. 500, 21 L. Ed. 133; *New York & N. E. R. Co. v. Town of Bristol*, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. Ed. 269. In *Shields v. Ohio*, 95 U. S. 319, 24 L. Ed. 357, the court has this to say concerning the limitations upon the exercise of this reserved power: "The power of alteration and amendment is not without limit. The alterations must be reasonable. They must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers, the vested rights of property of corporations in such cases are surrounded by the same sanctions and are as inviolable as in other cases." The court, in *Consolidated Traction Co. v. City of Elizabeth*, 58 N. J. Law, 619, 34 Atl. 146, states the practical and legal situation very pertinently as follows: "A street railway company uses as its roadbed public streets provided and improved at public expense, and acquired and held for the benefit and advantage of the public at large. * * * The legislature, in authorizing a street railway company to make use of the public streets, intended that the grantee of such privilege should be subject to municipal regulation of a greater scope than would be allowable in the case of companies occupying and using their own roadbed. * * * These companies hold their franchises subject to such municipal regulations as do not unreasonably or unnecessarily interfere with the exercise of the franchises conferred by the legislature." These principles have their substantial approval in the case of *English v. New Haven & Northampton Co.*, 32 Conn. 240.

The act of 1895 was, in effect, an amendment to the plaintiff's charter. *Bulkley v. Railroad Co.*, 27 Conn. 479; *New York & N. E. R. Co. v. City of Waterbury*, 60 Conn. 1, 22 Atl. 439. Plainly, what was required of the plaintiff by the amendment was well within the rule stated, and without its limitations.

Incidental objections are made by the plaintiff, and discussed in the briefs of counsel, to the assessment made by the city, to wit: (1) That it was without due notice to the plaintiff; and (2) that it included items of expense not involved in the cost of paving the 18 feet of width chargeable to the plaintiff. The first is not well taken, since the plaintiff was duly

Northern Cent. Ry. Co. v. State of Maryland

notified of the inception of the assessment proceedings before the city officials, which proceedings, from their beginning to their conclusion, in legal contemplation, formed one continuous proceeding, and at a later stage became a party to them. *Gilbert v. City of New Haven*, 39 Conn. 467. With respect to the second, it is sufficient to observe that, while it is quite possibly true that the city may have included improper items of charge, its claim is not tied to the precise amount of its figures, which it will become the duty of the court below to revise and correct as the facts may require when it comes to apply the proper rule for the determination of the plaintiff's liability.

There is error, and the cause is remanded to be proceeded with according to law. The other judges concurred.

NORTHERN CENTRAL RAILWAY COMPANY, Plff. in Err., v.
STATE OF MARYLAND.

(Argued October 16, 1902. Decided December 1, 1902.)

[23 Sup. Ct. Rep. 62.]

Contracts — Reserved Power to Alter — Amendment of Corporate Charter.

A state statute fixing the rate of taxation on the gross receipts of a railroad company, enacted for the purpose of settling by agreement a pending controversy as to a charter right of the company to exemption from taxation, must, notwithstanding its contractual form, be regarded as an amendment to such charter, and therefore subject to repeal by reason of a provision of the state constitution in force at the time of its passage, reserving the power to repeal, alter, or amend corporate charters.

In Error to the Court of Appeals of the State of Maryland to review a judgment which affirmed a judgment of the trial court denying a claim of a railroad company to a contract exemption from a tax imposed by a statute of the state. Affirmed.

See same case below, 90 Md. 449, 45 Atl. 465.

Statement by MR. JUSTICE WHITE:

The Baltimore & Susquehanna Railroad Company was chartered by an act of the legislature of Maryland in 1827, with authority to construct a railroad from the city of Baltimore to the Susquehanna river. The charter contained a provision declaring that the "shares of the capital stock of the company should be deemed and considered personal estate, and should be exempt from imposition of any tax or burden." It was conceded by both parties in the discussion at bar that the effect of this provision, as interpreted by the settled adjudications of the state of Maryland, was to forever exempt the company and its property from taxation. It was also conceded that at the time this act was passed there was no provision in the Constitution of the state of Maryland

Northern Cent. Ry. Co. v. State of Maryland

restricting the legislative power to exempt, and that no reservation of the power to repeal, alter, or amend was found in the Constitution of the state, or expressed or implied in the charter in question. In 1854 an act was passed by the Maryland legislature, designated as chapter 250 of the laws of that year. The title of this act was as follows:

“An Act to Authorize the Consolidation of the Baltimore and Susquehanna Railroad Company with the York and Maryland Line Railroad Company, the York and Cumberland Railroad Company and the Susquehanna Railroad Company, by the Name of the Northern Central Railway Company.”

The companies referred to in this title other than the Baltimore & Susquehanna Railroad were corporations owing their existence to charters granted by the legislature of Pennsylvania, and which were operating railroads in that state connecting with the Baltimore & Susquehanna. The effect of the consolidation was to create one corporation owning and operating one line of railroad from and across the state of Maryland into and across the state of Pennsylvania. The act of 1854 authorizing the consolidation, the title of which has just been stated, by its first section empowered the stockholders of the Baltimore & Susquehanna Railroad, upon their acceptance of the act, “to unite and to consolidate their company or corporation with the York & Maryland Line Railroad, the York & Cumberland Railroad Company and the Susquehanna Railroad Company of the state of Pennsylvania, so as to form and constitute one company or corporation, to be called the Northern Central Railway Company, on such terms and conditions, and conformably to such agreements and regulations, as the said several companies shall respectively determine and adopt, subject, nevertheless, to the following general provisions: First, that all existing contracts, engagements, and liabilities of the said Baltimore & Susquehanna Railroad Company shall continue to bind said company and its property as fully as before the consolidation herein above authorized, or that the said existing contracts, engagements, and liabilities shall be duly adopted and assumed by the consolidated company except as herein expressly altered or rescinded; second, that all laws heretofore made in reference to the said Baltimore & Susquehanna Railroad Company and not repealed or modified by the legislature of Maryland, and all ordinances relating to said company heretofore made and not repealed by the mayor and said council of Maryland, shall be binding and operative upon the said consolidated company, so far as its property or its operations may be within the jurisdiction of the state of Maryland or the city of Baltimore respectively, and so far as the laws or ordinances may be applicable to and consistent with the new organization of the said consolidated company; third, that the consolidated company shall have power from time to time to establish its capital stock at an amount not exceeding eight millions of

Northern Cent. Ry. Co. v. State of Maryland

dollars, the same to be represented by such number of shares, and the said consolidated company shall have power to issue their bonds convertible into stock on such terms as the company may prescribe, and to secure the same by one or more mortgages for any such amounts as they may find necessary for paying off any existing debt of the company."

After providing for a board of directors and officers of the new or consolidated company, the act proceeded to say: "That the company shall make and use a common seal, and possess all the corporate powers and privileges, and be subject to all the duties and obligations not inconsistent with this act, and its general intent, which are expressed in the charter heretofore granted to the said Baltimore & Susquehanna Railroad Company, and its supplements: Provided, that this clause shall not be construed to deprive the parties to the said consolidated company of the right or authority to make such provisions and regulations, notwithstanding said original charter and its supplements, as may be necessary to create and establish said consolidated company, and bring its organization into agreement and consistency with the terms and conditions of the charter of the several companies of which the said consolidated company shall be composed: And provided also, That the parties to the consolidated company shall be authorized and empowered to adopt and conform the organization of the said consolidated company to such provisions or enactments as may be required by the legislature of the state of Pennsylvania, touching the name of said corporation, and of the board of president and directors in said consolidated company, and the conditions relating to their appointments."

The 2d section of the act, among other things, provided that "this act shall take effect whenever and as soon as the said parties hereinbefore referred to shall have agreed to consolidate their several companies into one, and shall have settled, determined, and agreed upon the terms and conditions of such consolidation in conformity with the provisions of this act. . . ."

In pursuance of the authority thus conferred upon the Maryland corporation, and in virtue of power granted by the legislature of Pennsylvania to the three Pennsylvania corporations, the consolidation was effected, new stock was issued, and a company came into being known as the Northern Central Railway Company, whose affairs were managed by the new board of directors and officers elected or appointed pursuant to the new charter. The corporation, in availing itself of the provisions of the law of 1854, executed articles of consolidation. Although the act of 1854 only provided that the new corporation should have the corporate "powers and privileges" of the constituent bodies, it is stated in argument that the articles of consolidation executed under the law purported to vest the new corporation with, not only the right to

Northern Cent. Ry. Co. v. State of Maryland

the property rights and privileges of the old companies, but also with their immunities. In 1854, at the time the act of consolidation was passed, the Maryland Constitution (of 1850) was in force, and provided in § 47, article 3, as follows:

“Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes; and in cases where in the judgment of the legislature the object of the corporation cannot be attained under general laws. All laws and special acts pursuant to this section may be altered from time to time or repealed.”

In the years 1872 and 1874 the legislature of Maryland passed an act imposing a tax of $\frac{1}{2}$ of 1 per cent. upon the gross receipts of all steam railroad companies incorporated by the state and doing business therein. Two suits were thereafter (the one in 1873 and the other in 1874) brought by the state of Maryland against the Northern Central Railway Company to recover the $\frac{1}{2}$ of 1 per cent. tax upon the gross receipts of that company from that part of its railroad lying in the state of Maryland. The defense of the company was substantially, first, that it was entitled to the exemption from taxation granted by the act of 1827 to the Baltimore & Susquehanna Company; that such exemption was existing and had not been repealed, and, if repealed, the repealing act was void because an impairment of the obligations of the contract resulting from the act of 1827 and the transmission of its immunities to the new company created by the act of 1854. The causes were decided in the trial court in favor of the corporation. The cases were taken to the court of appeals of the state of Maryland. That court (in 1875) reversed the judgment of the court below, and remanded the cases for a new trial. The court of appeals in its opinion conceded that when in 1827 the charter of the Baltimore & Susquehanna Railroad Company was granted there was no restriction in the Constitution of the state on the power of the general assembly to make a contractual exemption from taxation. It also conceded that at that time there was no general power reserved in the Constitution to repeal, alter, or amend charters, and that no such reservation was found in the charter of 1827. But the court deemed it unnecessary to pass upon the question of whether the consolidation act of 1854 had endowed the new company with the exemption from taxation expressed in the act of 1827, because, conceding, arguendo, this to have been the case, it was held that as the consolidation had created a new company with new stock, new franchises, new rights, and new officers, the charter of such newly created company as to all its provisions, including the exemption from taxation, if such exemption were found in it expressly or by implication, was subject to the power to repeal, alter, and amend, reserved by the Constitution. Construing the acts imposing the tax which were sued for in connection with other laws of the

Northern Cent. Ry. Co. v. State of Maryland

state of Maryland the court held that the exemption from taxation had been repealed. 44 Md. 162.

The cause on being remanded to the trial court remained untried in 1880. In that year the legislature of Maryland passed an act on the subject of the taxation of the Northern Central Railway Company. The title of that act purported to adjust and settle finally by agreement all pending controversies on the subject of taxation between the state of Maryland and the railroad company. The preamble referred to and recapitulated the organization of the Baltimore & Susquehanna, the consolidation by the act of 1854, and the pending suits on the subject. The title and preamble are reproduced in the margin.*

By the 1st section of the act it was provided that the Northern Central Railway Company "shall have and possess all the powers, rights, privileges, and immunities, and be subject to all the duties and obligations, which are expressed in the act of assembly of Maryland of 1827, chapter 72, entitled, An Act to Incorporate the Baltimore & Susquehanna Railroad Company, and all the franchises and property of every description and gross receipts of said Northern Central Railway Company within the state of Maryland, shall be subject to taxation for state purposes to the extent of an annual tax of one half of one per cent. upon the gross receipts from its railroad and franchise lying within the state of Maryland, and from all other sources within this state; and said franchises, property, and gross receipts shall not be subject to any other tax under the laws of the state of Maryland; . . . " The act further provided for the payment of a

*An Act to Adjust and Settle Finally, by Agreement, All Pending Controversies between the State of Maryland and the Northern Central Railway Company, by Subjecting the Franchises and Property of Said Company within This State to Taxation for State Purposes to a Certain Extent, and by Providing for the Payment of a Certain Indebtedness Claimed by the State of Maryland to Exist on the Part of Said Northern Central Railway Company to Said State of Maryland, being an Act Supplementary to the Act of Eighteen Hundred and Fifty-Four, Chapter Two Hundred and Fifty, Entitled An Act to Authorize the Consolidation of the Baltimore and Susquehanna Railroad Company with the York and Maryland Line Railroad Company, the York and Cumberland Railroad Company, and the Susquehanna Railroad Company, by the Name of the Northern Central Railway Company.

Whereas, a controversy has arisen and exists between the state of Maryland and the Northern Central Railway Company in reference to the rights of the state of Maryland to subject to taxation the franchises and property of the Northern Central Railway Company, the said company claiming exemption of the same from taxation upon the grounds that among the terms and conditions of the union and consolidation of the several companies by which said Northern Central Railway Company was formed is one, that the latter should have all the rights, privileges, and immunities of each of said companies, which said terms were entered into under the authority given by the act of Maryland of eighteen hundred and fifty-four, chapter two hundred and fifty, which, moreover, declared that said Northern Central Railway Company should have all the powers and privileges expressed in the charter

Northern Cent. Ry. Co. v. State of Maryland

designated sum by the railroad company for past taxes, declared said payment should acquit such taxes, and directed the discontinuance of all suits pending against the company for such taxes. It was, however, provided that its provisions should not be operative until the payment which the act required had been made and until the acceptance of the provisions of the act by the stockholders of the company. The act was accepted, the money was paid and the suits were discontinued. At the time of the passage of this act of 1880 the Constitution of Maryland of 1867 was in force, and therein it was provided (art. 3, § 48): "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes and except in cases where no general laws exist providing for the creation of corporations of the same general character as the corporation proposed to be created, and any act of incorporation passed in violation of this act shall be void. . . . All charters granted or adopted in pursuance of this section, and all charters heretofore granted and created, subject to repeal or modification, may be altered from time to time, or be repealed." In accordance with the act of 1880 the company year by year paid the tax on its gross receipts.

In 1890 the state of Maryland passed a general law entitled "An Act to Provide for State Taxation on the Revenues of Railroad, Telegraph, or Cable, Express or Transportation, Telephone, Parlor Car, Sleeping Car, Safe Deposit, Trust, Guaranty, Fidelity, Oil or Pipe Line, Title, Insurance, Electric Light or Electric Construction Companies Incorporated Under Any General or Special Law of This State and Doing Business Therein." [Md. Laws, chap. 559.] By this

granted by the state of Maryland to the Baltimore & Susquehanna Railroad Company, among which privileges and immunity from taxation.

And whereas, the state of Maryland having, by the act of eighteen hundred and seventy-two, chapter two hundred and thirty-four, and the act of eighteen hundred and seventy-four, chapter four hundred and eight, imposed an annual tax of one half of one per centum on the gross receipts of all railroad companies worked by steam incorporated by or under the authority of said state of Maryland, and claiming that under said acts the gross receipts of said Northern Central Railway Company are liable to said tax, have instituted suits to recover the same.

And whereas, the property of said company has been also assessed as liable to taxation for county and municipal purposes.

And whereas, the said company has the right to have the question at issue between it and the state of Maryland carried to the Supreme Court of the United States to be there decided.

And whereas, it has been represented to this general assembly that what would be the ultimate decision of said question is a matter of great doubt, and it is deemed to be, moreover, just and proper that an equitable settlement should be made of the matters so in controversy, and it having been represented to this general assembly that the said Northern Central Railway Company, for the purpose of making such settlement, is willing to pay a tax of one half of one per centum on the gross receipts within this state, upon the terms and conditions hereinafter set forth; now, therefore—

Northern Cent. Ry. Co. v. State of Maryland

act a tax of 1 per cent. was imposed upon the gross receipts "of all railroad companies worked by steam incorporated by or under the authority of this state and doing business therein." Under the asserted authority of this statute a tax of 1 per cent. was levied by the state in each of the years 1891 to 1895, both inclusive, upon the gross receipts of the Northern Central Railway Company for the year preceding, and these taxes were paid by the company under protest. Upon demand, however, being made in 1896 for payment of the tax of 1 per cent. upon the gross receipts for the year 1895, compliance was refused. A tender by the company of the taxes, calculated at the rate of $\frac{1}{2}$ of 1 per cent., was refused by the state, and the present action was thereupon brought to recover the taxes thus asserted to be due and payable under the act of 1890. The company defended on the ground that the act of 1880 was a contract protecting it from a higher rate of tax on its gross receipts than in that act specified; that the act had not been repealed; that if repealed the repealing statute was void, because it impaired the obligations of the contract resulting from the act of 1880. There was judgment in favor of the corporation. The case was taken to the court of appeals of the state of Maryland and the judgment was reversed, the court holding that the provisions of the act of 1880 had been repealed by state statutes to which it referred, and that the repeal did not violate the Constitution of the United States by impairing the obligations of the contract, as asserted by the company, because the corporation held its rights subject to the power to repeal, alter, and amend, as reserved in the Constitution at the time both the acts of 1854 and 1880 were passed. 90 Md. 449, 45 Atl. 465. The case was remanded for a new trial. It was again tried, the Federal defense of the impairment of the obligation of the contract was again specially urged, the case was decided against the corporation, was taken again to the supreme court of the state of Maryland. That court, adhering to its former view, affirmed the judgment. It is to this judgment that the present writ of error is prosecuted.

Mr. Bernard Carter for plaintiff in error.

Messrs. Louis E. McComas and George R. Gaither for defendant in error.

MR. JUSTICE WHITE, after making the foregoing statement of the case, delivered the opinion of the court:

In order to confine the controversy arising on this record to the propositions upon which its decision must really rest to eliminate the questions discussed at bar, which are either irrelevant or so effectually foreclosed by prior decisions of this court as to be no longer open to controversy, the following propositions are stated:

First. Where a contract is claimed to arise from a state law, and, it is held below that a subsequent statute has repealed the alleged contract, and effect is thereby given to the subsequent law, the mere question whether the alleged contract has

Northern Cent. Ry. Co. v. State of Maryland

been repealed by the subsequent law is a state, and not a Federal, question. In such a case this court concerns itself, not with the question whether the state law, from which the contract is asserted to have arisen, has been repealed, but proceeds to determine whether the repeal was void because it produced an impairment of the obligations of the contract within the purview of the Constitution of the United States. In other words, where the state court has given effect to a subsequent law, this court decides whether such effect, so given by the state court, violates the Constitution of the United States. *Gulf & S. I. R. Co. v. Hewes*, 183 U. S. 66, 46 L. Ed. 86, 22 Sup. Ct. Rep. 26. We therefore put out of view the question whether the acts of 1854 or of 1880 were repealed by the subsequent state statutes as held by the court below, and, treating such repeal as an accomplished fact, shall determine whether the repealing acts were void because impairing the obligations of the contract relied upon, in violation of the Constitution of the United States. In considering this question, it will be borne in mind that it is elementary that where the constitution of a state reserves the right to repeal, alter, or amend, all charters granted by the legislature are subject to such provision, and therefore are wanting in that attribute of irrevocability which is essential to bring them within the intendment of the clause of the Constitution of the United States protecting contracts from impairment. The cases supporting this doctrine are so numerous that they need not be cited. We content ourselves, therefore, by referring to one of them: *Citizens' Sav. Bank v. Owensboro*, 173 U. S. 636, 641, 43 L. Ed. 840, 842, 19 Sup. Ct. Rep. 530. It is, moreover, conclusively determined that where the constitution of a state reserves the power to repeal, alter, or amend a charter, such provision is applicable to the charter of a consolidated corporation where, as the result of the consolidation, a new corporation takes being, new stock is provided for, new franchises are conferred, and new officers appointed. In other words, that where a legislature is inhibited by the constitution from making an irrepealable charter it cannot create a new contract and bring into being a new corporation, and yet by the charter of such corporation give rise to the irrepealable contract which the constitution absolutely prohibits. To state the doctrine in another form, it is this: That where a new corporation is chartered, subject to a constitution which forbids the granting of an irrepealable right, such new corporation cannot become endowed by the effect of a legislative contract with an irrepealable right forbidden by the constitution. If one of the constituent elements of the corporation possessed, prior to the formation of the new corporation, such right, and under the assumption that the right itself passed to the new body, it loses its irrepealable character, because the new corporation is subject by the very law of its being to the provision of the constitution forbidding irrepealable grants.

Northern Cent. Ry. Co. v. State of Maryland

The doctrine as just stated has been so frequently declared by this court that it is no longer open to discussion. The whole subject has been so recently fully reviewed and restated, it is sufficient to refer to that case: *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 1, 17, 45 L. Ed. 395, 405, 21 Sup. Ct. Rep. 240 et seq., and authorities there cited.

Coming to apply the principles just stated to the case before us, it is apparent that unless there is something peculiar in this case which takes it from under the control of the doctrine referred to, that the court below correctly held that the new corporation created by the act of 1854 had no irrepealable contract exempting it from taxation either as the result of the act of 1854 or of the act of 1880. The positive prohibition existing in the Constitution of the state against irrepealable charter grants, both when the act of 1854 and the act of 1880 were passed, renders any other conclusion impossible. But it is insisted that, as the Constitution of 1867, which was in force when the law of 1880 was enacted, reserved the right to repeal, alter, or amend only charters granted or adopted, the act of 1880 did not come within the right to repeal or amend because it was not a charter, but a contract entered into between the state and the corporation. True, the act of 1880 was put, not in the form of a charter amendment, but in that of a contract. The lower court, after quoting from the opinion rendered by it, when the case was before it under the act of 1854 (44 Md. 162) said:

“It is to be observed that the court does not rest the inability of the legislature to grant to a corporation an irrepealable exemption from taxation upon the form or character of the particular statute then under consideration, but puts it upon the broad ground of the want of power in the legislature under the Constitution to make such a grant at all. The court certainly in effect determines that any form of law which grants to a corporation such a corporate privilege as immunity from taxation is one passed pursuant to the section of the Constitution referred to, and is therefore subject to alteration or repeal by future legislatures.”

Without pausing to consider whether, as contended, the rule as thus announced may have been in some respects too broadly stated, we think it clear that the mere form adopted by a legislature in conferring a right on a corporation cannot be controlling, for if it were so the provision of the Constitution, instead of being commanding and prohibitive, would merely be precatory or advisory. We are also clearly of the opinion that the act of 1880, in its essential nature and effect, in whatever form couched, was intended to be and necessarily operated as an amendment to the charter of the company created by the act of 1854. Such being its essential nature and necessary effect, we think it plainly came within the provisions of the Constitution of 1867, and was therefore subject to repeal, alteration, or amendment.

Northern Cent. Ry. Co. v. State of Maryland

It is strenuously, however, insisted that this case should not be controlled by the reasons previously stated because of the following considerations: The decision of the court of appeals of Maryland under the act of 1854 (44 Md.), it is urged, was not unanimous. There was an elaborate dissent. For this reason, and because the case was open to review in this court on the question of the impairment of the obligations of the contract, it is said there was necessarily grave doubt as to the rights of the parties. In view of the foregoing conditions and of such doubt, the act of 1880 embodied but an honest effort by way of contract and compromise to close the doubtful controversy in the interest of both parties, the state on the one hand and the corporation on the other; hence the act of 1880 was not subject to repeal, alteration, or amendment. Conceding, arguendo, the premise upon which the above deduction is based, the conclusion itself is devoid of foundation. It but reiterates in another mode of statement the argument that the form in which a contract is couched, and not its substance and necessary effect, is the criterion by which to ascertain whether it is controlled by the constitutional provision forbidding irrepealable contracts. Moreover, it disregards the elementary principle that the power to grant an irrepealable right by a compromise agreement depended on the existence of the authority to make such grant by original action. The power to compromise on the subject was as limited as the power to contract originally. *District of Columbia v. Bailey* (1897) 171 U. S. 161, 43 L. Ed. 118, 18 Sup. Ct. Rep. 868. Indeed, the entire argument upon this branch of the case, reiterated in many forms, amounts but to the contention, when ultimately considered, that because the act of 1880 is asserted to have been enacted with the view of settling what was honestly deemed to be a pending and serious controversy, it was unwise, and it may be unjust to repeal it. Pretermittting the infirmity in the proposition which naturally is suggested by the fact that shortly after the decision in 44 Md. this court decided that the possession of the rights and privileges of a former corporation did not endow a new corporation with an exemption from taxation enjoyed by the old (*Morgan v. Louisiana* [1876] 93 U. S. 217, 23 L. Ed. 860), and putting out of view the other cases to the same effect, decided by this court prior to 1880, the proposition is untenable. It but invokes reasons of expediency or policy. Into these considerations we may not enter; we are concerned alone with the question of power, and on passing on such question cannot hold that an act which by the very terms of the state Constitution was made repealable, nevertheless engendered an irrepealable contract protected from impairment by the Constitution of the United States.

Affirmed.

CITY OF HARTFORD *v.* HARTFORD ST. RY. CO.*(Supreme Court of Errors of Connecticut, Jan. 30, 1903.)*

[53 Atl. Rep. 1010.]

Street Railways—Paving Street—Statutes.*

Pub. Acts 1893, c. 169, § 6 (Gen. St. 1902, § 3837), provides that every street railroad company occupying a public highway shall keep a certain part of the highway in repair to the satisfaction of the authorities of the municipality. By an act of 1901, a prior act of 1895, which authorized an appeal from orders of the local authorities relating to street railway companies to the superior court, or any judge thereof, was repealed; and such act, while providing that most of the matters provided for by the act of 1893 should be within the exclusive jurisdiction of the railroad commissioners, declared that when the local authorities should render any decision with reference to a street railway company as to the highway, etc., the company might appeal to the railroad commissioners: *held*, that the power given by the act of 1893 to the municipal authorities to order a street railway company to repair parts of the highway was not abrogated by the act of 1901.

Same—Same—Same—Right of Appeals.

The act of 1901 authorized the railroad company, on being denied by the city authorities the right to lay a particular kind of pavement, to appeal from such order to the railroad commissioners.

Appeal from superior court, Hartford county; Ralph Wheeler, Judge.

Application by the Hartford Street Railway Company for permission to replace certain asphalt pavement in the city of Hartford with creo-resinate wood pavement. An order was entered denying the application, which was reversed by the railroad commissioners on appeal, and the city appeals. Affirmed.

Joseph P. Tuttle, for appellant.

E. Henry Hyde and George H. Gilman, for appellee.

TORRANCE, C. J. In March, 1902, the Hartford Street Railway Company applied to the authorities of Hartford city for permission to replace with creo-resinate wood pavement the sheet asphalt pavement between and outside of its rails on Main street in said city, between certain described points. The city authorities refused to grant such permission. From this action the railway company took an appeal to the board of railroad commissioners. Before that board the city authorities appeared and moved to dismiss said appeal, mainly upon the ground that the action of the city authorities in denying the application to lay the proposed pavement was final, and not subject to review by the commissioners, by way of appeal or otherwise. That board denied the motion to dismiss, and after due hearing, and in view of the evidence before it, "permitted and directed" the railway company "to lay a creo-resinate wood pavement between its rails and two

*As to whether street railways can be required to pave streets, see *City of Philadelphia v. Hestonville, M. & F. R. Co.* (Pa.), 5 Am. & Eng. R. Cas., N. S., 859, and note, 663 et seq.

City of Hartford v. Hartford St. Ry. Co

feet outside of" the same, between two described points, "in order that its practicability and efficiency may be thoroughly tested." In all other respects the action of the city authorities in denying the application of the railway company was confirmed. From this action of the commissioners the city authorities took an appeal to the superior court. To this appeal the railway company was made a party, and it filed a motion to dismiss the appeal "so far forth as it involves matters other than the question as to the jurisdiction of the" commissioners, because all matters involved in it, other than said question of jurisdiction, were of "an administrative or legislative character, and are not judicial matters, and because it is not alleged and does not appear that the board of railroad commissioners, in making the order appealed from, and in modifying the denial and order of the mayor and court of common council of said city of Hartford, as is alleged in this appeal, acted illegally, unlawfully, or unreasonably, or in any way exceeded its powers in the premises." The street railway company also demurred to the appeal in so far forth as it is based upon the ground that the board of railroad commissioners did not have jurisdiction to entertain the appeal of the street railway company, and in so far forth as the appeal is based on the ground that said commissioners erred in not granting the motion of the city to dismiss said appeal of the street railway company "because the statutes of this state conferred upon said board of railroad commissioners jurisdiction of said appeal, and power to make the order from which the city of Hartford and the mayor and court of common council of the city of Hartford now appeal."

The only questions which have been presented for our consideration are those raised by the demurrer, which was sustained by the superior court. Although, therefore, the judgment appealed from recites that the motion to dismiss was granted, we do not examine the propriety of that ruling.

The city claims (1) that the commissioners had no jurisdiction whatever of the appeal taken to them by the street railway company; and that, (2) if they had, it was a jurisdiction limited to determining whether the municipal authorities had, in their refusal, acted unlawfully and unreasonably. The answer to both of these claims depends upon the construction of certain provisions of chapter 156 of the Public Acts of 1901.

In 1893 the legislature provided, with certain limitations, that every street railway company, occupying with its tracks a public highway, should "keep so much of the highway as is included within its tracks, and a space of two feet on the outer side of the outer rails thereof, in repair to the satisfaction of the authorities" of the municipality bound by law to maintain said highway. Pub. Acts 1893, c. 169, § 6 (Gen. St. 1902, § 3837). The act also gave to the municipal authorities power to make and enforce orders upon the railway company with respect to such repairs, but it gave no right of appeal

City of Hartford v. Hartford St. Ry. Co

from such orders. On the contrary, it expressly denied such right of appeal. That act also, in the third section, gave to the municipal authorities within their respective jurisdictions the "exclusive direction over the placing or locating of any tracks, wires, conductors, fixtures, structures of any such railway permanently located in the streets or highways, including the relocating or removal of the same, or changes in the grade thereof," and for the purposes "of any public improvement, and including the power of designating the material, quality and finish thereof, may make all orders necessary to the exercise of such power of direction and control, which orders shall be in writing, and recorded in the minutes of their respective municipalities." The act gave no right of appeal from any original orders of the kind above described. Under section 2 of the act, also, the municipal authorities had the power to adopt or to modify the "plan" which the railway company was obliged to submit to them, before constructing the railway, or laying additional tracks, or making a change in its motive power; and no right of appeal was given from the action of the local authorities in respect to the plan, except in a very limited way. For all practical purposes, the power of the local authorities as to all these matters was exclusive and final. In 1895, however, it was enacted that whenever the local authorities "shall make, pass, or render any decision, denial, order, or direction with respect to any matters relating to street railways which, by virtue of any public or private act or resolution, now are, or may hereafter be, within the respective jurisdictions" of such authorities, "any street railway company affected thereby may appeal" from any such decision, denial, direction, or order to the superior court or any judge thereof. Pub. Acts 1895, c. 283. This act, in the broadest terms, gave a right of appeal from any and all orders of any kind or nature which the local authorities had the power to make and enforce against the street railways in the occupancy of highways and streets, and, of course, included the right to appeal from orders relating to the repair of the highways or streets by the railway company. This act, however, in so far as it was a valid act, was held by this court to give a very limited right of appeal in such cases. *Norwalk St. Ry. Co.'s Appeal*, 69 Conn. 576, 37 Atl. 1080, 38 Atl. 708, 39 L. R. A. 794. Thus the law stood with respect to this matter when the act of 1901 was passed. That act, in certain respects, was a somewhat radical departure from the legislation embodied in the acts of 1893 and 1895, above referred to. By it most of the matters which by the act of 1893 were confided to the exclusive jurisdiction of the municipal authorities were confided to the exclusive jurisdiction of the railroad commissioners. It further provided that whenever the local authorities "shall make or render any decision, denial, order, or direction, with respect to the location of the tracks of any street railway company in any highway with

Eskildsen v. City of Seattle

reference to the center line of such highway and the grade thereof, and any change proposed to be made in such highway or grade thereof, or whenever any of such municipal authorities shall make or render any decision, denial, order or direction, with respect to any other matter relating to street railways, any street railway company affected thereby may appeal from any such decision, denial, direction, or order * * * to the railroad commissioners." The right of appeal thus given is to the railroad commissioners, instead of to the superior court, or to a judge thereof, as by the act of 1895. The act of 1901 in terms repeals the act of 1895, above referred to, but it does not in terms repeal the act of 1893. It does, however, repeal all other acts and parts of acts inconsistent with its provisions. Under the legislation embodied in the acts of 1893 and 1901, above referred to, we think it is clear (1) that the power given by the former of these acts to the municipal authorities to order the street railway company to repair its part of the highway was not taken away by the latter of these acts; and (2) that the act of 1901 gives to the street railway company the right to appeal from any such order to the railroad commissioners. Both parties to this proceeding properly concede the first of these propositions, and the dispute between them relates mainly to the last; but, as above stated, we think the language of the act of 1901 is too broad and comprehensive to admit of doubt that such right of appeal exists.

We further think that upon such an appeal the railroad commissioners try the matters brought before them by the appeal de novo, and that they do not sit to determine whether the municipal authorities, in what they did, acted unlawfully or unreasonably. The commissioners, while, as an administrative board, peculiarly well fitted to determine the questions that may be brought before them under the legislation in question, are not a court clothed with judicial power. We hold that the railroad commissioners, under the legislation in question, had the power to entertain the appeal taken to them by the street railway company from the action of the city authorities, and to make the order of which the city complains.

There is no error. The other judges concurred.

ESKILDSSEN v. CITY OF SEATTLE.

(*Supreme Court of Washington, Sept. 6, 1902.*)

[70 Pac. Rep. 64.]

Injury to Child—Imputable Negligence of Parents.*

The negligence of the parent cannot be attributed to the child in an action for the benefit of the child.

*See *Ploof v. Burlington Traction Co. (Vt.)*, 13 Am. & Eng. R. Cas., N. S., 702.

*Eskildsen v. City of Seattle***Same—Contributory Negligence.†**

A child under five years of age may not be charged with contributory negligence.

Same—Negligence and Contributory Negligence—Proximate Cause.

Negligence of a city in suffering a dangerous place in a railroad track in a street, in which a child gets his foot caught, and while so caught is run over by a train, is a proximate cause, rendering the city liable, notwithstanding negligence of the railroad company in construction, and of the child's parent in sending him to the place.

Appeal from superior court, Kings county; Geo. Meade Emory, Judge.

Action by Edwin Eskildsen, by his guardian ad litem, George A. Eskildsen, against the city of Seattle. Judgment for plaintiff. Defendant appeals. Affirmed.

Mitchell Gilliam, Wm. Parmelee, and W. E. Humphrey, for appellant.

E. P. Edsen, John E. Humphries, and Harrison Bostwick, for respondent.

DUNBAR, J. This is an action brought by Edwin Eskildsen, by his guardian ad litem, George A. Eskildsen, to recover for personal injuries, alleged to be due to the negligence of the city. The plaintiff at the time of the injury was four years and three months of age. He and his father were walking along Railroad avenue, in the city of Seattle, near the Northern Pacific Depot. The child desired to urinate, and was instructed by his father to go between the cars, where he did go, and where his foot got fastened between the planking and the rail of the car track. The father was unable to extricate the child from this position, and, an engine at that time pushing one of its cars toward the child, the father pulled the child out over the rail, the cars passing over the child's leg, cutting it off above the ankle. Upon trial, judgment was rendered in favor of the plaintiff in the sum of \$11,000, from which judgment this appeal is taken.

The assignments of error are: (1) The court erred in not granting defendant's motion for nonsuit. (2) In refusing to give instruction No. 1 requested by defendant. (3) In refusing to give instruction No. 6 requested by the defendant. (4) In giving instruction No. 5. (5) In giving instruction No. 15. It is insisted of the first assignment that the nonsuit should have been granted—First, because the city had no notice of the defective condition of the street; and, second, even if the city was negligent, its negligence was not the proximate cause of the injury. A perusal of the record convinces us that there was sufficient testimony for the consideration of the jury on the question of notice. It is contended that the father was the active agency in producing the injury of his child, but, outside of the great weight of authority

†As to the degree of care required of children for their own protection, see foot-note appended to *Citizens' St. R. Co. v. Hamer* (Ind. App.), 2 R. R. 9, 25 Am. & Eng. R. Cas., N. S., 9.

Esildaen v. City of Seattle

which sustains the rule that the negligence of the parent cannot be imputed to a child, it was held by this court in *Roth v. Depot Co.*, 13 Wash. 525, 43 Pac. 641, 44 Pac. 253, 31 L. R. A. 855, that "the negligence of the parent cannot be imputed to the child in an action brought for the benefit of the child, and not for the benefit of the parent;" and it is almost universally held that a child under five years of age cannot be guilty of contributory negligence in any event. But it is contended that, even if the negligence of the father cannot be imputed to the child, his negligence, and not that of the city, caused the child's injury, and that, assuming the father was not negligent, and that the city was negligent, yet the city would not be liable, because its negligence would not have caused the child any injury if it had not been for the intervening act of the railway company; it not being claimed that the hole in the street in itself injured the child, and that it appeared that he would have escaped injury but for the act of the railway company in passing its cars over him. We think that the great weight of authority on the subject of approximate cause is against the theory contended for by the appellant. The injury received was a reasonable and probable result of the negligence of the defendant, and it was held in *Binford v. Johnston*, 42 Am. Rep. 508, an Indiana case, that the fact that some agency intervenes between the original wrong and the injury does not necessarily bring the case within the rule, or within the maxim "*Causa proxima, et non remota, spectatur.*" "On the contrary," said the court, "it is firmly settled that the intervention of a third person, or of other and new direct causes, does not preclude a recovery, if the injury was the natural or probable result of the original wrong;" citing *Billman v. Railroad Co.*, 76 Ind. 166, 40 Am. Rep. 230; *Scott v. Shepherd*, 2 W. Bl. 892, commonly known as the "Squib Case." "The rule goes so far," says the court, "as to hold that the original wrongdoer is responsible, even though the agency of a second wrongdoer intervened;" citing *Clark v. Chambers*, 7 Cent. Law J. 11; *Cooley, Torts*, 70; *Add. Torts*, § 12. In that case two boys purchased of a dealer cartridges for use in a toy pistol. Another boy six years old picked up a toy pistol containing one of the cartridges, and discharged it, killing one of the boys who bought the cartridges. It was held that the dealer was liable for the death of the boy killed. It is true that it is against the statute to sell pistol cartridges to minors in that state, but the decision is bottomed on the legal doctrine announced. In *City of Joliet v. Shufelt* (Ill.) 32 N. E. 969, 18 L. R. A. 750, 36 Am. St. Rep. 453, it was held that a city which has negligently constructed a street is liable for damages received by a person who, without negligence on his part, is thrown from a buggy on account of such defective construction, even though such accident would not have happened had not the harness broken, and the horse run away. The principle involved there is identical with the

Eskildsen v. City of Seattle

case in point, because the accident here probably would not have happened had it not been for the intervening cause, namely, the approach of the car. In that case it was said: "The general doctrine is that it is no defense in actions for negligent injuries that the negligence of third persons, or an inevitable accident, or an inanimate thing, contributed to cause the injury of the plaintiff, if the negligence of the defendant was an efficient cause, without which the injury would have occurred." Certainly, in this case the hole in the walk was the efficient cause, without which this child would not have been run over by the car, as shown by the testimony in the case. In support of this doctrine the court cited: *Railway Co. v. Shacklet*, 105 Ill. 364, 44 Am. Rep. 791; *Transit Co. v. Same*, 119 Ill. 232, 10 N. E. 896; *Machine Co. v. Keifer*, 134 Ill. 481, 25 N. E. 799, 10 L. R. A. 696, 23 Am. St. Rep. 688; *City of Peoria v. Simpson*, 110 Ill. 301, 51 Am. Rep. 683; 16 Am. & Eng. Enc. Law, 440-443, and notes; 2 *Thomp. Neg.* 1085. In *City of Joliet v. Verley*, 35 Ill. 58, 85 Am. Dec. 342, it was held that if a plaintiff, while observing due care for his personal safety, was injured by the combined result of an accident and the negligence of a city or village, and without such negligence the injury would not have occurred, the city or village will be held liable, although the accident be the primary cause of the injury, if the consequences could, with common prudence and sagacity, have been foreseen and provided against. In that case it was stated: "If the accident would not have caused the injury but for the defect in the street, and that defect is the result of carelessness on the part of the city, and the plaintiff has used ordinary care, the city must be held liable;" citing many cases, both English and American, to sustain that announcement. In *Baldwin v. Turnpike Co.*, 40 Conn. 238, 16 Am. Rep. 33, it is said: "If the plaintiff is in the exercise of ordinary care and prudence, and the injury is attributable to the negligence of the defendants, combined with some accidental cause, to which the plaintiff has not negligently contributed, the defendants are liable." In *Railroad Co. v. Dudgeon* (Ill.) 56 N. E. 796, it was held that negligence in placing stones close to the track of a street-railway company, where it had piled them in making repairs, and against which a conductor struck, when thrown by the sudden starting of the car which he was attempting to board, and by which he was rolled under the car, is a concurrent cause of the injury, for which the company is liable; it being claimed in that case that the obstructions to the street were not, and could not have been, the proximate cause of the injury, and that the only efficient cause was the starting of the car, for which it is not answerable. In that case the court cited *Bridge Co. v. Miller*, 138 Ill. 465, 28 N. E. 1091, where, by reason of the want of the railing, some mules got onto the footpath, on which plaintiff was walking, and injured her; and the court

Eskildsen v. City of Seattle

said: "In legal contemplation, the case is one where the injury was inflicted by the co-operating negligence of the bridge company and the persons in charge of the mules, and the rule is well settled 'that a person contributing to a tort, whether his fellow contributors are men, natural or other forces or things, is responsible for the whole, the same as though he had done all without help;' " citing many cases in support of the doctrine. In the case of *Railroad Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 168, it was held: "Where an injury to a passenger, caused by the negligence of the carrier, is such as to render the system of the injured man liable to take on disease, and to so enfeeble the system as to make it less likely to resist the inroads of the disease when it does set in, and death results, the death is, in legal contemplation, attributable to the negligence of the carrier." In *Byrne v. Wilson*, 15 Ir. C. L. 332, a stagecoach in which the plaintiff's intestate was a passenger was thrown into a canal by the negligence of the driver, and the lockkeeper turned on the water, thereby causing the death, by drowning, of the passenger, and it was held that the proprietor of the coach was liable; the court saying: "The precipitation of the omnibus into the lock was certainly one cause, and, as it may be said, the primary cause, of her death, inasmuch as she would not have been drowned but for such precipitation. It is true that the subsequent letting of the water into the lock was the other and more proximate cause of her death, and that she would not have lost her life but for such subsequent act, which was not the necessary consequence of the previous precipitation, by the negligence of defendant's servants. But, in my opinion, defendant is not relieved from the liability for his primary neglect by showing that but for such subsequent act the death would not have ensued." The chief justice, in his opinion, said: "The law is clear that every party is liable, not only for the immediate consequences of his negligence, but also for the resulting consequences of his acts, whether those acts are acts of violence, or of negligence in breach of a duty which imposed the necessity of care and caution upon him." In *Eaton v. Railroad Co.*, 11 Allen, 500, 87 Am. Dec. 730, it was said by the court that it is no answer to an action by a passenger against a carrier that the negligence or trespass of a third party contributed to the injury. See *Spooner v. Railroad Co.*, 54 N. Y. 230, 13 Am. Rep. 570. A case exactly in point with the case at bar is *City of Kansas v. Orr* (Kan. Sup.) 61 Pac. 397, 50 L. R. A. 783, where a switchman got his foot fastened between the planks and the rails of the track, and was killed by a car passing over him. It was held that the fact that it may have been the duty of the railway company, under its contract with the city, to construct and keep its tracks in a suitable and safe condition for those who have occasion to pass over the streets, does not discharge the city from its duty to the public to keep its streets in a reasonably

Louisville & N. R. Co. v. Howerton

safe condition, nor relieve it from the liability for the consequences of its negligence in that respect; citing many cases to sustain the doctrine. But, outside of the overwhelming weight of authority on this proposition, this court settled the questions involved in this cause in opposition to appellant's contention in *White v. City of Ballard*, 19 Wash. 284, 53 Pac. 159, *Howe v. Improvement Co.*, 21 Wash. 595, 59 Pac. 495, and *Gray v. Water Power Co.* (Wash.) 68 Pac. 360,—where the question of the approximate cause is discussed at length, and where it was held that where a buggy attached to a runaway horse is overturned by street-car tracks negligently allowed to remain above the street level, the runaway cannot be said, as a matter of law, in an action against the car company, to be the proximate cause of an injury received by an occupant of the buggy. Upon the question of the duty of the city to keep its streets in reasonably safe condition for the use of pedestrians, see *Mischke v. City of Seattle*, 26 Wash. 616, 67 Pac. 357, and cases cited. The instruction complained of and the instruction asked for involved the point which we have just discussed, and there is no error committed by the court in giving or refusing to give the instruction, when the whole instruction asked for and given is taken into consideration.

The judgment is affirmed.

REAVIS, C. J., and HADLEY, FULLERTON, ANDERS, MOUNT, and WHITE, JJ., concur.

LOUISVILLE & N. R. CO. v. HOWERTON.

(*Court of Appeals of Kentucky, March 6, 1903.*)

[72 S. W. Rep. 760.]

Frightening Horses—Operation of Hand Car.*

A railroad company is not liable for injuries to one driving a horse, owing to the horse, when about to cross the railway, having become frightened at an approaching hand car operated without unusual noise.

Same—Same.

It is not negligence on the part of a railway company for a hand car not to give a signal when approaching a crossing.

Appeal from circuit court, Shelby county.

"To be officially reported."

Action by Mary J. Howerton against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Willis & Willis and E. W. Hines, for appellant.

R. F. Peak and P. J. Beard, for appellee.

*As to whether railroad companies are liable where horses are frightened by usual and necessary noises, see foot-note appended to *Texas & P. Ry. Co. v. Hamilton* (Tex. Civ. App.), 1 R. R. R. 884, 24 Am. & Eng. R. Cas., N. S., 884.

Louisville & N. R. Co. v. Howerton

PAYNTER, J. About four miles south of Shelbyville the appellant's track crosses at right angles the public road, forming what is known as the "Keene Crossing." To the right of the crossing, in going from Shelbyville, there is a deep cut. The appellee and her daughter were driving a horse, proven to be gentle, from Shelbyville to their home, over the highway in question. As they approached the crossing, and as the horse's fore feet were over the first rail, it became frightened, swerved to the left, and ran off, which resulted in the appellee being painfully injured. It is claimed that the horse became frightened because the servants and employees of the appellant operated the hand car with gross negligence and carelessness. The plaintiff did not see the hand car, but, as the horse lunged, her daughter discovered the hand car, which was about 50 or 60 feet away, approaching the crossing through the cut. There was not the slightest evidence introduced which tended to prove that the hand car was operated in an unusual way, or that it was making any unusual noise or sounds. The mere fact that the horse became frightened at the hand car, ran off, and injured the appellee, does not entitle her to maintain this action. She could only maintain it upon the ground that defendant's servants or employees were guilty of negligence resulting in the injury. Hand cars are necessary in the conduct of the business of railroads. They must be used for the purpose of carrying tools and the section forces from point to point in repairing and looking after the track. It is impossible to run them in a noiseless manner. The fact that they are run, and that a horse became frightened by reason of their approach, or the noise which they make, which results in injury to the driver, does not give a cause of action. When trains are run in the ordinary way, and whistles and bells are sounded as the necessities of the business require, and a horse becomes frightened by reason thereof, and damages result therefrom, no action can be maintained therefor. *Ohio Valley R. R. Co.'s Receiver v. Young* (Ky.) 39 S. W. 415. *Elliott on Railroads*, volume 3, section 1264, says: "A railroad company is not liable for injuries resulting from horses becoming frightened upon a highway at the mere sight of its trains, or noises incident to the running or operation of a railroad." It was held in *McCerrin v. Alabama & Vicksburg R. Co.*, 72 Miss. 1013, 18 South. 420, that because a horse became frightened by the noise of a hand car running over street crossings, and the person driving the horse was injured, the railroad company was not liable. The court said: "The defendant had the right to operate its car in the usual and customary way, and at a safe rate of speed, but had no right to convert it needlessly into a terror-inspiring thing, and for such departure from propriety would undoubtedly be liable in damages for any injury caused by this negligence to one free from fault; but rapidity of movement, noises, and sudden appearances are common inci-

Hoon v. Beaver Valley Traction Co

dents of the operation of railroads, and one complaining of hurt from these causes must show clearly a departure by the defendant from custom and propriety, to warrant recovery. Railroads operating trains and hand cars have the right to make all reasonable and usual noises incident thereto, whether occasioned by escaping steam, griping of cars, etc. Persons whose duties call them near railroads must know that such right exists. There is no law in this state requiring hand cars to give signals as they approach crossings, and we cannot say, as a matter of law, that a failure to do so is negligence.

For the reason that the plaintiff failed to show any negligence whatever which produced the injury of which she complains, we are of the opinion that the court should have given the jury a peremptory instruction to find for the defendant.

Judgment is reversed for proceedings consistent with this opinion.

HOON v. BEAVER VALLEY TRACTION CO.

(Supreme Court of Pennsylvania, Jan. 5, 1903.)

[54 Atl. Rep. 270.]

Killing of Boy on Track—Sufficiency of Evidence.*

Plaintiff sued an electric railway company to recover for the death of a boy six years old. The evidence showed that the car which injured the boy was running near a schoolhouse, when children were on the street, at a rate of 25 miles an hour, without notice, by gong or otherwise: *held*, that a verdict for plaintiff was sustained by the evidence.

Same—Excessive Verdict.

A verdict of \$1,518 for the death of a boy six years old is not excessive.

Appeal from court of common pleas, Beaver county.

Action by W. S. Hoon against the Beaver Valley Traction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Defendant presented this point: "While on account of the tender age of Gilbert Hoon at the time of the accident, he being only 6½ years of age, contributory negligence cannot be attributed to him, yet if you find under the evidence that at the time of the accident he unexpectedly and without warning ran from the pavement, or from the cross street, against or in front of the moving car of the defendant, and was killed, such fact is not evidence of negligence on the part of the street railway company, so as to render it liable in this action; and if you so find, your verdict must be for the defendant. Answer. Refused." The court charged in part as follows: "The measure of damages for the death of a minor child occasioned by negligence is the money value of the child's services until it attains its majority, reduced by the cost of maintenance and education." Verdict and judgment for plaintiff for \$1,518.

*As to the care required of those in charge of street cars to prevent injuries to children, see note appended to *Sample v. Consolidated Light & Ry. Co.* (W. Va.), 1 R. R. R. 380, 24 Am. & Eng. R. Cas., N. S., 380.

Hoon v. Beaver Valley Traction Co

Argued before McCOLLUM, C. J., and MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

A. P. Marshall and John M. Buchanan, for appellant.

Richard S. Holt and J. H. Cunningham, for appellee.

FELL, J. The case could not properly have been withdrawn from the jury. The plaintiff's son was not of an age to be charged with negligence. There was testimony that the car by which he was injured was running at a rate of 25 miles an hour through a populous part of the borough, near a school-house, at an hour when school children were on the street, and that no notice, by gong or otherwise, was given of its approach to the crossing where the accident happened.

The point for charge, the refusal of which is the subject of the second assignment of error, could not have been affirmed. It leaves out of view altogether the negligence in running the car too rapidly under the circumstances, and it ends with a direction to find for the defendant, an ending so often fatal to points otherwise good. The question intended to be raised by this point was fully covered by the general charge, in which it was said by the learned trial judge: "While negligence cannot be imputed to a child of the age of Gilbert Hoon, nevertheless it may be assumed that a child old enough to be allowed to run at large has discretion enough to avoid ordinary dangers; and that persons who have business on the streets may reasonably conclude that they are not to provide against possible danger that may result to such a child from its own willful trespasses; so that where a child unexpectedly and without warning runs from the pavement against a moving traction car, or in front of a moving traction car, such fact is not evidence of such negligence on the part of the street railway company as to render them liable."

The objection that there was not sufficient evidence of the value of the child's services or the cost of maintenance on which to base the amount of the verdict is not without force, but it cannot be sustained. The age, physical and mental condition of the child, and the circumstances in life of its parents, were shown. Ordinarily this is all that can be shown. It furnishes a very unsatisfactory basis for the computation of pecuniary damage, as the chances of life and death, of health and sickness, and of the earnings of the child going to the parents, are necessarily involved in it. A verdict in such cases is always more or less conjectural, but the common experiences of life furnish some basis for a reasonable estimate. All that a trial judge can do is to state clearly the true ground of recovery, limiting it to the probable pecuniary loss, and pointing out the elements to be considered, and to permit no excessive verdict to stand. The instruction upon the subject in this case was full, clear, and accurate, and was accompanied by a caution to the jury not to render a verdict for an unreasonable amount. The judgment is affirmed.

CARTER v. PENNSYLVANIA R. CO.*(Circuit Court of Appeals, Second Circuit, January 8, 1903.)*

[120 Fed. Rep. 663.]

Railroads—Fires—Evidence to Establish Negligence.*

Stock owned by plaintiff was burned, while in an open car owned by defendant railroad company and standing in its freight yards, by fire which caught in the straw bedding of the car, and it was shown that a number of defendant's engines had passed on near-by tracks not long before the fire, some of which emitted sparks in large quantity, which fell near the car. There was also evidence which tended to show that the fire could not have been caused in any other way: *held*, that such evidence was sufficient to make a prima facie case for plaintiff, and to require a submission of the question of defendant's negligence to the jury.

In Error to the Circuit Court of the United States for the Southern District of New York.

A. Delos Kneeland, for plaintiff in error.

Henry Galbraith Ward, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. This is an action to recover damages for the loss of fourteen mules and one horse, worth \$2,315, which were destroyed by fire, while in the lawful possession and control of the defendant, at or near Mantua station on the defendant's railroad in the city of Philadelphia. The defendant is a common carrier of freight and passengers. The live stock in question was loaded on one of the defendant's open rack stock cars at Marlboro, Md., to be transported to Oldtown, Me. The car, with several others containing plaintiff's property, reached Philadelphia about 7 o'clock in the morning of May 24, 1899, and remained at the lower freight yard for about an hour and a half, when it was removed to the upper freight yard at Mantua. It remained there for over four hours, was shifted from place to place and, much of the time, was in close proximity to the main tracks of the defendant where locomotives were constantly passing. The fire occurred about 1 o'clock in the afternoon. At that time the car was between two others, also containing the plaintiff's property, and was "about five tracks" distant from the main tracks. The live stock was in charge of three of plaintiff's servants whose duty it was to feed and care for the animals. The fire originated in the straw bedding and hay on the bottom of the car. It was first discovered near the center and spread rapidly towards the ends of the car. It was proven that trains were continually passing on the main line and cars were being shunted about by shifting engines in the yard. These engines, presumably the engines of the defendant, were throwing out smoke and sparks. Several trains passed on the

*See foot-note appended to *Crissey & Fowler Lumber Co. v. Denver & R. G. R. Co.* (Colo.), 2 R. R. R. 412, 25 Am. & Eng. R. Cas., N. S., 412.

Carter v. Pennsylvania R. Co

main line within three quarters of an hour prior to the fire. One of these threw out "great volumes of smoke and sparks" in the direction of the burned car. One of the plaintiff's men who, earlier in the day, was sitting on a car near the one that was destroyed, had his clothing burned from the cinders thrown out by a passing locomotive. The band was burned off his hat and holes were burned in his trousers. These sparks were bright and would carry a distance of 150 feet. They could be plainly seen while moving that distance and were bright all the time. There was also evidence tending to show that the fire could not have been started by the carelessness of the plaintiff's employees or by any other person. At the time of the fire the plaintiff's men were about three car lengths away, they had not been smoking pipes or cigars and saw no one else doing so.

The trial judge was of the opinion that the evidence failed to establish the relation of shipper and common carrier between the parties. In this view we concur. There was some testimony tending to show a written agreement, but the contract was not in evidence and the court was not at liberty to speculate as to its terms. Upon the other branch of the case the court, though not entirely clear as to the correctness of the ruling, was inclined to the opinion that negligence was not sufficiently established and that in order to find negligence on the part of the defendant the jury would have to indulge in conjecture and guesswork. Accordingly a verdict was directed for the defendant and the plaintiff excepted. We think the case made by the plaintiff was *prima facie* sufficient and that in the absence of all explanation the question of negligence should have been submitted to the jury.

Property valued at \$2,315 belonging to the plaintiff was destroyed by fire while in a car of the defendant, on its premises and under its control. There was no *vis major*. Apparently the fire was the result of carelessness. Some one was to blame, and yet the circumstances were such that direct testimony was out of the question. No one saw the fire set. The only course open to the plaintiff, in these circumstances, was, first, to show that sparks from the defendant's engines might easily have lodged in the straw and hay of the open car and thus have caused the fire, and, second, by a process of exclusion, to make it apparent that no other cause for the fire existed. There was evidence that during the morning, and within a short time prior to the discovery of the fire, showers of live sparks from defendant's engines were falling in the immediate vicinity of the car in question; there was also evidence from which it might be fairly inferred that the fire could not have been caused in any other way. The proposition that such testimony is *prima facie* sufficient and calls for an explanation from the defendant is established by numerous well-considered cases in the state and federal courts. *Ann Arbor R. Co. v. Fox*, 34 C. C. A. 497, 92 Fed. 494; *Gulf Ry.*

Royal Trust Co. v. Washburn, etc., Ry. Co

Co. v. Johnson, 4 C. C. A. 447, 54 Fed. 474; Missouri Pac. Ry. Co. v. Texas & P. Railway (C. C.) 41 Fed. 917; O'Neill v. N. Y. O. & W. R. Co., 115 N. Y. 579, 22 N. E. 217, 5 L. R. A. 591; Sheldon v. Hudson River R. Co., 14 N. Y. 221, 67 Am. Dec. 155; Peck v. N. Y. C. & H. R. Co., 165 N. Y. 350, 59 N. E. 206.

In the latter case the court of appeals of this state says:

"It was sufficient if the plaintiff proved facts and circumstances from which the jury might fairly infer that the engine was either defective in its condition, or negligently operated. The emission of sparks, unusual in quantity or character, or of an extraordinary size, such as would not be emitted from well-constructed locomotives in proper repair, would justify the jury in inferring negligence, and though not shifting the burden of proof, would cast on defendant the duty of explanation."

In the case of Flinn v. N. Y. C. & H. R. R. Co., 142 N. Y. 11, 36 N. E. 1046, quoted in the defendant's brief, the court says:

"If there had been evidence that any particular engine emitted an unusual quantity of sparks of an unusual size, that might, within the authorities cited, have furnished prima facie proof that the engine was out of repair, and the burden would have been cast upon the defendant to show that it was in proper condition and that the emission of sparks was inevitable, notwithstanding the use of any ordinary care."

The testimony was taken out of court and only portions of the depositions were read at the trial. We have, therefore, had an opportunity, which the trial judge did not have, to consider the entire testimony bearing upon the defendant's negligence. The result of this examination is to convince us that sufficient was shown to require the submission of the question of negligence to the jury.

The judgment is reversed, with costs, and a new trial is directed.

ROYAL TRUST CO. *et al.* v. WASHBURN, B. & I. R. Ry. Co.
JOHN O'BRIEN LUMBER CO. v. ROYAL TRUST CO. *et al.*

(Circuit Court of Appeals, Seventh Circuit, October 7, 1902.)

[120 Fed. Rep. 11.]

Receivers—Certificates—Vendor's Lien—Priority.

The seller of rails to a railroad company, reserving a valid lien thereon for their price, may not enforce the lien, as against the certificates of the receiver of the road, duly issued by the court in the administration and maintenance of the property.

Appeal from Circuit Court of the United States for the Western District of Wisconsin.

Richard Sleight, for appellants.

M. F. Gallagher, for appellees.

Royal Trust Co. v. Washburn, etc., Ry. Co

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

GROSSCUP, Circuit Judge. The appellees, the Royal Trust Company and Horace S. Oakley, are trustees under a mortgage given by the Washburn, Bayfield and Iron River Railway Company, a corporation of Wisconsin, to secure its bonds to the extent of five hundred and thirty-five thousand dollars. The mortgage covered the right of way, together with all grades, bridges, culverts, ties, rails, rolling stock, cars, engines, outfits, and property of every description, including privileges and franchises belonging, or appurtenant to the railroad. The appellee, A. C. Frost, is the Receiver of the road, appointed by the Circuit Court for the Western District of Wisconsin December 24th, 1898.

The appellant, the John O'Brien Lumber Company, a corporation of Wisconsin, is a creditor of the railroad company, to the extent of four thousand, five hundred and eighteen dollars and twenty nine cents; three thousand, three hundred dollars of which was for rails sold to the railroad company, upon which it claims a specific vendor's lien.

The main case, in which appellee intervened, was to foreclose the mortgage mentioned, for default in the payment of interest; and, pending foreclosure, for a receiver. The receiver appointed, as, above stated, took possession of the road December 24th, 1898, including in such possession, the rails purchased of appellant. The decree of the Circuit Court, entered July 5th, 1901, ordered that in default of the payment of the receiver's expenses, and of the principal and interest due on the bonds, the property of the railroad company be sold, and the funds arising therefrom, distributed as follows: first, the expenses of executing the decree, and of administration, including the receiver's certificates; then to the payment of the bonds. On the same day—July 5th, 1901—the intervening claims, including appellant's, as far as they sought a preference or lien, were denied and dismissed. From both decrees this appeal is prosecuted.

In the view we have taken of the case, it is unnecessary to consider many of the interesting questions argued. It is shown that the court, in the administration of the property through its receiver, has issued receiver's certificates, pledging for the payment thereof, the property and income of the railroad company, to the amount of two hundred and twenty thousand, five hundred and eighty-one dollars; and that the upset price fixed in the decree for the sale of the road, was two hundred and twenty-five thousand dollars; sufficient only to pay the receiver's certificates, and the costs of administration. It was admitted at the argument, that the road had not sold for more than this amount. The question that arises, therefore, is this: Will the vendor of rails to a railroad company, reserving to himself a valid lien upon the rails sold, be allowed to enforce that lien, not only against the railroad

Royal Trust Co. v. Washburn, etc., Ry. Co

company, and its mortgagees, but also against the receiver's certificates duly issued by the court in the administration and maintenance of the property.

The certificates were issued, as the orders show, to procure funds for wages, operating expenses, maintenance and repairs, purchase of rolling stock and of rails, and for other purposes not specifically mentioned. The first were issued January 3rd, 1899, and the last April 9th, 1901.

The appellant became a party to the suit May 29th, 1899, after certificates to the amount of about one hundred and sixty-one thousand dollars had been issued. There is no proof in the record, that appellant had no notice from time to time of these orders. Nor is there any attack upon the orders, upon the ground, either that the money was not needed, or that it was improvidently expended, or that there should have been an earlier cessation of the operation of the road by the receiver. Standing thus unimpeached, the orders of the court carry the presumption that the money was needed, and was providently spent in execution of the court's duty toward the property in its possession.

The rails purchased of appellant, upon which the lien is claimed, had been laid originally upon spurs leading into the timber lands tapped by the road. The larger portion of the rails were on lands not belonging to the railroad right of way; but from time to time the rails were taken up from the lands tapped, many of them being relaid in the main line. There can be no question that the rails were a part of the property of the railroad company, and, as such, included within the receiver's possession, and within the description of the property pledged by order of the court to the payment of the receiver's certificates.

In *Union Trust Co. v. Illinois M. R. Co.*, 117 U. S. 434, 6 Sup. Ct. 809, 29 L. Ed. 963, the Supreme Court said:

"Property subject to liens and claims and debts, of various characters and ranks, which is brought within the cognizance of a court of equity for administration, and conversion into money, and distribution, is a trust fund. It is to be preserved for those entitled to it. This must be done by the hands of the court, through officers. The character of the property gives character to the particular species of preservation which it requires. Unimproved land may lie idle, with only payment of taxes. Improved property should be rented. Movable property that is not perishable may be locked up and kept; but if perishable, it must be sold, by way of preservation. A railroad, and its appurtenances, is a peculiar species of property. Not only will its structures deteriorate and decay and perish if not cared for and kept up, but its business and good will will pass away if it is not run and kept in good order. Moreover, a railroad is a matter of public concern. The franchises and rights of the corporation which constructed it were given not merely for private gain to the corporators,

Hays v. Wilksburg, etc., Ry. Co

but to furnish a public highway; and all persons who deal with the corporation as creditors or holders of its obligations must necessarily be held to do so in the view, that, if it falls into insolvency and its affairs come into a court of equity for adjustment, involving the transfer of its franchises and property, by a sale, into other hands, to have the purposes of its creation still carried out, the court, while in charge of the property, has the power, and, under some circumstances, it may be its duty, to make such repairs as are necessary to keep the road and its structures in a safe and proper condition to serve the public."

In view of the law laid down in that case, and of the fact that so far as this record discloses, the Circuit Court rightly felt itself obliged to continue operations, and make repairs—at least until full experience had shown the contrary—we do not see how we can hold otherwise than that the certificates thus issued are a first lien; prior to the bonds, and prior to any possible lien of a vendor for purchase price of rails. All claims against the railroad as debtor—whatever their priority as between creditors—became subordinated to the power of the court to operate the railroad property. As expenses of legitimate administration, the receiver's certificates must be met before question of priority among creditors is reached. *Kneeland v. Trust Co.*, 136 U. S. 98, 10 Sup. Ct. 950, 34 L. Ed. 379.

The decree of the Circuit Court will be affirmed.

HAYS *et al.* v. WILKINSBURG & E. P. ST. RY. CO.

(*Supreme Court of Pennsylvania, Jan. 5, 1903.*)

[54 Atl. Rep. 322.]

Street Railroads—Contracts—Abandonment—Damages.

A street railroad company obtained a right of way, and covenanted to grade and pave the portion thereof not occupied as a roadway by its tracks. Thereafter it abandoned the location by reason of its failure to gain the municipal consent, and placed no tracks whatever upon the land: *held*, that the owner was not entitled to recover from the railroad company the cost of the grading and paving, but only nominal damages.

Appeal from Court of Common Pleas, Allegheny County.

Action by Miriam Hays and others against the Wilksburg & East Pittsburg Street Railway Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Plaintiffs presented this point: "(2) That the measure of damages is the cost of grading, paving, curbing, and sewerage the street through the plaintiffs' land in the manner and to the extent set forth in the contract in evidence, with interest from July 15, 1900. Answer. Affirmed."

Defendant presented these points: "(1) Under the pleadings and the evidence, the plaintiffs are entitled only to re-

Hays v. Wilkinsburg, etc., Ry. Co

cover nominal damages. Answer. Refused. (2) Under the pleadings and the evidence, in no event are the plaintiffs entitled to recover the cost of grading, paving, curbing and sewerage, for the reason that such cost does not constitute or furnish the measure of damages, if any, to which the plaintiffs are entitled. Answer. Refused."

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

J. H. Beal, J. H. Reed, Edwin W. Smith, and George E. Shaw, for appellant.

James G. Hays and C. C. Dickey, for appellees.

POTTER, J. The appellant in this case procured from the appellees an agreement for a right of way across their premises in the borough of Swissvale. Under the contract the appellant was at liberty to enter upon the property, and grade the right of way, and make cuts and fills, lay down rails, erect poles, and string wires therefrom. It was empowered to do all things necessary to construct, maintain, and operate upon and through the said premises a system of double-track electric street railway. As part of the consideration for these privileges the appellant agreed to grade and pave and curb, for the use of the owners and occupants of the premises, a roadway on the said right of way, outside of and along its tracks. No question is raised as to the perfect good faith of the appellant in entering into this agreement; but, in order to carry out the contract, it was necessary to obtain the consent of the municipal authorities of the borough of Swissvale to lay tracks upon a street leading to a point opposite the property of appellees, and from which it was separated by adjoining private property. The borough councils refused consent. Appellant was thereby prevented from building its line of railway over appellees' premises, and was obliged to seek another route. The privileges for which it had bargained with appellees were then of no use, and it refused to accept the grant of the right of way, and has relinquished all claim thereto. The breach of contract, therefore, upon the part of appellant, consisted in its refusal to accept, or enter into possession of, the right of way for which it had contracted.

Such a breach is analogous to that of the vendee in a contract for the conveyance of land. In such case the damages which may be recovered are not the whole amount of the purchase money, as that would be to enforce specific performance. The damages should only equal the loss sustained by nonfulfillment of the contract. The loss of the bargain is the measure of damages. The trial court here, however, adopted as the measure the equivalent of the full amount of the purchase money, or the cost of grading, paving, curbing, and sewerage the street through the plaintiff's land. If the street railway company had accepted from the plaintiffs the grant of the right of way, and had entered thereon, laid its tracks,

Hays v. Wilkinsburg, etc., Ry. Co

erected its poles, strung its wires, and constructed and operated its railway over plaintiffs' property, and had then refused to make payment of the compensation as stipulated in the contract, the measure of damages applied by the trial court would have been correct. But as it is, the appellees have given up nothing to the street railway company. They have their property left in their possession, practically undisturbed, and not burdened in any way by the easement which they agreed to create in favor of the appellant. The privileges for which the street railway company stipulated, and in return for which it agreed to do the paving, grading, and curbing, have not been exercised by it, nor does it claim any right to them.

In so far as any act of the appellant is concerned, the appellees remain in the uninterrupted enjoyment of their property; and yet, without giving up anything, or suffering the loss of anything, or being put to inconvenience or annoyance by the appellant, they have been permitted to recover all that they would have been entitled to receive if they had sustained all the injury and annoyance which, by the terms of the contract, and for the consideration therein expressed, they were to sustain. Having parted practically with nothing, they have lost nothing, and are entitled to recover nothing more than the actual loss. Clearly, they are not entitled to have their property intact, and at the same time recover the full amount of the compensation to which they would have been entitled had the street railway been built upon their premises.

The authorities cited to sustain the contention of the appellees are all cases in which the party who committed the breach did so after having received the benefits of the agreement. For instance, in *Taylor v. Northern Pacific Coast R. R. Co.*, 56 Cal. 317, the railroad company, in consideration of the conveyance to it of a right of way, agreed to build a wagon road, and fence both sides of the way. It accepted the grant and built its railroad thereon, and then refused to construct the wagon road and build the fence. Of course, in such a case, the measure of damages would properly be the cost of building the fence and constructing the wagon road, which it had promised to give as the price of the grant which had been accepted and used by it. But if the railroad company had not accepted the grant of the right of way, or constructed its railroad thereon, or made any use of it whatever; and if no title thereto had vested in it, and all claim thereto had been relinquished, then, obviously, the measure of damages would have been properly confined to the actual loss.

Or take another illustration advanced in the argument. If A. contracts to build a house for B., and then fails to keep his agreement, the measure of damages to which B. is entitled is certainly not the whole of the contract price, but only such an amount as will compensate him for the difference between the

Potts v. Shreveport Belt Ry. Co

price he was to pay to A. and that which, by reason of the breach, he may be forced to pay someone else. If B. had paid the consideration in advance to A., then the measure of damages would be the value of the house for which he had paid. But in the case in hand the consideration which the appellant was to receive for doing the grading, paving, and curbing of the street was the right to burden the property of the appellees with a perpetual easement, and to subject it to the annoyance of the construction, maintenance, and continuous operation of a street railway. Owing to the breach, they did not suffer this loss or inconvenience, or incur any burden. Nor did the appellant take any benefit from the grant. Under these circumstances, the measure of damages can be nothing more than the actual loss sustained by the appellees, which, in so far as the evidence shows, was merely nominal.

The assignments of error are all sustained, and the judgment is reversed, and a venire facias de novo is awarded.

POTTS v. SHREVEPORT BELT RY. CO.

(Supreme Court of Louisiana, Feb. 2, 1903.)

[34 So. Rep. 103.]

Contributory Negligence.

It is not of itself contributory negligence to engage in a dangerous occupation.

Same.

Where a person is employed in the presence of a known danger, to constitute contributory negligence it must be shown that he voluntarily and unnecessarily exposed himself to the danger.

Electric Wires—Duty of Master.

A company maintaining electrical wires, over which a high voltage of electricity is conveyed, rendering them highly dangerous, is under the duty of using the necessary care and prudence at places where others may have the right to go, to prevent injury. It must see to it that its wires are perfectly insulated, and kept so, or else it must provide adequate guard wires or other sufficient safety appliances, as means of protection against the dangerous wires.

Same—Same—Inspection.

The fact that frequent inspections of the line were made to ascertain the condition of the wires and remedy defective insulation, does not relieve the company of liability. If the span wire had become dangerously charged with the electrical current, the company's inspection should have been thorough enough to have detected it. It is the company's business to know the dangerous defects in or along its lines, and, knowing, to safeguard the same.

(Syllabus by the Court.)

Appeal from Judicial District Court, Parish of Caddo; Alfred Dillingham Land, Judge.

Action by Birdie Potts against the Shreveport Belt Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Potts v. Shreveport Belt Ry. Co

Wise & Herndon, for appellant.

J. Henry Shepherd and Alexander & Wilkinson, for appellee.

BLANCHARD, J. Plaintiff sues as the surviving widow of George Potts. Her action is one sounding in damages on account of his death, which she charges to the negligence and omission of duty of the defendant corporation. She asked judgment for \$25,000.00.

The jury that sat upon the case returned a verdict for \$5,000, and from the judgment based thereon defendant appeals.

Her husband was 27 years of age when he met his death and she had been married to him only about eight months.

When killed he was foreman of a line gang operating for the Cumberland Telephone Company at Shreveport, La., and engaged at the time in stringing wires. He was earning a salary of sixty-five dollars per month.

Under a franchise granted by the City of Shreveport defendant company operates a double track electric street railway on Texas Avenue in said City. It is the overhead trolley system. There is a trolley wire over each track. They are suspended by wires spanning the street and these are called span wires.

These span wires are attached to wooden poles placed opposite each other on the two sides of the street. The trolley wires are made fast to the span wires by means of what are called "hangers" or "ears." The latter name is given them, supposedly, because in shape and appearance they somewhat resemble an ear.

These hangers or ears are insulated, the purpose being to confine the current of electricity, which propels the cars, to the trolley wire. Were it otherwise each span wire would be a "live," or "hot" wire, charged with the same voltage of electricity that the trolley wire is. This would result in so much leakage of the electrical current as to impair its efficiency in the work of operating the cars, and would, besides, render each span wire dangerous.

The Cumberland Telephone Company, also under a franchise from the City, occupies the sides of Texas Avenue with its poles and wire. On cross-arms attached to its poles it maintains and operates numerous wires on and along the street.

The electrical current with which telephone wires are charged is too weak to be dangerous to human life. But the current with which the trolley of the car company is charged is of deadly potency.

Potts, the dead man, was the employee of the telephone company—not of the car company. His death was occasioned by the telephone wire he was stringing coming in contact with a span wire of the car company. This span wire, notwithstanding its connection with the trolley wire, should have

Potts v. Shreveport Belt Ry. Co

been, through proper insulation, harmless. But it was not. It was deadly dangerous. The insulation at the hanger or ear was gone, if it had ever existed, and the wire was alive with, likely, the same voltage of electricity as was passing over the trolley.

This being so the instant the telephone wire touched it—one end of the wire being on the ground thus completing the circuit—it (the telephone wire) became likewise charged with the deadly current.

Potts, at the time, had hold of the wire he was stringing. It was the wire that came in contact with the span wire. The current was, thus, communicated to him and the shock killed him instantly.

The petition charges negligence in defendant in exposing its wires without insulation or protection at a point or place where it was known plaintiff's husband and others would be required to work and be exposed to contact therewith.

The answer is a general denial, coupled with a plea of contributory negligence on part of the deceased.

The contention of the plaintiff is that to the absence of insulation protecting the span wire from inoculation by the current of electricity the trolley wire was conveying, is the death of her husband immediately attributable; that the proximate cause of his death was the condition of this span wire—heavily charged with electricity; that it was the duty of defendant to prevent this, and as a safe-guard against possible defective insulation it was its further duty to provide guard wires over each span wire; that had guard wires been so placed the telephone wire would not have come in contact with the span wire and her husband would not have met with untimely and violent death.

The contention of the defendant is that the dead man was an experienced and skilled electrician and lineman and was well aware of the perils incident to the handling of wires in the City of Shreveport; that he had knowledge of the fact that the span wire in question was a live wire and knowing this should have declined service at that point until it was made harmless by insulation, or else going on with his work, should have taken the precautions necessary to shield himself from harm; that there were various means by which he could have protected himself from contact with the dangerous wire, none of which he resorted to; and that, failing in this, he was guilty of that degree of carelessness and neglect which bars recovery.

In stringing the telephone wire Potts had with him two assistants, Whitworth and Holt. He was up on the pole to which the wire was to be strung. In close proximity was the span wire in question. That it was heavily charged with electricity there is no doubt. The death of Potts attests this fact. That it was so charged is due to the fact that it had no insulation to protect it from the trolley wire. The testimony leaves no doubt whatever of this.

Potts v. Shreveport Belt Ry. Co

The wire Potts was stringing had been passed over the span wire. This had been accomplished by means of a rope. Whitworth was westward of the pole Potts was on. Under instructions from Potts he was pulling the wire which was being strung. This pulling of the wire kept it taut, and while taut it was free from contact with the span wire. But Whitworth stumbled and this circumstance caused a slackening of the wire. This slackening brought it in contact with the span wire and immediately it became charged with the deadly current.

So deadly was this current that when Potts was shocked and hung suspended, Whitworth, rushing up to the end of the wire touching the ground, in the generous effort to pull it away from Potts, seized it and was himself instantly killed.

One witness (Clinton), called by the defense, testifies the telephone wire came in direct contact with the trolley wire, leaving the inference that it got its charge of electricity from the trolley. But the great preponderance of testimony is that it rested not against the trolley wire, but on the span wire, about half way from the pole to the trolley.

It is true, Potts was aware the span wire near him was a "hot" wire, but to what extent it was charged with the electrical current he did not know.

The fact that he knew there was, at that point, leakage from the trolley wire to the span wire, and yet continued working there, was not, of itself, negligence barring recovery.

Beach on Contributory Negligence (2d Ed.) pp. 44 and 50. He could still work there notwithstanding knowledge of the hot span wire, and would not be chargeable with negligence unless he failed to take due precaution and exercise due care to shield himself from harm.

This is not a case of a master furnishing defective appliances to do his work and which the servant, knowing the defect and danger, proceeded, notwithstanding, to do the work, thus assuming the risk. Potts was not the servant of the car company and it was the latter's span wire that did the mischief.

In *Clements v. La. Electric Light Co.*, 44 La. Ann. 692, 11 South. 51, 16 L. R. A. 43, 32 Am. St. Rep. 348, this Court held that when a person is employed in the presence of a known danger, to constitute contributory negligence it must be shown that he voluntarily and unnecessarily exposed himself to the danger.

It is not contributory negligence to engage in a dangerous occupation. Such was the ruling of this Court in *Myhan v. Electric Light and Power Co.*, 41 La. Ann. 969, 6 South. 799, 7 L. R. A. 172, 17 Am. St. Rep. 436. See, also, Beach on Con. Neg. 370; Wood, 763.

It did not appear to the satisfaction of the jury that Potts had unnecessarily exposed himself to the existing danger in executing the work he was called on by his employers, the

Potts v. Shreveport Belt Ry. Co

Telephone Company, to do. It did not appear to them that he had failed to take due precaution to shield himself from danger.

In this we are not prepared to say the jury erred.

Potts had the necessary assistance to enable him to do the work he was engaged in with safety to himself and them.

But for the unforeseen occurrence of Whitworth stumbling and letting the wire slack, the accident would not have happened. Potts was keeping himself "in the clear"—that is, from contact with the dangerous circuit. He was doing this by keeping the wire he was holding off the dangerous span wire. So long as his assistant did not stumble he was safe, and because he could not and did not foresee that his assistant would stumble, he is not chargeable with contributory negligence.

Nor is it a case where the principle involved in "the fellow servant doctrine" may be invoked. Whitworth was his fellow servant in the Telephone Company's employ, but neither of them was the servant of the car company to whose benefit the doctrine would enure, if applicable. The appliance (the span wire) which caused the harm was the property of the car company and the danger arising from it was due to the neglect of the latter. The prime cause of Potts' death was not Whitworth's stumble. It was the "live" span wire of defendant company. Had that wire been a "dead" one in the sense that it was not charged with electrical current, the stumble of Whitworth would not have resulted in his death.

A company maintaining electrical wires over which a high voltage of electricity is conveyed, rendering them highly dangerous to others, is under the duty of using the necessary care and prudence at places where others may have the right to go either for work or pleasure, to prevent injury. It is the duty of the company under such conditions to keep its wires perfectly insulated, and it must exercise the utmost care to maintain them in this condition at such places.

Joyce Electrical Law, Secs. 445, 517.

And a company maintaining such wires must see to it that their lines are safe for those who by their occupation are brought in close proximity to them.

Clements v. Electric Company, 44 La. Ann. 692, 11 South. 51, 16 L. R. A. 43, 32 Am. St. Rep. 348; *Overall v. Louisville Electric Light Company (Ky.)* 47 S. W. 442; *Brown v. Edison Illuminating Co. (Md.)* 45 Atl. 182, 46 L. R. A. 745, 78 Am. St. Rep. 442.

In the instant case the fact of the span wire being heavily charged by leakage from the trolley wire subjected the workman to greater risks than those which fairly belong to the employment he was engaged in. 41 La. Ann. 969, 6 South. 799, 7 L. R. A. 172, 17 Am. St. Rep. 436.

For this defendant must be held liable under the circumstances disclosed. The live span wire was the proximate

Potts v. Shreveport Belt Ry. Co

cause of Potts' death. It ought to have been a harmless wire and would have been with proper insulation.

It was the duty of defendant company to have ascertained the unsafe and dangerous condition of its span wire at that point and to have remedied the same. The fact that frequent inspections of the line were made to ascertain the condition of the wires and to remedy defective insulation does not relieve the company of liability. If the span wire had become dangerously charged with the electrical current the company's inspection should have been thorough enough to have detected it.

Using an agency of such subtle and dangerous power as electricity, the burden of the utmost care and vigilance to keep all wires connected with the trolley perfectly insulated was upon the company. It was its business to know the span wire in question was a "live" wire through leakage from the trolley which it suspended.

"The knowledge which they ought to have had," said this Court in *Myhan v. Electric Co.*, 41 La. Ann. 968, 6 South. 799, 7 L. R. A. 172, 17 Am. St. Rep. 436, "the law presumes, *juris et de jure*, they had."

And in that case it was further said that even had the company's representatives sworn they did know of the dangerous condition of the wires such ignorance would not have exculpated them; that a superior is presumed to know, and in law knows, that which it is his duty to know, viz.:—whatever may endanger the person and life of his employee in the discharge of his duties.

These observations of the Court in the *Myhan* case apply with more force here by reason of the fact that Potts (the man killed) sustained no contractual relation with defendant company. He was not in its employ. He was the servant of the Telephone Company, which had the right to be upon the street with its poles and wires and servants in the lawful and legitimate pursuit of its business.

Defendant company knew that the employees of the Telephone Company must needs be in the street and on the poles and among the wires in the discharge of their duties. It knew that wires for the telephone service were constantly being strung, and since there was joint occupancy of the street by the two companies with their poles and wires and servants, it was all the more incumbent upon that one of the company whose wires carried the deadly current to see to it that its transmission was effected with safety to all concerned.

It requires a powerful voltage of electricity to propel street cars. The agent for the transmission of this power is the trolley wire. The current should be kept confined to it. Had this been done and the employees of the telephone company had been so careless as to get the wires they were stringing mixed up with the trolley wire and injury or death resulted, there could be no recovery.

But it is different as regards the span wires suspending the

Railroad Commission of Texas v. Weld & Neville

trolley. It is the duty of the car company to keep these immune from electrical contagion, free from dangerous and deadly electrical energy. The telephone wires being strung over the span wires are liable to come in contact with them no matter how careful those engaged in stringing such wires may be. And where they do come in contact it should be a harmless contact and would be a harmless one were the span wires kept free from the electrical current.

Such is intended to be and should be their usual condition. When it is otherwise and injury or death ensues to those who have not accepted such risks, owners of the offending wire must stand the responsibility.

It is in evidence that the primary object of car companies in insulating their span wires is to confine the electrical energy to the trolley, to prevent its escape by leakage, and, thus, keep unimpaired the efficiency of the power which drives the cars. But courts of justice will not consider this the primary object of such insulation where danger to human life lurks in span wires. They will consider the primary object of the insulation to be to obviate such danger, and the efficient propulsion of the cars a secondary object.

Judgment affirmed.

RAILROAD COMMISSION OF TEXAS v. WELD & NEVILLE *et al.*

(Supreme Court of Texas, April 13, 1903.)

[73 S. W. Rep. 529.]

Railroad Commission—Freight Rates—Reasonableness.

Under Rev. St. 1895, arts. 4565, 4566, authorizing an action against the Railroad Commission by a party dissatisfied with a rate made by it, in which such party must show that the rate is unreasonable and unjust to him, the inquiry is not limited to whether the rate is so unreasonable and unjust as to amount to the taking of property without due process of law.

Same—Same—Same—Jurisdiction to Review.

Rev. St. 1895, arts. 4565, 4566, authorizing an action against the Railroad Commission to ascertain the reasonableness and justness of rates made by it, though they be not so unreasonable and unjust as to amount to the taking of property without due process, do not confer legislative power on the court, in contravention of the Constitution.

Same—Same—Same.

Plaintiff in an action against the Railroad Commission does not, as required by Rev. St. 1895, art. 4566, show that the freight rate on cotton made by it is unreasonable and unjust to him because there is no car rate, and because it is the same amount per 100 pounds whether pressed to a density of 40 pounds to the cubic foot, as shipped by him, or to a density of only 22½ pounds, as shipped by others.

Error from Court of Civil Appeals of Third Supreme Judicial District.

Action by Weld & Neville and others against the Railroad Commission of Texas. Judgment for plaintiffs was affirmed by the Court of Civil Appeals (68 S. W. 1117), and defendant brings error. Reversed.

Railroad Commission of Texas *v.* Weld & Neville

C. K. Bell, Atty. Gen., and T. S. Reese, Asst. Atty. Gen., for plaintiff in error.

Gregory & Batts, Hutcheson, Campbell & Hutcheson, and Crane, Greer & Wharton, for defendants in error.

BROWN, J. Under article 4565, Rev. St. 1895, the defendants in error instituted this suit in the district court of the Twenty-Sixth Judicial District, Travis county, against the Railroad Commission of Texas, and alleged, in substance, that the said Railroad Commission had established rules and regulations for the transportation of cotton from various points in Texas to Houston and Galveston as follows: For the territory extending not more than 100 miles from Houston the rate allowed to be charged upon cotton was based upon the length of the haul, but from all points more than 100 miles from Houston the same rate was allowed based upon 100 pounds of weight, whether in car load or less lots, with reduction of rate upon cotton compressed to a density of 22½ pounds to the cubic foot. It is alleged that the regulations of the commission require the railroad companies to cause the cotton to be compressed either at the initial point of shipment or at the first compress in the line of transportation; charges for compressing to be paid by the railroad company, except for cotton shipped from points between 70 and 100 miles from Houston, the charges of compressing are apportioned between the shipper and the railroad company, but cotton shipped from stations less than 70 miles from Houston is not required to be compressed.

The petition alleges that the regulations of the Railroad Commission governing the shipping of cotton and fixing the rates thereon were made with reference to the old system of handling cotton, which involves its compression at the gins in bales of 54 to 58 inches long, 28 to 36 inches wide, and from 24 to 28 inches thick, which must be hauled to the railroad station, thence by the carrier to the nearest compress; 25 bales being all that a car will carry in an uncompressed condition, but, after being compressed to a density of 22½ pounds to the cubic foot, 50 bales can be carried to the car. Plaintiffs allege that they are interested in one of a number of improved economic methods of handling cotton in successful operation in Texas and minutely describe the method by which a bale of cotton is produced by the Lowry system which weighs 250 pounds, with a density of more than 40 pounds to the cubic foot, being convenient in size and weight for handling, impervious to water, and not combustible. With bales thus compressed the carrier can load cars to the limit of their capacity and the allowed excess, and can use flat cars in the transportation of the cotton without danger of injury from water or fire.

Plaintiffs allege that the cotton crop of Texas amounts annually to 3,000,000 bales, the greater part of which is gathered and shipped during the last four months of each

Railroad Commission of Texas v. Weld & Neville

year, and all of it must be transported by the railroads of the state within that time, necessitating the ownership and use of a large number of cars at a heavy cost, which cars cannot be used at other seasons of the year; that the demand for cars to carry cotton is so great as to often create car famine and great delay in the transportation of the cotton, which causes the railroad companies to resort to the use of flat cars that are unfit for that use, and expose the cotton to damage by water and fire, whereby the railroad companies are subjected to heavy damages. The petitioners state minutely the supposed advantages that accrue to the railroad companies in shipping the Lowry bales of cotton over other freight or cotton otherwise compressed. Briefly stated, the allegations are that the Lowry bales are not breakable; that they are not combustible, nor liable to injury by water; save the expenses incident to short hauls and concentrating the cotton, and the difference between the cost of carrying two packages of the same weight, one compressed to the density of 22½ pounds to the cubic foot and one to the density of 40 pounds to the cubic foot.

The petition charges that, notwithstanding cotton properly compressed is the most desirable class of freight for railroad companies, the railroad commission has fixed upon cotton the highest charge for transportation. It is charged that in transporting the same weight of cotton as originally compressed and the Lowry bale the railroad company receives nearly twice as much freight for a car load of the Lowry bale as for a like car load of the other, and particular instances are cited to illustrate this proposition. It is averred in the petition that under the regulations complained of the railroad companies are given an extraordinary and unreasonable revenue and profit for transporting Lowry bales of cotton, that the revenue derived by railroads from handling cotton compressed under the new method is greatly in excess of that derived from cotton handled in the old way, and that the cost under the new method is so much less that to establish the same rate for both classes of cotton is unjust and inequitable, and a discrimination against plaintiffs.

Plaintiffs allege that prior to the institution of this suit they twice called upon the Railroad Commission for proper hearing to establish reasonable rates for the transportation of cotton, which application the Railroad Commission refused, alleging as its reason that to grant the prayer of petitioners would give the owner of the improved bales practically a monopoly of the business of compressing cotton. It is alleged that the refusal to grant a hearing and the refusal to establish the regulations requested were unreasonable and unjust to plaintiffs, that the regulations requested were reasonable and just to defendants, and they prayed that the regulations be established by the court.

The Railroad Commission, by the Attorney General, filed general demurrer and special exceptions, which were by the

Railroad Commission of Texas v. Weld & Neville

court overruled, and upon trial before the court judgment was entered declaring the rates and regulations to be unreasonable and unjust as to the defendants in error, which judgment was affirmed by the Court of Civil Appeals. 68 S. W. 1117.

The contention of the Railroad Commission may be considered under the following propositions: (1) Articles 4565 and 4566 of the Revised Statutes of 1895 do not authorize an inquiry by the courts into the reasonableness and justness of the rates, rules, and regulations made by the commission, except to ascertain if they amount to the taking of property without due process of law; in other words, that such rates, rules, and regulations are confiscatory in their effect. (2) It is contended that, if the said articles do authorize an inquiry into the reasonableness of rates, etc., except to ascertain whether or not they are in conflict with the Constitution, then such articles of the statute are in violation of the Constitution of the state, because they thereby confer legislative power upon the courts. (3) That the facts alleged in plaintiffs' petition do not constitute a cause of action under articles 4565 and 4566.

The first question stated above has been decided by this court adversely to the contention of plaintiff in error in the case of Railroad Commission v. H. & T. C. Railway Co., 90 Tex. 340, 38 S. W. 750. In that case the court said: "The language of the law is so antagonistic to the rules established by the decisions, which construction is claimed to have been adopted by the Legislature, that we must conclude that the Legislature intended to change those rules in their application to the subject embraced in the articles quoted; otherwise there was no need for the articles 4565 and 4566. Indeed, the conferring of that jurisdiction upon the courts of itself imposed the duties to try the case by the ordinary rules of procedure, unless otherwise provided." Upon re-examination of the question we are constrained to adhere to our conclusions announced in that case, and to hold that the Legislature intended to confer upon the courts power to determine the question of the reasonableness of rates as they affect the rights of shippers and the railroads by the same rules that would be applied in determining a like question between other parties.

Articles 4565, 4566, do not confer legislative power upon the courts, but, by subjecting the rates to be made by the commission to examination, their reasonableness becomes a judicial question, and there is no conflict between those articles and the provision of the Constitution which provides that "no person or collection of persons being of one of these departments shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted." The making of rates by the commission is the exercise of legislative authority, which the courts cannot exercise; but whether the law under which it acts has been complied with is a question for the courts. It is unnecessary for

Railroad Commission of Texas *v.* Weld & Neville

us to inquire what the rule would be in the absence of our statutory provisions.

Articles 4564-4566, Rev. St. 1895, read as follows:

"Art. 4564.—In all actions between private parties and railway companies brought under this law, the rates, charges, orders, rules, regulations and classifications prescribed by said commission before the institution of such action shall be held conclusive, and deemed and accepted to be reasonable, fair and just, and in such respects shall not be controverted therein until finally found otherwise in a direct action brought for that purpose in the manner prescribed by articles 4565 and 4566 of this chapter.

"Art. 4565.—If any railroad company or other party at interest be dissatisfied with the decision of any rate, classification, rule, charge, order, act or regulation adopted by the commission, such dissatisfied company or party may file a petition setting forth the particular cause or causes of objection to such decision, act, rate, rule, charge, classification or order, or to either or all of them, in a court of competent jurisdiction in Travis county, Texas, against said commission as defendant. Said action shall have precedence over all other causes on the docket of a different nature, and shall be tried and determined as other civil causes in said court.

"Art. 4566.—In all trials under the foregoing article the burden of proof shall rest upon the plaintiff, who must show by clear and satisfactory evidence that the rates, regulations, orders, classifications, acts or charges complained of are unreasonable and unjust to it or them."

The meaning of the phrase "unreasonable and unjust to it or them" is the question to be solved. An examination of the law as it existed before the creation of the Railroad Commission will aid in the solution of the question. Prior to the enactment of the commission law, railroad companies were authorized by statute to make their rates of freight and their rules and regulations, but were limited in their charges to a reasonable sum, not to exceed 50 cents per 100 pounds per 100 miles; the charges to be uniform on each class of freight, and unjust discrimination was forbidden. The fact that the carrier charged one person a greater sum than was charged to another for "transportation in this state of any freight of the same kind and class in equal or greater quantities for the same or less distance" was made *prima facie* evidence of unjust discrimination, but the carrier was permitted to rebut this presumption by showing that it was not unjust discrimination. Article 4258 (Sayles' Old Ed.) Rev. St. 1888-89. It will be observed that the violation of the law did not consist alone in the discrimination in charges, but depended upon the justness of such discrimination. That statute declared in a negative form what the common law affirmed of the same subject; that is, at common law a carrier was permitted to discriminate in freight rates, provided the circumstances were

Railroad Commission of Texas *v.* Weld & Neville

not such as to make it unjust and unreasonable. *Baxendale v. E. C. Ry. Co.*, 93 Eng. Common Law Rep. p. 75; *Garton v. B. & E. Ry. Co.*, 101 Eng. Common Law Rep. p. 153; *Cowden v. Pacific Coast Steamship Co.*, 94 Cal. 470, 29 Pac. 873, 18 L. R. A. 221, 28 Am. St. Rep. 142; *Avinger v. South Carolina Ry. Co.*, 29 S. C. 265, 7 S. E. 493, 13 Am. St. Rep. 716; *Johnson v. Pensacola & Perdida Ry. Co.*, 16 Fla. 666, 26 Am. Rep. 731; *Scofield v. Railway Co.*, 43 Ohio St. 612, 3 N. E. 907, 54 Am. Rep. 846; *Fitchburg Ry. Co. v. Gage*, 12 Gray, 398. Under the statute discrimination in rates is prohibited unless it appears not to be unjust and unreasonable. At common law the party complaining was required to show that the discrimination was unjust and unreasonable, while by statute the burden of proof was upon the carrier to establish that it was reasonable and just.

The railroad commission law deprived railroad companies of the power to make rates, and conferred that authority upon the commission, which necessarily took from shippers any right of redress against carriers in case the rates were unreasonable, because they are compelled by law to carry at the rate fixed by the commission, and cannot be held responsible for excess in charges thus forced upon them. The commission was organized as arbiter between carriers and shippers, and for that purpose is invested with very large, but not absolute, powers. To secure the rights of both carrier and shipper against errors or intentional wrongs which might be committed by the railroad commission, articles 4564-4566 were adopted, which give the railroads a right of action against the commission to set aside such rates as might be prescribed for their government in case they should be unremunerative, giving to the shippers an action against the commission to secure a reduction of such rates in case they be unreasonably high. Being thus clothed with power to adjust the rights of the carrier and shipper, and being subjected to judicial control so as to secure such rights, the commission stands in this action in the attitude towards plaintiffs that the railroad company would stand if excessive charges had been collected from the plaintiffs: and this suit were for the purpose of recovering the excess of charges paid: hence the same construction should be given in this action to the phrase "unreasonable and unjust to it or them" that would have obtained in a suit to recover from the carrier excess of charges paid.

At common law, in a proceeding of this kind, the terms "unreasonable and unjust" meant that the rate charged was more than a fair compensation for the services rendered, or that the difference in rates constituted an unjust discrimination against the complainant. In *Garton v. Railway Company*, above cited, the action was to recover for excessive charges paid by the plaintiffs, based upon the proposition that the charge collected was greater than the sum demanded

Railroad Commission of Texas v. Weld & Neville

from another shipper for like service. In the course of the trial Justice Cockburn said: "Suppose the company choose from some motive of mere favor to convey the goods for A. B. for nothing, could every person else to whom they made a charge recover it back as money had and received unless there was proof of damage? The amount to which they favor others can make no difference." And in the same case Justice Crompton remarked, "The charging of another person too little is not charging you too much." An examination of that case will show that it fully sustains the position that the carrier had the right to discriminate between shippers as to the amount of charges, provided it did not amount to unjust discrimination, and the charge complained of was not more than a fair compensation for the services performed.

In *Cowden v. Pacific Coast Steamship Co.*, 94 Cal. 470, 29 Pac. 873, 18 L. R. A. 221, 28 Am. St. Rep. 142, the court made the following quotation from *Directors, etc., of Great Western Railway Company v. Sutton*, 4 Eng. & Ir. App. 238: "At common law, a person holding himself out as a common carrier of goods was not under any obligation to treat all customers equally. The obligation which the common law imposed upon him was to accept and carry all goods delivered to him for carriage according to his profession (unless he had some reasonable excuse for not doing so), on being paid a reasonable compensation for so doing; and, if the carrier refused to accept such goods, an action lay against him for so refusing; and if the customer, in order to induce the carrier to perform the duty, paid, under protest, a larger sum than was reasonable, he might recover back the surplus beyond what the carrier was entitled to receive in an action for money had and received, as being money extorted from him. But the fact that the carrier charged others less, though it was evidence to show that the charge was unreasonable, was no more than evidence tending that way. There was nothing in the common law to hinder a carrier from carrying for favored individuals at an unreasonably low rate, or even gratis. All that the law required was that he should not charge any more than was reasonable."

In *Fitchburg Ry. Co. v. Gage*, cited above, it was sought to recover from the railroad company the difference between freight charges collected from Gage and others and charges upon the same class of freight carried for others between the same points about the same time, the contention being that railroads are common carriers, and "in that relation required to carry merchandise and other goods or chattels of the same class at equal rates for the public and for each individual on whose account service in this line of business is performed." The court answered the contention as follows: "The principle derived from that source [the common law] is very plain and simple. It requires equal justice to all. But the equality

Railroad Commission of Texas *v.* Weld & Neville

which is to be observed in relation to the public and to every individual consists in the restricted right to charge, in each particular case of service, a reasonable compensation, and no more. If the carrier confines himself to this, no wrong can be done, and no cause afforded for complaint. If, for special reasons, in isolated cases, the carrier sees fit to stipulate for the carriage of goods or merchandise of any class for individuals for a certain time or in certain quantities for less compensation than what is the usual, necessary, and reasonable rate, he may undoubtedly do so without thereby entitling all other persons and parties to the same advantage and relief. It could, of course, make no difference whether such a concession was in relation to articles of the same kind or belonging to the same general class as to risk and cost of transportation. The defendants do not deny that the charge made on them for the transportation of their ice was according to the rates established by the directors of the company, or assert that the compensation claimed is in any degree excessive or unreasonable. Certainly, then, the charges of the plaintiffs should be considered legal as well as just; nor can the defendants have any real or equitable right to insist upon any abatement or deduction, because for special reasons, which are not known, and cannot, therefore, be appreciated, allowances may have been conceded in particular instances, or in reference to a particular series of services, to other parties."

If the rates, rules, and regulations complained of in this action had been made by a railroad company before the creation of the commission, and this suit had been instituted against the railroad company to recover damages for discrimination, it could not be maintained, because the facts alleged in the petition do not show that there was any discrimination against the plaintiffs in the rates charged and collected from them. The comparison is made by plaintiffs between cotton compressed to a density of 40 pounds and more to the solid foot and cotton not so compressed, and it is claimed that, because the railroad company derives more profit from a car load of the one than the other, there is discrimination against the shipments of cotton compressed by the method represented by plaintiffs. The same rate is charged per hundredweight for all cotton, and the plaintiffs' case rests wholly upon the proposition that they have the right to compel the Railroad Commission to make a rate by the car load instead of by the 100 pounds, or to give lower rates on cotton in round bales. There is no rule of the common law nor provision of the statute which requires the carrier or the commission to make rates based upon car-load lots, nor is there any precedent or principle by which the reasonableness of a rate (as it affects individual shippers) made by carriers or by the commission can be determined by a comparison of the profits, derived from the shipment of different classes of freight.

Article 4562, Rev. St. 1895, prescribes the duty of the commission in making rates in this language:

Railroad Commission of Texas *v.* Weld & Neville

“Art. 4562. The power and authority is hereby vested in the Railroad Commission of Texas, and it is hereby made its duty, to adopt all necessary rates, charges and regulations to govern and regulate railroad freight and passenger tariffs, the power to correct abuses and to prevent unjust discrimination and extortion in rates of freight and passenger tariffs on the different railroads in this state, and to enforce the same by having the penalties inflicted as by this chapter prescribed through proper courts having jurisdiction.

“1. The said commission shall have power, and it shall be its duty, to fairly and justly classify and subdivide all freight and property of whatsoever character that may be transported over the railroads of this state into such general and special classes or subdivisions as may be found necessary and expedient.

“2. The commission shall have power, and it shall be its duty, to fix to each class or subdivision of freight a reasonable rate for each railroad subject to this chapter for the transportation of each of said classes and subdivisions.”

The performance of these duties requires that classification be made so as to secure equality as near as may be in the carriage of similar articles, and each shipper is entitled to have his property carried for a reasonable compensation for the service rendered to him. In making the classification and rates of charges, the railroad companies must also be protected in their right to have a fair return from their business; but in determining this question the railroad commission must have in view the entire business operations of the railroads. A marked difference between the right of the shipper and the carrier in determining the reasonableness of rates consists in this: When considered from the shippers' standpoint, it must be reasonable as to the particular property carried; that is, the charge must not be more than a fair compensation for the services rendered to the shipper in the carriage of the particular property. When, however, the commission considers the reasonableness of rates from the standpoint of the railroads, it is not confined to the particular article, but must look to the whole business of the railroads, which are required to carry many articles at a loss as a single transaction, which must be made up by levying higher rates upon such articles as can bear it within the limit of reasonable compensation. The rate and classification must be so arranged as to give a result of just and reasonable compensation on the entire business of the railroad company; but the rate on each article need not be reasonable if considered alone, but the aggregate must, however, produce a reasonable return. The work of the commission as prescribed by the article last copied involves a comprehensive knowledge by the commission of the business transactions of railroads and of the various business interests of the people, so that by a just exercise of their ample powers the citizen may be guarded against extortions and unjust dis-

Railroad Commission of Texas v. Weld & Neville

crimination, and the railroads be allowed a fair return for the services rendered to the public. To every one who is charged with the distribution of taxes upon property and pursuits the serious question is presented: how much can be levied upon each class of property or each occupation, and which is best able to bear the burden that is necessary for the support of the government? A like, but more complicated, question presents itself to the Railroad Commission or railroad company in the fixing of rates and making classifications. Public interest must be consulted in the regulation of these matters so as to give support to weak enterprises, and not to exclude from market many things which would not bear transportation if the charges were based upon absolute equality. The superficial view of the subject which we are able to take with our limited knowledge makes it manifest that discrimination in rates is often necessary to uphold justice and to promote the public good, and such discrimination is not unjust to him who gets in service the equivalent of what he pays.

The plaintiffs do not complain that the rates charged against them are either unjust or unreasonable. They claim simply that the Railroad Commission has failed to give them an advantage over their competitors, which is unjust to them because it deprives them of a benefit that they would derive from the control of improved machinery, and because it gives to the railroad company more profit on a car load of cotton prepared by their method than upon other cotton. But a complete answer to this proposition is that in the transportation of a car load of cotton composed of round bales the shipper receives the service of carrying nearly twice as much cotton as can be carried upon a car of flat bale cotton. The profits which are made by railroad companies are greater to the car load, but the car load is of greater value and weight than the other, and the liability of the railroad company is proportionally increased. Plaintiffs can as well complain of lower rates given upon other articles; for instance, upon wheat, oats, and corn, neither of which would bear a charge equal to that placed upon cotton, either by the car load or by the 100 pounds. In truth, if such a rule was adopted as that proposed by the plaintiffs in this case, the commissioner's work could not possibly be sustained in any court, for it might, by comparison between rates on different articles, and by showing a difference in profits derived from the transportation of one over the other, destroy any schedule of rates that could be prepared. The process that the plaintiffs would inaugurate to test the reasonableness of a rate is such as the Railroad Commission might adopt for the purpose of making proper distribution of rates. It is applicable strictly to rate making, and is, therefore, legislative in its character. It is not appropriate to the work of testing the reasonableness or justness of a prescribed rate, therefore is not judicial.

Railroad Commission of Texas v. Weld & Neville

Courts are limited in their review of the work of the commission by the terms of the statute, and cannot go into an investigation of the methods by which the commissioner arrived at its conclusions.

We have found no case like this because there is not within the range of our research any trace of a statute like that under which this proceeding was instituted. The cases of *Garton v. Railway Company*, 101 Com. L. R. 153, and *Fitchburg Railway Company v. Gage and others*, 12 Gray, 398, which we have cited, are analogous in some respects, and announce principles which condemn the contention of the defendants in error. We repeat the following part of the quotation before made from the latter case: "But the equality which is to be observed in relation to the public and to every individual consists in the restricted right to charge in each particular case of service a reasonable compensation, and no more. If the carrier confines himself to this, no wrong can be done, and no cause afforded, for complaint." Certainly, the commission has, under the laws of this state, no less authority than the railroad corporations had before the commission was created. According to the allegations of the petition of defendants in error, the commission has, in conformity to the principles announced in the cases cited, "confined itself to a rate not unreasonable for the services rendered" in the transportation of all classes of cotton.

The defendants in error disclose their purpose by that which they ask the court to do; that is, to fix a rate upon cotton in round bales lower than the rate which has been fixed by the commission upon cotton of all classes; in other words, they ask that the rate of charges upon the cotton in which they are interested shall be sufficiently below the general rate to enable them to avail themselves of the advantage their improved machinery would give them under such circumstances. The effect of such action would be to give them such advantage over their competitors in the purchase and sale of cotton that it would tend very decidedly to creating in their favor a monopoly of the cotton business. Their allegations are sufficient to show that the machinery they claim to be interested in is being operated in different parts of the state, and with the discrimination which they seek would enable them to cover in a large measure the cotton producing territory of Texas, and to control the bulk of the crop. To make such difference in the rates upon cotton in flat bales and that in round bales would manifestly be unjust discrimination, and it was proper for the commission, in making rates, to bear in mind that the probable effect would be the creation of a monopoly to the detriment of the public. The owners of improved machinery have a right to all the benefits of its superiority over the old machinery for ginning and bailing cotton that comes from the use of the machinery itself, but they have no right to ask the government to bend its policy

Cincinnati, etc., Ry. Co. v. Caskey

to their aid in this respect to the injury of the citizenship of the state.

We are of opinion that the facts alleged in the petition do not show any right of action in the defendants in error as against the Railroad Commission, and that the court below erred in not sustaining the general demurrer to the petition. The allegations of the petition and the facts proved show that no better case can be made by an amendment of the petition; hence it would be useless to send this case back to the district court for further proceedings.

It is therefore ordered that the judgments of the district court and of the Court of Civil Appeals be reversed, and that the general demurrer of the Railroad Commission to the petition of the defendants in error be, and the same is hereby, sustained, that this case be dismissed, and that the defendants in error pay all cost.

CINCINNATI, N. O. & T. PAC. RY. CO. v. CASKEY.

(*Court of Appeals of Kentucky, May 6, 1903.*)

[74 S. W. Rep. 201.]

Railroads—Fires Along Right of Way—Negligence—Condition of Spark Arrester—Evidence.

Though no recovery can be had against a railway company for the destruction of property by fire set by sparks from a passing engine if the engine was furnished with the best screens and spark arresters in use, which were in perfect order, nevertheless evidence showing that sparks and cinders escaped from the engine in unusual quantities is sufficient to warrant the assumption that the spark arrester was out of order or improperly adjusted, and that the railroad company was consequently guilty of negligence in this regard.

Appeal from Circuit Court, Boyle County.

“Not to be officially reported.”

Action by J. W. Caskey against the Cincinnati, New Orleans & Texas Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

C. H. Rodes, for appellant.

Robt. Harding and Rawlings & Vories, for appellee.

BARKER, J. This action was instituted by appellee, J. W. Caskey, in the Boyle circuit court, to recover damages against appellant, Cincinnati, New Orleans & Texas Pacific Railway Company for negligently setting fire to his house, whereby it and a large portion of his furniture and other personal effects therein, were burned. The evidence for appellee showed that his house was situated about 100 feet from appellant's line of railway, and on the ——— day of February, 1901, within 25 or 30 minutes after the passing of one of appellant's trains, the roof of the house was discovered to be on fire, and, those present not being able to extinguish the flames, it was in a short time entirely destroyed; that on the

Cincinnati, etc., Ry. Co. v. Caskey

day the fire occurred the weather was extremely dry, with a strong wind blowing from the direction of the line of railway towards the house; that, as the train passed, it was noticed that the smokestack of the engine was emitting dense clouds of smoke, and that cinders were escaping therefrom in such quantity and size that, when carried by the wind against the house of appellee, it sounded as if it was hailing, and that some of these cinders were as large as peas; that the fire originated at a point on the roof next the line of railroad; that it could not have originated from sparks coming from the chimneys of the house, the strong wind blowing from the direction of the railroad excluding this as a possibility; that the fires in the grates within the house were all down very low and throwing out no sparks at the time, and there were no other fires in the neighborhood, except that in the engine of appellant's train, from which the conflagration which destroyed appellee's house could have originated. The answer of appellant put in issue the allegations of negligence contained in the petition, and its evidence conduces to show that the smokestack of the engine in question was furnished with a spark arrester of the most improved pattern known to science; that it was properly adjusted at the time; that the train was a light one, and not going at an unusual rate of speed. The jury, under the instructions of the court, returned a verdict in favor of appellee for the sum of \$900.

Appellant complains on this appeal of no technical error occurring during the trial, but bases its claim to a reversal solely upon the want of merit in appellee's cause of action. In other words, it complains only of the court's refusal to peremptorily instruct the jury to find for it after all the evidence was in. In the case of *L. & N. R. Co. v. Samuel's Ex'ors* (Ky.) 57 S. W. 235, it is said: "The law is well settled in this state that a railroad company, authorized by its charter to use steam power, has necessarily the right to use fire as a means of generating steam; and it is not liable for injuries resulting from the sparks escaping from its locomotive if it was furnished at the time with the best and most improved screen and spark arrester in practical use, when these appliances are in perfect order, if not otherwise guilty of negligence in the operation of its engine. But it is equally well settled that in an action against a railroad company to recover for loss by fire alleged to have resulted from negligence in operation, or for failure to have the spark arrester in proper condition, the testimony showing that sparks and cinders escaped from the locomotive in unusual quantities was competent, and will of itself warrant the assumption that the arrester was out of order or was improperly adjusted, and that the defendant was consequently guilty of negligence in this regard." This case was approved in *Illinois Central Railroad Company v. Scheible*, 72 S. W. 325, in an opinion which reviewed all of the cases decided by this court on the subject of

Carrier v. Missouri Pac. Ry. Co

the negligence of railroad companies in the use and management of spark arresters, whereby fires were caused to adjacent property. Undoubtedly the evidence of appellant strongly conduces to show that it was not guilty of the negligence charged by appellee; but, on the other hand, the evidence of appellee was such, in our opinion, as created an issue of fact which was peculiarly within the province of the jury to determine, and, as they determined it adversely to appellant, we are not able to say that their verdict was flagrantly against the weight of the evidence.

Wherefore the judgment is affirmed.

CARRIER v. MISSOURI PAC. RY. CO.

(Supreme Court of Missouri, Division No. 2, May 19, 1903.)

[74 S. W. Rep. 1002.]

Costs—Discretion of Court.

Where plaintiff has brought suit, and, after the issues have been made up and costs have accumulated, has taken a nonsuit, it is in the discretion of the court whether it will restrain her from bringing another action on the same cause without first paying the accrued costs in the original action.

Same—Security—In Forma Pauperis.

Rev. St. 1899, § 1542, provides that in all civil cases commenced by a nonresident the plaintiff "shall," before the institution of the suit, file a cost bond, and that the court "may" dismiss any action so commenced by a nonresident without the filing of the bond. Section 1545 provides that the court "may, in its discretion," permit a plaintiff who is unable to pay the costs to prosecute his action as a poor person, etc.: *held* not error, after requiring a nonresident plaintiff to give security for costs, to permit her to sue as a poor person.

Injury to Trespasser—Contributory Negligence—Deafness.

Deceased was struck by a train while trespassing on the right of way, and killed. The dirt road running alongside the right of way was muddy, and he was walking either on the path, a few feet wide, running between the track and a ditch, or on the track. The accident occurred in the daytime, and, if deceased had looked behind him, he could have seen the train for a distance of 400 yards. The track was fenced, and there was no crossing at the place where deceased was found. Deceased was hard of hearing, but could hear loud sharp noises. No signal of any kind was given by the train crew, but the train, moving at usual speed, on schedule time, made a heavy rumbling noise: *held*, that deceased was guilty of contributory negligence.

Same—Care Due from Railroad—Lookouts—Negligence and Contributory Negligence.*

Deceased was struck by a train while trespassing on the right of way, and killed. He was in plain view for 400 yards before the accident, but there was no evidence that any member of the train crew saw him. There was no crossing where the accident occurred, and only one house in the vicinity, and the right of way was fenced on each side. The train was run on schedule time, at the usual speed, and on an upgrade, so as to make a heavy rumbling noise. No signals of any kind were given as a warning by the crew: *held* that, they being

*As to the duty owing to trespassers on track, see foot-note appended to *Vanarsdell's Adm'r v. Louisville & N. R. Co. (Ky.)*, 1 R. R. R. 61, 24 Am. & Eng. R. Cas., N. S., 61.

Carrier v. Missouri Pac. Ry. Co

under no legal duty to be on the watch for trespassers, they were not guilty of such wanton negligence as to justify a verdict in spite of decedent's contributory negligence.

Same—Right to Presume That Person Seen on Track Will Avoid Train.†

If the deceased was seen by the crew within the line of danger, they had a right to presume that he would be on the lookout for the train, and would step out of its way as it approached him.

Appeal from Circuit Court, Johnson County; Samuel Davis, Special Judge.

Action by Susan P. Carrier against the Missouri Pacific Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

R. T. Railey, for appellant.

O. L. Houts, for respondent.

BURGESS, J. This is an action by plaintiff, the widow of T. E. Carrier, deceased, to recover from defendant \$5,000 damages for negligently and carelessly killing her husband on the 15th day of January, 1899.

The petition alleges that on said date defendant was operating a line of railway through the city of Warrensburg, county of Johnson, and that on said 15th day of January, 1899, and for a long time prior thereto, defendant's railway and track in said city and extending for a long distance west thereof was and had been used by persons and the public as a traveled way; that on said 15th day of January the said T. E. Carrier was upon defendant's track and right of way west of the city limits of said city, and where the said track and right of way was used as a traveled way as aforesaid, walking and traveling to the said city, and an engine and train of cars owned and operated by the defendant, going east, and called train "No. 2," approached the said T. E. Carrier from the rear along said track, and he became and was in great danger and imminent peril of being run over, killed, and injured by said train; that defendant, its officers, servants, agents, and employees running, conducting, operating, and managing said train, saw the said T. E. Carrier and his said peril and danger, and became aware thereof in time by the exercise of ordinary care to have stopped said train and averted any injury to him, and by the exercise of ordinary care could have seen him and become aware of his said peril and danger in time to have stopped said train and prevented his injury; that, after seeing the said T. E. Carrier, and becoming aware of his said peril and danger, and after they could have seen him and become aware of his said peril and danger by the exercise of ordinary care as aforesaid, the said defendant, its said officers, servants, agents, and employees, negligently and carelessly failed to sound the usual and ordinary danger signals, and failed to sound them in time to avert the injury to said T. E.

† See foot-note p. 650, appended to *Humphrey's Adm'x v. Valley R. Co.* (Va.), 5 R. R. R. 649, 28 Am. & Eng. R. Cas., N. S., 649.

Carrier v. Missouri Pac. Ry. Co

Carrier, and negligently and carelessly neglected to use air brakes and other appliances for stopping said train, and negligently failed to use the appliances at hand and provided for putting said train under control, but negligently and carelessly ran said engine and train upon and over the said T. E. Carrier, and injured and killed him at the time and place aforesaid, to the damage of the plaintiff in the sum of \$5,000, for which she prays judgment, with costs. The defenses were general denial, contributory negligence in illegally, wrongfully and without authority of law, while deaf and dumb, and going upon defendant's right of way, and while not paying any attention to the operation and running of defendant's train, and by his negligence and carelessness, and without fault of the defendant, going upon its track, and receiving the injuries complained of; that defendant had no knowledge of the fact that said deceased was either deaf or dumb or on said premises. Plaintiff replied, admitting that deceased, T. E. Carrier, went upon defendant's right of way, stepped near its track; that he also stepped and went upon defendant's track; and stating that he received the injuries complained of when near or upon said track, and admitting that defendant did not know the deceased was deaf or dumb, and averring that he was neither deaf nor dumb. All other allegations in the answer are denied. The trial resulted in a verdict and judgment in favor of plaintiff for \$5,000, from which defendant appeals.

It appears from the record that plaintiff brought suit to the June term, 1899, of the circuit court of Johnson county upon this same cause of action, and that, after that issue had been made up and a large amount of costs had accumulated, and the case brought to trial before the court and a jury, plaintiff took a nonsuit, and thereafter instituted this suit on the same cause of action, without having paid the cost, or any part of it, which accumulated in the former suit. After the institution of the suit at bar defendant filed its motion to restrain plaintiff from the prosecution of this suit until the costs of the former suit were paid, and to require her to give security for the costs of this suit. In the meantime plaintiff had become, and was at the time of the institution of this suit, a nonresident of this state, and a resident of the state of Kansas. The motion to restrain, or that part of the motion that asked the court to restrain, the plaintiff from prosecuting this action, was overruled, that part of the motion to require plaintiff to give security for cost sustained, and plaintiff allowed to sue as a poor person.

On Sunday morning, January 15, 1899, T. E. Carrier started to walk from Centerview, which is six miles west of Warrensburg, Johnson county, on the line of the Missouri Pacific Railway, to Warrensburg. The dirt road being muddy, he started out on the railroad track, and when nearing Warrensburg he was struck and fatally injured by one of defendant's regular passenger trains, which arrived at that place from the west

Carrier v. Missouri Pac. Ry. Co

between 11 and 12 o'clock on that day. A short time after the train passed by, deceased was found lying a short distance south of the south rail of the track, and about 15 to 20 steps west of the corporate limits of the city of Warrensburg. He was lying, when found, on the south side of the track, his feet south, and his head about six inches from the track. The left side of his skull was mashed in, and his shoulder hanging limp. He was bleeding. He was alive when found, but died the same day. The track for 400 yards west of where deceased was found is comparatively straight, and there was at the time of the accident nothing to obstruct the view of the engineer in charge of the train for that distance up to where Carrier was found, and, if he had looked, could have seen the train, and, if the engineer had been looking, he could have seen Carrier. The train was moving at the usual speed. Deceased was a mute, and hard of hearing, but could hear loud sharp noises. When last seen before the accident, he was within a mile of the corporate limits of Warrensburg, and going in that direction, walking between the rails of defendant's track. There was no crossing at the place where deceased was found. There were no signals of any kind given by the train crew as a warning to the deceased. There was a ditch on south side of railroad track from where deceased was found, running west parallel with said railroad track for a distance of 180 feet to a culvert. Between the end of the ties and the north edge of this ditch, from where deceased was lying, and west towards said culvert, there was a pathway from 3½ to 4 feet and 8 inches in width outside of the ties. The testimony is conflicting as to whether there was any water in the ditch where deceased was lying. Those witnesses who testified that the ditch contained water described it as only six or eight inches wide at the bottom of the ditch, while the ditch at the bottom was from a foot to 18 inches in width. The shoes of deceased, when he was found after the injury, were dry, and had no mud thereon. The right of way was fenced on each side with wire fence. There was a warning sign, with plain letters printed thereon, prior to the accident, located 1,500 feet west of defendant's depot at Warrensburg, and near the track. There was a public road running from the Ft. Scott crossing to Warrensburg nearly parallel with the railroad track, and close to same. There was no house except one out in that vicinity. There is a heavy upgrade from Ft. Scott crossing to Warrensburg, and the train going up this grade usually makes a loud rumbling noise, and can be heard for some distance. No witness testified to having seen the engineer or fireman in the cab or looking in the direction which deceased was traveling. There is no evidence in the record to the effect that any of the train crew were looking in the direction deceased was walking, or that any of the train crew were seen by any person prior to the accident. Defendant offered no evidence. At the close of the evidence defendant

Carrier v. Missouri Pac. Ry. Co

asked an instruction in the nature of a demurrer to the evidence, which was refused, and an exception duly saved. Over the objection of defendant, the court, at the instance of plaintiff, instructed the jury as follows:

“(1) The court instructs the jury that if they believe from the evidence that T. E. Carrier was killed by the train of defendant mentioned in evidence; that at the time he was killed was the husband of plaintiff; that this suit was brought within one year after his death; that while walking upon defendant’s right of way or upon or near its track he became in imminent peril of being struck by one of defendant’s trains; that defendant’s employees in charge of said train became aware of his peril of being struck in time to have enabled them, by the exercise of ordinary care, to have stopped said train, or to have rung the bell or sounded the whistle, and to have averted injury to said Carrier; that said employees failed to exercise said care and stop said train or ring said bell or sound said whistle in time to avert said injury; that by reason of such failure to exercise such ordinary care the train was not stopped, the bell was not rung, or the whistle was not sounded; and the said Carrier was struck and killed by said train—then the jury must find for the plaintiff, though the jury may find that the deceased, Carrier, was guilty of negligence in walking upon the defendant’s right of way. By ordinary care is meant such care as a careful and prudent person would exercise under the same or similar circumstances.

“(2) The court instructs the jury that under the law, if they find for plaintiff, their verdict must be for \$5,000. That it cannot be more nor less than that sum, if for the plaintiff.”

The action of the trial court in overruling defendant’s motions to restrain plaintiff from prosecuting this action until the costs in the former suit upon the same cause of action were paid, and in making an order requiring plaintiff to give security for costs in the case at bar, and then permitting her to prosecute it as a poor person, is assigned for error. With respect to the first proposition, it seems to be a matter resting in the sound discretion of the court, and not appealable. *Hewitt v. Steele*, 136 Mo. 332, 38 S. W. 82; *Loan & Trust Co. v. Brown*, 59 Mo. App. 461; *Daniels v. Moses*, 12 S. C. 130; *Harless v. Petty*, 98 Ind. 53; *Kitts v. Wilson*, 89 Ind. 95; *Drake v. New York Iron Mine*, 71 Hun, 211, 24 N. Y. Supp. 518; *Hennies v. Vogel*, 87 Ill. 247.

As to the next proposition, section 1542, Rev. St. 1899, provides that: “In all civil cases when the plaintiff or person for whose use the action is to be commenced shall not be a resident of this state, the plaintiff or person for whose use the action is to be commenced shall, before he institutes such suit, file with the clerk of the court in which the action is to be commenced the written undertaking of some person, being a resident of this state, whereby he shall acknowledge himself bound to pay all costs which may accrue in such action; and

Carrier v. Missouri Pac. Ry. Co

if any such action shall be commenced without filing such undertaking, or depositing with the clerk of the court in which said suit is brought, a sum of money sufficient to pay all costs that may accrue in the case, subject to be increased at any time, whenever the court may deem proper, and by its order of record require, the court, on motion, may dismiss the same, unless such undertaking be filed or sum of money be deposited before the motion is determined, and the attorney of the plaintiff shall be ruled to pay all costs accruing therein." The following section (1543) is to the same effect, except it applies to a party plaintiff who becomes a nonresident of the state after the institution of the suit. Section 1545 provides that: "If any court shall, before or after the commencement of any suit pending before it, be satisfied that the plaintiff is a poor person, and unable to prosecute his or her suit, and pay the costs and expenses thereof, such court may, in its discretion, permit him or her to commence and prosecute his or her action as a poor person, and thereupon such poor person shall have all necessary process and proceedings as in other cases, without fees, tax or charge; and the court may assign to such person counsel, who, as well as all other officers of the court, shall perform their duties in such suit without fee or reward; but if the judgment is entered for the plaintiff, costs shall be recovered, which shall be collected for the use of the officers of the court." It will be observed that section 1542, *supra*, provides that, if an action shall be brought by a nonresident without filing the written undertaking of some person being a resident of this state, whereby he shall acknowledge himself bound to pay all costs which may accrue in such action, and if any such action shall be commenced without filing such undertaking, or depositing with the clerk of the court in which such suit is brought a sum of money sufficient to pay all costs that may accrue in the case, subject to be increased at any time whenever the court may deem proper, and by its order of record require, the court on motion may (not shall) dismiss the same, unless such undertaking be filed or sum of money be deposited before the motion is determined; thus leaving it entirely within the discretion of the court whether it will, in any event, dismiss the suit for the failure of the plaintiff to secure the costs. A like discretion is conferred upon the court by section 1545, *supra*, with respect to allowing a plaintiff to prosecute a suit. When satisfied that he or she, as the case may be, is a poor person, and unable to prosecute his or her suit, and pay the costs and expenses thereof, the court may, in its discretion, permit him or her to prosecute his or her action as a poor person; and the discretion to do so is not restricted to citizens of this state, but applies alike to all persons who are entitled to sue in the courts of record in this state. We therefore think the motions were properly overruled.

The conduct of Carrier in going upon and walking along

Carrier v. Missouri Pac. Ry. Co

on defendant's track or along the side thereof until struck by a passing train can only be characterized as the grossest negligence, especially when his defective hearing is considered. The accident occurred in the country, away from any crossing, where the right of way was fenced on each side with a wire fence. There was only one dwelling house in the immediate neighborhood, and the accident occurred at a point where those in charge of the train had the right to anticipate a clear track, and were not, therefore, required to look out for trespassers on the track. There was no evidence showing the relative position of deceased to the track at the time of the injury—whether on the track or in proximity to it when injured. Nor was he shown to have been seen by any of those in the management of the train prior to the injury. In the absence of evidence tending to show that the engineer in charge of the engine actually saw deceased, defendant owed him no duty. In *Feedback v. Mo. Pacific Ry. Co.*, 167 Mo. 206, 66 S. W. 965, 1 R. R. R. 713, 24 Am. & Eng. R. Cas., N. S., 713, it is said: "Unless the damage complained of arises out of a failure to perform a legal duty to the person injured, there is no cause of action. * * * The plaintiff's husband was a trespasser on the track, and the only duty the defendant owed him was to avoid inflicting injury on him wantonly." That the evidence conclusively shows such contributory negligence on the part of deceased as to prevent plaintiff's recovery no reasonable minds can well differ. He went upon or within the danger line of defendant's track, and walked eastwardly on or along the same so near thereto as to imperil his life, without looking or paying any attention whatever to his surroundings, when by looking he could have seen the train that collided with him, and have avoided the danger to which he thus voluntarily and recklessly exposed himself. A stronger case of contributory negligence could not well be made out. As was said by Brace, J., in *Tanner v. Missouri Pacific Ry. Co.*, 161 Mo. 497, 61 S. W. 826, 20 Am. & Eng. R. Cas., N. S., 809: "No reasonably prudent man will do so. Hence it must be held that the plaintiff was guilty of such contributory negligence in being within the danger line * * * when he was struck as to preclude a recovery, and that the court committed error in sending the case to the jury, unless after the plaintiff had thus put himself in a place of danger the conduct of the defendant's employees in the management of the train was characterized by such willful, reckless, or wanton disregard of human life as that the defendant shall not be heard to say that the plaintiff was guilty of such negligence. *Morgan v. Wabash Ry. Co.*, 159 Mo. 262 [60 S. W. 195, 20 Am. & Eng. R. Cas., N. S., 372]; *Kellny v. Mo. Pac. Ry. Co.*, 101 Mo. 67 [13 S. W. 806, 43 Am. & Eng. R. Cas. 186, 8 L. R. A. 783]. We have looked in vain through all the evidence in this voluminous record for indicia of such willful, reckless, or wanton disregard of human life upon the part of defendant's

Carrier v. Missouri Pac. Ry. Co

servants." Moreover, even if the engineer had seen deceased within the line of danger from the approaching train, he had the right to presume that he was in possession of all his faculties, and was a prudent person, having due regard for his own safety from the approaching train; that he would be on the lookout for it, and would step out of its way as it approached him, and leave the way clear, and hence there would be no necessity for stopping the train on his account. This would have been the conclusion of an ordinarily prudent manager of the movement of such a train, and the defendant's servants thus managing the train in question cannot be convicted of a willful, reckless, or wanton disregard of human life in not stopping the train before it reached the place where plaintiff was struck, because, forsooth, he proved to be an imprudent person, without a proper regard for his own safety, and did not step out of the way of the train, as he might easily have done, and as he would have necessarily been expected to do. The demurrer to the evidence should have been sustained. *Sharp v. Ry. Co.*, 161 Mo. 235, 61 S. W. 829, 21 Am. & Eng. R. Cas., N. S., 47. The servants of defendant had no reason to anticipate that deceased or any other person would be on its track, or so near it as to be in danger of being struck by the train, and were not required to keep a lookout for such persons, did not see deceased before he was struck; and, if they had seen him in a place of danger, they had a right to presume that he would withdraw to a place of safety; and it did not become their duty to give a warning signal, or to check the speed of the train in order, to prevent injuring him, until they had reason to believe that he did not hear or see the train, then it would have become their duty to use every reasonable means at their command, not inconsistent with the safety of the train and the passengers, in order to prevent injuring him. But, as we have said, there was no evidence that defendant's employees in charge of the train saw deceased before he was struck, and was, therefore, improper to submit that question to the jury. In *Morgan v. Ry. Co.*, 159 Mo. 282, 60 S. W. 209, 20 Am. & Eng. R. Cas., N. S., 372, deceased and others had been in the habit of using the railroad track in the outskirts of a town as a passway, where deceased was killed by a tender in front of an engine upon which coal was piled up so as to obstruct the view of the engineer. Valliant, J., in speaking for the court, said: "So, in the case at bar, it was improper to have submitted to the jury the question as to the conduct of defendant's servants after they became aware of the peril of the deceased, for the reason that there was no evidence tending to show that they did see him at all." In *Barker v. The Hannibal & St. J. Ry. Co.*, 98 Mo. 50, 11 S. W. 254, 37 Am. & Eng. R. Cas. 292, plaintiff lived close to defendant's track. There was a public road 35 feet south of his house. The south side of this road was separated from the defendant's right of way by a fence, and the track of the

Carrier v. Missouri Pac. Ry. Co

Wabash Railway Company ran parallel to the track of the defendant, but adjoining and to the south thereof. Barker left his house, went south across the public road which leads directly to St. Joseph, got over the fence, and ascended a bank some six or eight feet in height to the defendant's track. He then started westward on the track towards St. Joseph, where he was going, without stopping or looking to the east. He had not traveled more than 60 to 75 feet, when a regular daily west-bound passenger train came through a cut, around a curve, and on a downgrade, and ran over and killed him. Had Barker looked to the east, he could have seen the train for a distance of 200 yards, and the engineer could have seen a person on the track for nearly the same distance. Barker knew the train was due when he got upon the track. There was a tie train standing on the Wabash track at the time, and it seems probable that his attention was attracted to the men at work on that train. He was a little hard of hearing, but could hear ordinary conversations. The evidence tended to show that no signal was given by sounding the whistle or ringing the bell, and that the train, if on a level track, could have been stopped in a distance of 100 yards. It does not appear within what distance it could have been stopped on this downgrade.

There can be no doubt that Barker was guilty of negligence in going upon the track at a time when he knew the train was due, without looking or listening for it. Besides this, he got upon the track at a place other than a crossing, and was making a footpath out of the railroad track, and that, too, at a place where the defendant was required to and had fenced its road. In short, he was a trespasser, declared to be such by the statute law of this state. Rev. St. 1879, § 809. Being a trespasser, the company owed him no duty, except not to wantonly, willfully, or with gross negligence injure him. The company was not in duty bound to look out for him. *Maher v. Railroad*, 64 Mo. 267; *Hallihan v. Railroad*, 71 Mo. 114, 2 Am. & Eng. R. Cas. 117; *Maloy v. Railroad*, 84 Mo. 270; *Rine v. Railroad*, 88 Mo. 392, 25 Am. & Eng. R. Cas. 545; *Williams v. Railroad*, 96 Mo. 275, 9 S. W. 573; *Langan v. Railroad*, 72 Mo. 394, 3 Am. & Eng. R. Cas. 355; *Comly v. Railroad* (Pa.) 12 Atl. 496. Some of the authorities just cited and many others show that, though a person is a trespasser on a railroad track, still, if such person is in a dangerous position to the knowledge of the servants of the railroad company, then it becomes their duty to use all reasonable efforts within their power and at their command to avoid injuring such person thus in the wrong. *Shear. & Redf. on Negligence*, § 36. But this duty on the part of the defendant's servants only arises when and after the perilous position of the person is discovered. Now, in this case there is no evidence whatever of a wanton or willful injury; nor is there any evidence tending to show that the engineer saw the deceased on the track

Riley v. Missouri Pac. Ry. Co

in time to have avoided the calamity. The fact that no signal was given, tends to show that the deceased was not seen by the engineer, in the absence of any other evidence. But the argument is made on behalf of the plaintiff that, if the engineer was at his post of duty and on the lookout, he could have seen the deceased, and, if he was not, then he was guilty of negligence. The answer to all this is that the company owed the deceased no duty to be on the watch for him. As to a passenger, it was, of course, the duty of the engineer to see that he had a clear track, but the defendant owed no such a duty to the deceased. As to him there was no breach of duty for a simple failure to discover him in the commission of a trespass. As stated by a reliable text-writer, the general duty of a railroad company to run its trains with care becomes a particular duty to no one until he is in a position to have a right to complain of neglect. Cooley on Torts, 660. The deceased was in no position to complain of neglect on the part of the engineer, and would only be in such a position when and after it is made to appear that some person in charge of the train saw or knew of his presence on the track in time to have avoided the injury.

It is thought advisable to say again that Barker got upon the track and was killed at a place where the defendant's road was fenced, and where there was nothing in the surroundings that would naturally or reasonably lead the servants in charge of the train to suspect that persons would be on the track. We have been speaking of the case before us, and not of others, which may present a different state of facts. The death of plaintiff's husband can be attributed to nothing but his own wrongful act and reckless carelessness, and the plaintiff has no just ground for damages against the defendant, and the judgment is simply reversed.

From these considerations the conclusion is irresistible that the deceased was guilty of inexcusable negligence contributing directly to his death, and, as there was nothing in the conduct of the servants in the management of the train indicating a willful, wanton, or reckless disregard of human life also contributing to his death, the plaintiff is not entitled to recover in this action. It follows that the court erred in not sustaining the demurrer to the evidence interposed by defendant, and in giving the instructions in behalf of plaintiff.

The judgment is reversed. All of this division concur.

RILEY v. MISSOURI PAC. RY. CO.

(Supreme Court of Nebraska, May 20, 1903.)

[95 N. W. Rep. 20.]

Evidence.

"The reception of evidence tendered by the defendant after a decision against him on a demurrer to plaintiff's evidence is not error." *Dunn v. Bozarth*, 80 N. W. 811, 59 Neb. 244, followed and approved.

Riley v. Missouri Pac. Ry. Co

Same.

Rulings of the trial court on the admission of evidence *held* not prejudicial.

Exceptions.

"Exceptions to the exclusion of testimony are unavailing unless there be tender made of the proof which it was sought to elicit." *Hambleton v. Fort*, 78 N. W. 598, 58 Neb. 282, followed and approved.

Instructions.

Where no request is made for a more explicit instruction, an objection cannot be entertained because the one given is vague and indefinite.

Comparative Negligence.*

The existence of negligence should be proven to, and passed upon by, the jury, as any other fact.

New Trial.

The doctrine of comparative negligence is not recognized in this state.

Instructions.

Instructions given examined and approved.

New Trial.

A sound discretion is reposed in the trial court in refusing a new trial on the ground of newly discovered evidence which is cumulative in its character.

(Syllabus by the Court.)

Commissioners' Opinion. Department No. 1. Error to District Court, Lancaster County; Frost, Judge.

Action by John Riley against the Missouri Pacific Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Strode & Strode and D. J. Flaherty, for plaintiff in error.

B. P. Waggoner, J. W. Orr and A. R. Talbot, for defendant in error.

OLDHAM, C. This was an action for personal injuries which plaintiff sustained while driving a team hitched to a lumber wagon across the railroad track of defendant on a public crossing on North Fourteenth street in the city of Lincoln, Neb. It appears from the testimony that the plaintiff had purchased some coal, which was in his wagon box, at a coalyard some distance north of the railroad crossing; that his son, a man of the age of 35 years, and his grandson, a youth of about 17 years, were also in the wagon, and that they were driving south, toward plaintiff's home, at the time the accident occurred. The plaintiff's evidence shows that from the wagon there was a clear view of defendant's track for about 100 feet before the crossing was reached; that, when plaintiff was from 30 to 60 feet from the railroad crossing, he noticed an engine attached to two coal cars and a box car, which he says was standing still, about a block east of the crossing; that he then looked westward along defendant's tracks, and saw no trains coming from that direction, and that he then proceeded to drive across the track; that when he reached the track he discovered for the first time that the

*For general note on comparative negligence, see 11 Am. & Eng. R. Cas., N. S., 842, and foot-note.

Riley v. Missouri Pac. Ry. Co

engine, which was on the east side of the crossing, was in motion, and had backed its cars to within about 10 feet of the crossing; that he was on the track before he made this discovery, and was forced to attempt to drive across to avoid a collision. The son and grandson jumped from the wagon, and do not appear to have been seriously injured. The wagon, however, was run into by the cars, and plaintiff was thrown under the hind car and seriously and permanently injured. Plaintiff's evidence tended to show that the accident was occasioned by the negligence of defendant in backing its train over a much-used public crossing without blowing the whistle, ringing the bell, or keeping a flagman at the crossing, or placing a brakeman or other employee on the rear car of the train to give warning of its approach. There was no contention that the train was running at an unusual rate of speed, but there was proof of an ordinance of the city which required the ringing of the bell and blowing of the whistle, and the keeping of a flagman or other employee to warn of danger at the crossing. The defendant, on its part, contended that it had complied with all these requirements, by ringing the bell, blowing the whistle, and having a switchman standing on the rear car, hallooing and warning the plaintiff and others against attempting to cross the track while the train was approaching, and that the injury was occasioned by plaintiff's negligence in attempting to cross in front of a moving train after having been properly warned of its approach. On issues thus joined, there was a trial to a jury, verdict for defendant, and plaintiff brings error to this court.

We shall consider the allegations of error in the proceeding in the order in which they are presented in plaintiff's brief.

At the close of plaintiff's testimony, defendant filed a motion for a nonsuit and to direct a verdict for defendant. Plaintiff thereupon filed a motion to instruct the jury to return a verdict for plaintiff. Each of these motions was overruled by the trial court, and defendant, over the objection of plaintiff, was permitted to introduce his testimony. Plaintiff's contention is that, as defendant's motion amounted to a demurrer to plaintiff's testimony, it was error for the trial court to permit the defendant to proceed with its testimony after overruling its motion. Some authorities are cited from other states which seem to support this contention, but however it may be elsewhere, the rule in this state seems to be firmly established that when, at the close of plaintiff's testimony, in a civil action, the defendant desires to test the sufficiency of plaintiff's evidence to sustain a verdict, he may file a request for an instruction for that purpose, and, if his request be denied, he may proceed then to introduce his own evidence. This rule was favorably commended and adhered to in *Dunn v. Bozarth*, 59 Neb. 244, 80 N. W. 811, in which it was said that "the reception of evidence tended by the defendant after a decision against him on a demurrer to plaintiff's evidence is not error."

Riley v. Missouri Pac. Ry. Co

Complaint is next lodged against the action of the trial court in the admission of evidence. On the cross-examination of one of plaintiff's witnesses, defendant's counsel were permitted, over plaintiff's objection, to ask the witness if he had not made a statement in writing, shortly after the injury, containing certain declarations differing from the statements to which he had just testified. It was objected that it was improper to ask this question without first showing the witness a copy of the written statement. Whatever technical merit may have attached to this objection at the time it was made, it was all cured by the subsequent action of plaintiff's counsel in consenting that the entire written statement might be offered in evidence, which was accordingly done.

Complaint is also made of the action of the trial court in sustaining defendant's objection to two questions propounded by plaintiff's counsel to one of his witnesses on re-examination. As the plaintiff did not follow his question by an offer to prove the answer sought to be elicited, we cannot examine this contention, if it were otherwise meritorious. *Hambleton v. Fort*, 58 Neb. 282, 78 N. W. 498.

At the close of the testimony, numerous instructions were requested by counsel for the contending parties. The requests were all denied, and all the instructions submitted to the jury were given on the court's own motion, so that, to determine whether or not the court erred either in the giving or refusing of instructions, it is necessary to examine the instructions given, and ascertain whether or not they have fairly presented to the jury each material issue arising on the pleadings and proofs contained in the record.

Paragraphs 1, 2, 3, and 4 of the instructions given by the court are confined to a statement of the issues and directions as to the burden of proof. None of these are complained of. Paragraph 5 defines actionable negligence. This instruction is complained of by plaintiff as being couched in language that an ordinary jurymen could not understand, and as being vague and indefinite. It is not contended, however, that there is anything inherently wrong in the definition given. While we agree with counsel that "instructions to a jury should be clear, explicit, and definite, and couched in plain, simple language," and while we do not commend the instruction given, either for clearness or precision, yet plaintiff made no request for an instruction defining actionable negligence; and consequently, under the well established rule of this court, he is not entitled to complain of the vagueness and uncertainty of the one given. *R. Co. v. Fink*, 18 Neb. 89, 24 N. W. 691.

Paragraphs 6, 7, and 8 of the instructions given define contributory negligence, and tell the jury that, if the plaintiff has proven his case without disclosing negligence on his part, the burden is upon the defendant to prove contributory negligence. These instructions are each couched in concise terms, and no complaint is lodged against any of them. Paragraph

Riley v. Missouri Pac. Ry. Co

9 defines ordinary care. Paragraph 10 defines the proximate cause of injury. Paragraph 11 tells the jury that they have been permitted to view the premises, and may consider what they saw there, as any other evidence in the case. Paragraph 12 is as follows: "In determining whether the defendant's employees have been guilty of actionable negligence, as hereinbefore defined, you should take into consideration the fact that the defendant was pushing its train backward, and also the fact that the defendant had no flagman at its crossing at Fourteenth street. You should also consider whether the bell was rung and the whistle sounded; whether there was a brakeman on the rear end of defendant's train. You should also take into consideration the amount of travel across defendant's track at Fourteenth street, and all the other facts and circumstances shown in the evidence bearing upon this question. And you are instructed that while it was the duty of the defendants' employees to comply with the ordinances of the city relating to the ringing of the bell of the engine, and to the stationing of a flagman at the Fourteenth street crossing, yet a failure on the part of the defendant's employees to comply with said ordinances in either or both of these respects, while that may be considered by you as evidence tending to prove the actionable negligence of the defendant's employees, does not necessarily demand an inference of negligence." This instruction we have set out at length, for the purpose of determining whether or not it fairly presented the question of defendant's alleged negligence in approaching this public crossing, to the jury. Plaintiff had made numerous requests for instructions on this question, which were all refused, and this one given in their stead. The first principle contended for in the requests which were refused is that, if defendant backed its train over the public crossing without giving the required signals, then, as a matter of law, it was guilty of actionable negligence. This court has decided many times that the existence of negligence should be proven to, and passed upon by, the jury, as any other fact, and that it is improper to state to the jury a circumstance or group of circumstances as to which evidence has been introduced on the trial, and instruct that such fact or group of facts amounts to negligence, in law. The approved practice is to instruct the jury that such facts or circumstances, if established by the weight of the evidence, are proper to be considered in determining the existence of negligence. *Mo. Pac. v. Geist*, 49 Neb. 489, 68 N. W. 640. Another principle contended for in the instructions refused is founded on the doctrine of comparative negligence, which is not recognized in this state. *Mo. Pac. v. Fox*, 56 Neb. 749, 77 N. W. 130.

The other proposition contended for and refused was that, if no signals were given, plaintiff, as a matter of law, would not be guilty of contributory negligence in driving across the railroad track at the public crossing. Instead of declaring

Riley v. Missouri Pac. Ry. Co

this fact as a matter of law, the court submitted the question of plaintiff's contributory negligence to the jury, under all the facts and circumstances proved in the case, in the instruction immediately following the one just discussed. It follows from what has been said that, in our view, the jury were properly instructed both on the question of actionable negligence of defendant and contributory negligence of the plaintiff.

Paragraph 14 of the instructions given told the jury that the rights of the public and of a railroad company at a public crossing are mutual and reciprocal, and that both must use the highway with due regard for the safety of others; that the train of the railway company has the right of priority in the use of a crossing, provided due and timely warning of its approach is given. Paragraph 15 says that a railroad crossing is a place of danger, and that all persons situated as the parties to this suit are bound to take notice of that fact; that plaintiff, upon approaching the crossing of defendant's track, was bound to use care commensurate with the perils involved; and that the law did not require the plaintiff to exercise extraordinary care. Paragraph 16 told the jury that if they believed that, on account of the want of ordinary care on the part of defendant, he (plaintiff) found himself suddenly in a condition of imminent peril or danger, the law would not hold him guilty of contributory negligence merely because in that emergency he did not act in the best way to avoid injury. These instructions seem to state the law as favorably as possible to plaintiff's contention.

The seventeenth paragraph of the instructions is assailed in plaintiff's brief. This instruction tells the jury, in substance, that if they believe from the evidence that defendant gave proper signals of the approach of its train, and stationed a man on the rear car to warn plaintiff of his approaching danger, and that plaintiff was so warned while in a place of safety, then the defendant would not be liable for the injury received. We see no reason why this instruction should not have been given. It simply submitted to the jury defendant's theory of the accident, as outlined in its proof.

The next alleged error called to our attention is the action of the trial court in overruling plaintiff's motion and supplemental motion for a new trial, the supplemental motion being based on newly discovered evidence. In determining the merits of this contention, it is well to keep in mind the conflicting theories of plaintiff and defendant as to the facts and circumstances surrounding the accident. Plaintiff contended that when he first saw the train, some distance from the track, it was standing still. He also contended that there was no employee of defendant on the hind car of the train to warn of the approach of the train, and that no signals were given on its approach to the crossing. The defendant, on the contrary, contended that the train was not standing still, but was slowly

Riley v. Missouri Pac. Ry. Co

backing, and that the bell was being continuously rung, and that the whistle was sounded on nearing the crossing, and that there was a switchman on the back end of the car, hallooing as loud as he could, and particularly warning the plaintiff against attempting to cross the track. The newly discovered evidence relied upon in support of the supplemental motion consists of an affidavit of a witness who states that within a day or two after the accident he had a conversation with defendant's engineer on his engine, and he told him that the engine and train of cars which collided with plaintiff were standing on a track a short distance from the crossing, and that he (the engineer) started the train backing toward the crossing, and forgot to give any signal, and that there was no brakeman on the train. This affidavit is contradicted by counter affidavits of the engineer and fireman, who positively deny any such conversation, and affirm the former testimony given by them—that the train was in motion all the time. Another affidavit was filed, of a conductor on the Burlington & Missouri Railroad, who stated that he was in a coal office about 100 feet from the crossing at the time of the accident, and was looking out of a window when the accident occurred; that he heard no signal sounded, and saw no one on the hind car of the train, at the time the accident occurred. Two affidavits were also filed, stating that after the trial two of defendant's witnesses had told affiants that they had received money for the testimony which they gave on the trial from the defendant. Affidavits of diligence in procuring this testimony were also filed by plaintiff and his attorneys. Numerous counter affidavits were filed, denying each of the allegations of this newly discovered evidence. It is plain from an examination of this evidence that it is all either cumulative or impeaching in its character. There is no strong probability that this testimony would change the result if a new trial were granted. A sound discretion is reposed in the trial court in refusing or granting a new trial on account of newly discovered evidence which is cumulative in its character, and this court has said in *Davis v. State*, 51 Neb. 301, 70 N. W. 986, that "the denial of a motion for a new trial upon the ground of newly-discovered evidence will not be held erroneous when it appears that the newly-discovered evidence is cumulative, and would not probably change the result already reached."

Finding no reversible error in the trial of this cause, we recommend that the judgment of the district court be affirmed.

AMES and HASTINGS, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

HOCKENHAMMER v. LEXINGTON & EASTERN RY. CO.

(Court of Appeals of Kentucky, May 6, 1903.)

[74 S. W. Rep. 222.]

Dead Bodies—Collision with Train—Damages.

While there is a legal right in the bodies of the dead which the courts will recognize and protect, there can be no recovery for mental anguish caused by the dead body of a relative being thrown from a wagon by the negligent operation of a railroad train, in the absence of any injury to the body.

Appeal from Circuit Court, Powell County.

“Not to be officially reported.”

Action by John Hockenhammer against the Lexington & Eastern Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

W. D. Jackson, for appellant.

Arthur Carey and Morton, Darnall & Wilson, for appellee.

HOBSON, J. Appellant complains of the judgment of the circuit court dismissing on demurrer his petition. The original petition is in these words: “The plaintiff, John Hockenhammer, says that the defendant, the Lexington and Eastern Railroad Company, is a corporation created by the Legislature of Kentucky, with authority to construct and operate a railroad from Lexington, Kentucky, eastward through Kentucky; that on the 4th day of September, 1899, the plaintiff, in company with his wife, mother, and divers other persons, was bringing to Stanton, Kentucky, the corpse of his infant child Virgil, for the purpose of burying it in the graveyard at Stanton; that on said day, in crossing defendant’s road at the regular county crossing made by defendant for said purpose, in Clay county, Kentucky, with a wagon containing the corpse of said child, by the willful neglect and gross carelessness of the defendant’s servants and agents, said wagon was run over, and the corpse therein thrown to the ground out of said wagon by the defendant’s servants and agents in running defendant’s engine and train of cars which said servants and agents had been employed by the defendant to run, and which they were running under said employment, from said city of Lexington, Kentucky, east. Wherefore the plaintiff asks for judgment against the defendant for the sum of \$10,000.00 (ten thousand dollars) damages and cost, and for all relief that he may be entitled to.” The defendant entered a motion for the plaintiff to make his petition more specific as to the injury to the wagon, and thereupon he avowed that he claimed no damages for injury to the wagon. The defendant then filed a general demurrer to the petition, which was sustained, and the plaintiff was given leave to amend. The following amendment was filed: “The plaintiff, by leave of court, amends his petition herein, and now makes all the allegations set out in his original petition a part of

Hockenhammer v. Lexington & Eastern Ry. Co

this amendment, and now states that by the willful negligence and gross carelessness of defendant's servants and agents said corpse was thrown out of said wagon in the presence of plaintiff, his wife, and divers other persons following the said corpse to its last resting place, causing the plaintiff great distress and anguish of mind, by the defendant's agents and servants in running defendant's engine and train of cars, which said servants and agents had been employed by the defendant to run, and which they were running under said employment, and that by reason of the said wrongful act, gross negligence, and carelessness of this defendant and its servants and agents, this plaintiff was damaged in the sum of ten thousand dollars. Wherefore he prays judgment for the aforesaid sum, and for all proper relief." The demurrer was sustained to the petition as amended, and, the plaintiff declining to plead further, the action was dismissed.

In 8 Am. & Eng. Ency. of Law, 834, it is said: "While a dead body is not property in the strict sense of the common law, yet the right to bury a corpse and preserve its remains is a legal one, which the courts will recognize and protect. And any violation of it will give rise to an action for damages."

The English common-law authorities are not applicable in America, for the reason that the ecclesiastical courts in England exercised exclusive jurisdiction as to the burial of the dead, and the common-law courts treated such matters as belonging exclusively to the church. But as we have no ecclesiastical courts in this country exercising the jurisdiction conferred on such courts in England, rights in the bodies of the dead must be protected by the civil courts. Thus, in *Larson v. Chase*, 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370, a widow brought an action to recover damages for the wrongful mutilation of the corpse of her deceased husband, and it was held that, as she had the legal right to the custody of the body of her husband for the purposes of preservation and burial, she could maintain the action, and that as, wherever a legal right is invaded, compensation for the injury may be recovered, she was entitled to recover for mental pain and suffering, as these were the proximate and natural consequences of the defendant's wrongful act. In *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759, the defendant entered upon plaintiff's land and dug up and removed the dead body of his child. It was held that the plaintiff could recover damages therefor, including mental anguish as an element of recovery; but in this case the court rests its opinion upon the idea that the gist of the action was the trespass upon the plaintiff's land. In *Bessemer Land Company v. Jenkins*, 111 Ala. 135, 18 South. 565, 56 Am. St. Rep. 26, the same rule was followed. But, in discussing this rule in *Larson v. Chase*, the court said: "It would be a reproach to the law if a plaintiff's right to recover for mental anguish resulting from the

Hockenhammer v. Lexington & Eastern Ry. Co

mutilation or other disturbance of the remains of the dead should be made to depend upon whether, in committing the act, the defendant also committed a technical trespass upon plaintiff's premises, while everybody's common sense would tell them that the real and substantial wrong was not the trespass on the land, but the indignity to the dead."

In *Renihan v. Wright*, 125 Ind. 536, 25 N. E. 822, 9 L. R. A. 514, 21 Am. St. Rep. 249, the plaintiffs, who were the father and mother of a child, sued an undertaker who had taken charge of the body and agreed to keep it safely in a vault until they were prepared to bury it, but who had negligently allowed the body to be taken from the vault and in some way lost. It was held that they could recover, and that they were entitled to recover for mental anguish. The decision of this court in *L. & N. Railroad Co. v. Hull*, 68 S. W. 433, 57 L. R. A. 771, is in line with these cases. In that case it was held that damages for mental anguish might be recovered by a husband against a carrier for negligence in the transportation of the corpse of his deceased wife, following the principle laid down by this court in *Chapman v. Western Union Telegraph Co.*, 90 Ky. 265, 13 S. W. 880, and *Western Union Telegraph Co. v. Vancleave*, 107 Ky. 464, 54 S. W. 827.

On the other hand, it was held in *Griffith v. The Charlotte, etc., Railroad*, 23 S. C. 25, 55 Am. Rep. 1, that there can be no suit for mutilating a dead body, and in *Gatzow v. Buening*, 106 Wis. 1, 81 N. W. 1003, 49 L. R. A. 475, 80 Am. St. Rep. 1, that exemplary damages might be recovered for depriving the plaintiff of the use of a hearse and stopping it as he was burying the body of his child, but that mental suffering could not be considered, as there was no physical injury. But the South Carolina case was an action by an administrator whose rights were determined by the statute under which he was appointed, and in Wisconsin the rule adopted by this court as to the recovery of damages for mental suffering in the cases above referred to is not followed, and this seems to be the foundation for the difference of result reached.

In *Burney v. Children's Hospital*, 169 Mass. 57, 47 N. E. 401, 38 L. R. A. 413, 61 Am. St. Rep. 273, a father sued a hospital to recover for an autopsy performed upon the dead body of his child intrusted to it for treatment, without his consent. It was held he could recover, and the case of *Meagher v. Driscoll* was cited as holding that the jury might take into consideration the injury to the plaintiff's feelings.

In *Foley v. Phelps*, 1 App. Div. 551, 37 N. Y. Supp. 471, the same conclusion was reached, and, speaking of the right to possession of the corpse, the court said: "It is the right to what remains when the breath leaves the body, and not merely to such a hacked, hewed, and mutilated corpse as some stranger, an offender against the criminal law, may choose to turn over to an afflicted relative."

In *Pierce v. Swan Point Cemetery*, 10 R. I. 227, 14 Am. Rep.

Florida Cent. & P. R. Co. v. Foxworth

667, the court said: "There is a duty imposed by the universal feelings of mankind by some one towards the dead, a duty, and we may also say a right, to protect from violation; and a duty on the part of others to abstain from violation. It may therefore be considered as a sort of quasi property, and it would be discreditable to any system of law not to provide a remedy in such a case.

We therefore conclude that the great weight of authority sustains the rule that there is a legal right in the bodies of the dead, which the courts will recognize and protect by the proper action, as the case may be. It remains to determine whether the plaintiff's petition shows an actionable injury to his legal rights. It will be observed that it is only charged that by the negligence of the defendant the corpse was thrown out of the wagon to the ground. It is not alleged that the corpse was mutilated in any way, or any injury done to it or the coffin. If the plaintiffs had been in the wagon themselves and been thrown out, but not hurt, they could not have maintained an action for the mental suffering thereby caused, for no rule is better settled than that mental suffering in cases of this character, not connected with physical injury, cannot be recovered for; and if the child had been alive and had been thrown from the wagon, just as the corpse was, but not hurt, no action could have been maintained. 2 Shearman & Redfield on Negligence, §§ 761, 764. Both the railroad company and the wagon were rightfully upon the highway. It was not a case of willful trespass, but simply a case of collision between the two vehicles, and must stand as any other collision between vehicles on a highway. We see no reason why the same rule should not be applied to a corpse in a case like this as would be applied if the child were alive and no injury done it. To allow the action to be maintained would be to make an exception to well-settled legal principles, not warranted by any precedents we have found.

Judgment affirmed.

FLORIDA CENT. & P. R. CO. v. FOXWORTH.

(*Supreme Court of Florida, Division A., March 17, 1903.*)

[34 So. Rep. 270.]

Death by Wrongful Act—Damages—Loss of Society.

In a suit by the wife for the negligent death of her husband, while the court does not hold that allowances for the loss of the society, comfort, and protection of the husband should in any case be estimated as equaling in pecuniary worth the amount proved to have been the actual, tangible, and substantial pecuniary value of the life of the deceased, yet the court does hold that, when it is estimated at a greater valuation, then such allowance is unreasonable, shocking to a sense of justice, and, in a case where punitive damages are not justified, will cause a reversal, unless the excessive and unreasonable allowance shall be remitted.

(Syllabus by the Court.)

Error to Circuit Court, Duval County; Rhydon M. Call, Judge.

Florida Cent. & P. R. Co. v. Foxworth

Action by Sarah A. Foxworth against the Florida Central & Peninsular Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed on conditions.

Jno. A. Henderson and Jno. C. Cooper, for plaintiff in error.

A. W. Cockrell & Son, for defendant in error.

TAYLOR, C. J. This cause was originally commenced in the circuit court of Duval county on the 23d day of April, 1891, and was formerly tried, resulting in a former verdict and judgment in favor of the plaintiff below, which, upon a review on appeal, was reversed by this court, because of improper charges, at its January term, 1899. 41 Fla. 1, 25 South. 338, 79 Am. St. Rep. 149. Since its former reversal by this court the case was again tried, resulting in a verdict and judgment in favor of the plaintiff below on May 26, 1899, for the sum of \$9,000, and the defendant below again brings the case here for review by writ of error.

Numerous errors are assigned upon rulings of the court below, involving the pleadings, admissions, and rejections of evidence, and instructions given and refused. A discussion of all these in detail would be profitless, and we therefore dispose of them by saying that we have given to each of them due consideration, and find no reversible error in any of them that have not been waived or abandoned here.

The defendant below, plaintiff in error here, moved for new trial upon 28 different grounds. Among these were "that the damages awarded by the jury are excessive," and "that there was not sufficient evidence in the case from which the jury could assess the amount of damages as found by them." This motion was overruled, and its denial is also assigned as error.

The two above-quoted grounds of the motion for new trial are meritorious. The only definite proof in the case bearing upon the question of damages, viewed from the standpoint most favorable to the plaintiff below, is, in substance, as follows: That the deceased was a man of about 80 years of age, but in vigorous health—a minister of the gospel by profession; that he had not accumulated any property, and had none at the time of his death; that at the time of his death he filled the pastorate of three or four small churches, at a salary, subscribed, of \$600 per year; that he and his wife, whom he married within a year previous to his death, lived very happily and affectionately together, and lived well, his wife owning some property of her own. The uncontradicted evidence in the case, supported by the recognized mortuary tables, is that the expectancy of life of a man in vigorous health at the age of 80 years does not exceed $4\frac{1}{2}$ years. This, practically, is the substance of all the evidence, viewed most favorably for the plaintiff, out of which the jury arrived at the amount of their verdict. There is nothing in the evidence that would have justified punitive or vindictive damages. Admitting that the capacity for pecuniary earnings of the

Florida Cent. & P. R. Co. v. Foxworth

deceased amounted to \$600 per year—and the proofs do not show it to have been more—and admitting that he contributed one-half of this, or \$300, to his wife, which is fully as much as she could have expected, and multiplying this by $4\frac{1}{2}$, the number of years of his expectancy of life, the result is \$1,350. Add to this interest thereon from the 15th of December, 1890, the date of the accident, to May 25, 1899, the date of the verdict, at the rate of 8 per cent. per annum (being 8 years, 5 months, and 10 days of interest), amounting to \$912, to the \$1,350 of principal, makes a sum total, of actual, tangible, pecuniary loss and damage, ascertainable by definite proof, of \$2,262. Multiply this by 2, upon the supposition that the loss to the wife of the “comfort, society, and protection” of the husband may be worth, in the cold dollars of a verdict, equally as much as the life-preserving, tangible, provable substantial contributed by him—and we do not think that, in reason, they can be valued at more—and the result of the calculation aggregates \$4,424; deducting nothing, as required by the statute, for the contributory negligence of the deceased at the time of the accident; and the proofs show clearly, we think, that he was guilty of gross negligence, that contributed largely towards bringing about his injury. Any substantial amount in excess of this aggregate cannot be reasonably extracted from the evidence, and therefore the verdict was and is excessive. We do not wish by what is here said to be understood as holding that allowances for the “society, comfort, and protection” of the husband in such cases should in any case be estimated as equaling in pecuniary worth the amount found to be the actual, tangible, and substantial pecuniary value of the life of the deceased; but what we do say is that, when it is estimated at a greater valuation, then it is unreasonable, shocking to a sense of justice, and in the nature of punitive damages, under circumstances where the law does not authorize punishment, but compensation only. As was aptly and properly said by Judge Baldwin in Hoyt v. City of Danbury, 69 Conn. 341, 37 Atl. 1051: “Every lawsuit looks to two results: to end a controversy, and to end it justly; and in the administration of human government the first is almost as important as the last.” Influenced by this rule, and in view of the fact that this litigation has been pending in the courts for 12 years, resulting at two separate trials thereof in verdicts for the plaintiff, we think that it should be now concluded. Therefore the judgment of the court is that if the defendant in error, within 30 days after the mandate of this court in the cause is filed in the court below, shall enter a remittitur of the sum of \$4,500 from her judgment, as of the date of its rendition in the circuit court, then the residue of such judgment, amounting to \$4,500, shall stand affirmed; otherwise the entire judgment of the circuit court shall be reversed, and a new trial awarded. The plaintiff in error to be taxed with the costs of this appeal.

**PENNSYLVANIA R. CO. v. PENNSYLVANIA CO. FOR INS. ON LIVES
& GRANTING ANNUITIES.**

(Supreme Court of Pennsylvania, March 23, 1903.)

[54 Atl. Rep. 783.]

Railroads—Pledge of Stock—Substitution of Collaterals.

Where a railroad company deposits with a trustee, under a written agreement, stock of another railroad company, reserving to itself all the rights, powers, and privileges appertaining to the ownership of the stock, including the right to vote it, the railroad company can exact from the trustee a proxy in order to vote the stock for a merger of the railroad company, whose stock is deposited with another company, as authorized by law, though the trustee will be compelled to receive back, instead of the stock of the original company, stock in the consolidated company.

Appeal from Court of Common Pleas, Philadelphia County;
Davis, Judge.

Bill by the Pennsylvania Railroad Company against the Pennsylvania Company for Insurance on Lives & Granting Annuities. Decree for plaintiff, and defendant appeals. Affirmed.

The trial court found the facts to be as follows:

“(1) Shares of stock of the Philadelphia, Wilmington & Baltimore Railroad Company to the number mentioned in the bill, belonging to the Pennsylvania Railroad Company, were deposited with the defendant, as stated in the bill, at the time therein stated, as collateral security for the performance by the railroad company of the agreement attached to the bill as Exhibit A.

“(2) Upon said deposit, said defendant company did issue its certificates in the form and to the extent set forth in the bill.

“(3) Certificates by the defendant company as trustee are now outstanding to the amount set forth in the bill, and there are now on deposit, under the terms of agreement with the corporation defendant as trustee, the number of shares of stock of the Philadelphia, Wilmington & Baltimore Railroad Company—part of those originally deposited—stated in the bill.

“(4) The holders of shares of stock of the Baltimore & Potomac Railroad Company and of the Philadelphia, Wilmington & Baltimore Railroad Company, representing almost the entire holding in each, have determined and are of the opinion that it will be beneficial to both of said railroad companies that they should be consolidated into a new company, to be called the Philadelphia, Baltimore & Washington Railroad Company, in the way and manner and under the terms and conditions set forth in the bill.

“(5) The Pennsylvania Railroad Company owns a much larger proportion of the shares of stock of the Philadelphia, Wilmington & Baltimore Railroad Company than of the Balti-

Pennsylvania R. Co. v. Pennsylvania Co. for Ins., etc

more & Potomac Railroad Company, in which latter company there is a considerable holding—to the extent of nearly twelve per centum—by the Northern Central Railway Company.

“(6) The matter of the propriety of the consolidation of said railroad companies into the one railroad company upon the terms set forth in the bill is a question of judgment, fairly determinable by the holders of the shares of the respective companies.

“(7) By the terms of agreement under which said shares of Philadelphia, Wilmington & Baltimore Railroad Company are held by the corporation defendant it is, inter alia, provided: ‘Until default shall be made in the payment of interest and minimum sinking fund or principal, as hereinbefore provided, the said trustee, or the trustee or trustees for the time being, shall permit and suffer the said party of the first part to retain all the rights, powers, and privileges belonging or incident to the ownership of the stock hereby deposited, except as hereinbefore provided and the said trustee, or the trustees or trustee for the time being, shall and will execute and deliver to the said Pennsylvania Railroad Company, or to such person or persons as may be designated either by its board of directors or by the president thereof, such powers, authorities, proxy or proxies irrevocable, from time to time, as may be necessary or expedient for carrying into full effect the powers hereby expressly retained and reserved by the said Pennsylvania Railroad Company, including, amongst other things, the right to appear at all stockholders’ meetings and at all elections of the said Philadelphia, Wilmington & Baltimore Railroad Company, and to vote upon said shares of stock at such meetings or elections as fully as if these presents had never been made.’

“(8) The corporation plaintiff has demanded from the corporation defendant that the latter shall give to the former a proxy, which will enable it to vote at a meeting of the stockholders of the Philadelphia, Wilmington & Baltimore Railroad Company intended shortly to be held, in favor of the said consolidation with the Baltimore & Potomac Railroad Company.

“(9) The corporation defendant has refused to give the proxy because of its averment that there is no right on the part of the corporation plaintiff to demand the giving of such proxy, and because the result of giving the same, if the consolidation be voted, will be that the corporation defendant will be compelled to take in exchange for shares of stock of the Philadelphia, Wilmington & Baltimore Railroad Company, now held by it, shares of stock such as would be allotted in lieu thereof in the Philadelphia, Baltimore & Washington Railroad Company.

“Conclusions of Law.

“(1) Under the reservation of right to demand proxy, and to vote thereon, made by the corporation plaintiff when it

Pennsylvania R. Co. v. Pennsylvania Co. for Ins., etc

deposited the shares of the Philadelphia, Wilmington & Baltimore Railroad Company with the corporation defendant, it is the duty of the latter to give the demanded proxy to the corporation plaintiff.

“(2) There was the fullest possible reservation on the part of the corporation plaintiff in the agreement to retain, until default, all rights, powers, and privileges belonging or incident to the ownership of the stock, saving the matter of payment of dividends thereon. There was also fullest reservation of a right to demand from time to time proxy such as might be necessary or expedient ‘for carrying into full effect the powers’ thus retained and reserved by the Pennsylvania Railroad Company, including the right to appear at all stockholders’ meetings, and to vote upon the said shares of stock at such meetings, as fully as if the agreement had never been entered into, or the stock deposited.

“(3) It is the right of the corporation plaintiff, under said reservation, to attend with a proxy to be given to it by the corporation defendant, and to vote in accordance with its own judgment upon the question of consolidation of the two railroad companies into the Philadelphia, Baltimore & Washington Railroad Company.

“(4) If at the meetings of the stockholders of the two companies a consolidation be ordered in accordance with law, it will be the duty of the corporation defendant to accept, in lieu of the shares of stock of the Philadelphia, Wilmington & Baltimore Railroad Company now held by it, the shares of stock in the new or consolidated company which shall be issued in lieu or place of the shares now deposited.”

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

John C. Bell, for appellant.

John G. Johnson, for appellee.

DEAN, J. At the argument of this case we had doubts whether the agreement of July 1, 1881, broad as is its language, implied a power to exact a proxy from the trustee, authorizing plaintiff to vote the remaining 160,000 shares of stock in favor of a merger of the Philadelphia, Wilmington & Baltimore Railroad, with two other railroads, into a new railroad corporation, to be known as the Philadelphia, Baltimore & Washington Railroad Company; that is, whether it could be fairly implied from the agreement that the trustee was bound to give to plaintiff a proxy, by which, in case the proposed merger should be accomplished, it was the duty of the trustee to accept, in lieu of the original shares, \$240,000 shares of the stock of the new company. By so doing, the original subject of the contract, the Philadelphia, Wilmington & Baltimore Railroad, although physically the same, would, as a corporation, pass out of existence, and, although not destroyed, would lose its identity as a distinct and inde-

pendent company, and the new certificates received would no longer represent, as a security, the old Philadelphia, Wilmington & Baltimore Railroad, but a new corporation, theretofore without existence—the Philadelphia, Baltimore & Washington Railroad Company. We concede that to carry the implication thus far is somewhat startling, yet a careful analysis of the agreement renders it inevitable. The sixth clause of the agreement reads thus: "Sixth. Until default shall be made in the payment of interest and minimum sinking fund or principal, as hereinbefore provided, the said trustee, or the trustees or trustee for the time being, shall permit and suffer the said party of the first part to retain all the rights, powers and privileges belonging or incident to the ownership of the stock hereby deposited, except as hereinbefore provided; and the said trustee, or the trustees or trustee for the time being, shall and will execute and deliver to the said P. R. R. Company, or to such person or persons as may be designated either by its board of directors or by the president thereof, such powers, authorities, proxy or proxies irrevocable, from time to time, as may be necessary or expedient for carrying into full effect the powers hereby expressly retained and reserved by the said P. R. R. Company, including, amongst other things, the right to appear at all stockholders' meetings and at all elections of the said P. W. & B. R. R. Company, and to vote upon said shares of stock at such meetings or elections, as fully as if these presents had never been made." It will be noticed that the railroad company retains "all the rights, powers and privileges belonging or incident to the ownership of the stock, * * * except as hereinbefore provided." The right of the owner to vote the stock as he chose, unless restricted by public policy or legislation, was undoubted. No public policy forbade him to vote for the merger or consolidation of his company with one or more others. Express legislation authorized him to so vote. The title of the trustee was created, defined, and limited only by the agreement under which it held possession of the stock, subject to the rights of plaintiff to demand proxies for the exercise of all the rights incident to ownership. If the owner could exercise the right to vote for a merger, the plaintiff could demand from the trustee a proxy authorizing it to appear at a stockholders' meeting of the Philadelphia, Wilmington & Baltimore Company to vote upon the question of merging this company with two others into a new company. This was a right, by the express terms of agreement, incident to ownership. The trustee was bound to give it, although such purpose was not specially mentioned in the agreement. If it desired to withhold this extreme exercise of power, it should have so restricted the sweeping general language of the agreement by expressly prohibiting the right to vote, to destroy the identity of the old corporation. But the trustee reserved the right to refuse the proxy upon but one con-

Norfolk & W. Ry. Co. v. Perrow

tingency—default of the railroad company to pay interest, sinking fund, or principal. It is not alleged that there was default in either particular.

As if to guard against any liability of the trustee because of the immense powers retained by the railroad company in the sixth clause, before quoted, the ninth clause is inserted, thus: "It is hereby further covenanted and agreed and this trust is accepted upon the express condition, that neither the said trustee, nor any successors in the trust, shall incur any responsibility or liability, by reason of permitting and allowing the said Pennsylvania Railroad Company to retain and reserve the power and authorities, heretofore provided for in regard to the stock of the said Philadelphia, Wilmington & Baltimore Railroad Company."

The argument of appellant's counsel tending to show that a trustee has no right to sell or pledge the trust estate, or to vote it out of existence, in the shape it came into his hands, does not meet the point. The argument and the authorities cited in support of it are pointedly applicable to simple trusts. They demonstrate in such case the power of the trustee and the rights of the cestuis que trustent, and show that the power of the trustee extends only to the preservation and protection of the trust property, and without the consent of the cestuis que trustent he cannot incumber, sell, exchange, or convert the trust property. But this is not a simple trust. Every word of the agreement in which it had its inception, and without which it does not exist, shows it was a special trust, created by the parties for a special purpose, and so accepted by the trustee. The duties of the latter were fixed by the contract, and its liabilities defined by the contract, and that is all we can look to, to ascertain them.

We think the court below was right in its decree, and we therefore overrule all the assignments of error, and affirm it.

NORFOLK & W. RY. CO. v. PERROW.

(*Supreme Court of Appeals of Virginia, March 12, 1903.*)

[43 S. E. Rep. 614.]

Negligence and Contributory Negligence.

Where the negligence of defendant has been established, the fact that plaintiff has also been guilty of negligence is no defense, unless such negligence contributed to the injury.

Fires Set by Locomotives—House Wrongfully on Right of Way—Liability.

The fact that the wall of a house is wrongfully on the right of way of a railroad is no defense in an action for the willful destruction of the house by the company by fire.

Assignment of Error.

Under Code 1887, § 3464, requiring that a petition for a writ of error shall assign errors, a general statement that the refusal of the court to give instructions is relied on as error is insufficient.

Fires Set by Locomotives—Defective Engines.

Where the evidence in an action for fire set by a locomotive to plain-

Norfolk & W. Ry. Co. *v.* Perrow

tiff's property shows that defendant company at the time of the fire was operating a defective engine, or else was negligently operating engines in approved condition, it would be liable for resulting fires in either case.

Sufficiency of Evidence.

Evidence in an action for fire set by locomotive *held* to clearly raise an issue of fact as to the condition of the engines and the character of their operation.

Error to Circuit Court, Campbell County.

Action by William R. Perrow against the Norfolk & Western Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

F. S. Kirkpatrick, for plaintiff in error.

Caskie & Coleman and Lee & Howard, for defendant in error.

HARRISON, J. This suit was brought in the circuit court of Campbell county by William R. Perrow to recover of the Norfolk & Western Railway Company damages for the destruction of his residence and its contents, alleged to have been caused by fire thrown from an engine of the defendant railway company. A verdict was returned in favor of the plaintiff for \$3,750, which the court refused to set aside. This action of the circuit court we are asked to review and reverse.

The only error specifically mentioned in the petition is the refusal of the lower court to give instructions "A" and "E" asked for by the defendant. By instruction "A" the court was asked to tell the jury that if they believed from the evidence that the plaintiff, through either accident or design, caused to be partially erected upon the right of way of the Norfolk & Western Railway Company a frame building which had a window in it on the railway side, that the wall of the house which contained said window rested in part upon the defendant's right of way, and that the sash was left open, with a curtain of inflammable material therein, the jury must find a verdict for the defendant company, although they may believe from the evidence that the fire was caused by an engine of the defendant company, and that such engine was at the time in a defective condition.

The evidence is conflicting as to whether or not the wall of the house in question was, in part, upon the right of way of the defendant company, but if the jury had believed that it was, by design or mistake, placed in part over the line between the plaintiff and defendant, and that a window was open on the side next to the railway company, with a curtain therein of inflammable material, and it were a sound proposition that these acts constituted negligence, the instruction would still be defective as a statement of law, for it assumes that such negligence contributed to the injury sustained by the plaintiff. The jury might have believed every fact mentioned in the instruction, and, unless those acts contributed to the injury, the plaintiff would not have been deprived of the right

to recover. The evidence was conflicting as to which side of the house was first ignited, with a strong preponderance in favor of the view that it began on the side of the house farthest from the right of way of the defendant, which was conceded to be upon the land of the plaintiff.

Instruction "E" is obnoxious to the same objection that has been suggested to instruction "A." By it the court was asked to tell the jury that if they believed from the evidence that the defendant, through accident or design, erected the house in question with the northern side placed entirely, or almost entirely, on the right of way of the defendant company, with a window in said northern side left open, with an inflammable curtain therein, and that if the jury should be of opinion that such an act on the part of the plaintiff constituted negligence, then they must find for the defendant company, without any regard to the question whether or not such negligence had anything to do with causing the injury complained of. These instructions were clearly erroneous and properly refused. The effect would have been to require the jury to disregard all of the evidence of the plaintiff as to the origin of the fire and the cause of the damage sustained, if they believed that the northern wall of the plaintiff's house was in whole or in part upon the right of way of the defendant company, with an open window therein, over which hung a curtain of inflammable material. If the wall of the plaintiff's house had been wrongfully upon the right of way, that fact would not have justified the destruction of the property by any willful or negligent conduct of the defendant company. See *Grand Trunk R. R. v. Richardson*, 91 U. S. 454, 23 L. Ed. 356.

So far as appears from the petition, the only other assignment of error is a general statement, in closing, that the defendant relies upon the refusal of the court to give a number of other instructions asked for by it. There were three other instructions asked for by the defendant company, and refused, but the error in this action of the court is not pointed out. The general statement that the refusal of the court to give instructions is relied on as error is not a compliance with section 3464 of the Code of 1887, which requires that a petition for an appeal, writ of error, or supersedeas shall assign errors.

In *Orr v. Pennington*, 93 Va. 268, 24 S. E. 928, Judge Buchanan, speaking for this court, said: "A petition for an appeal is in the nature of a pleading. It ought to assign clearly and distinctly all the errors relied on for a reversal of the case, so that the opposite party may know what questions are to be raised in the appellate court, and not have new questions sprung upon him at or just before the hearing of the cause, when there may not be sufficient time or opportunity for meeting them."

In *Atlantic & Danville Rwy. Co. v. Reiger*, 95 Va. 418, 28 S.

E. 590, the same judge says: "The action of the court in giving instructions copied into bill of exceptions No. 8 is assigned as error, but, as no ground of objection is stated either in the petition or brief of the defendant company, that assignment of error will not be considered." See, to the same effect, Hite's Case, 96 Va. 495, 31 S. E. 895.

Without intending to depart from the settled rule that a petition must clearly and distinctly state the ground of each assignment of error to be relied on, it may not be improper in this case to say that we have maturely considered the three instructions in question, and are of opinion that the rights of the defendant were not prejudiced by their rejection.

On April 10, 1901, about 10 minutes after an extra freight train, drawn by three engines, had passed, the plaintiff's house was discovered to be on fire. The evidence clearly shows that one of these three engines emitted much more fire than the other two, and much more than is usually emitted, and that this condition of things did not exist until about three weeks before the fire. The following extract from the opinion of the learned judge of the circuit court gives an accurate summary of the salient features of the evidence:

"The plaintiff offers much testimony in support of his contention that the company fired his property with sparks emitted from an engine either defectively equipped or negligently operated. He does not content himself with showing that the company's engine communicated fire to his property, and allow his case to rest upon the presumption of negligence thereby raised. He submits evidence of a varied character to establish negligence in fact on the part of his adversary. It is fully shown by the witnesses for the plaintiff that for several weeks prior to the fire this extra was noticeable for the abundance and variety of the sparks emitted by one of its engines. Witnesses who had been in the service of other railroads testify that they had never seen an engine throw fire like the engine on this extra—that it threw sparks more heavily than freight engines are wont to do. One witness describes the sparks as 'pouring out of the smokestack.' Another (Rosser) saw a cinder big as his finger fall 75 yards from the train (the extra) and fire some roots; on another occasion it set fire at 100 yards from the track. Although this witness had served on other roads, he had never seen an engine throw fire like this one. Still another witness saw this extra emit sparks as big as his thumb. Another spoke of fire 'just rolling out of it.' On the day of Perrow's fire the witness Barracks saw a live coal left by the double-header near Perrow's trestle an inch in diameter.

"This extra had acquired the local cognomen of 'fire scatterer,' and, after it passed, landowners watched to see that their premises had not been fired. On the day that Perrow's house was burned, it left in its wake a number of fires from Perrow's along the ascending grade towards Win-

Richmond Passenger & Power Co. v. Racks' Adm'r

fall, a station south of Rustburg. On this particular day it is shown that a high wind was blowing. It was a 'gusty' day, and 'pretty tolerable dry'; in fact, the weather had been dry for some time. As has been stated, this notable emission of sparks with resulting fires along the Perrow grade, culminating in the fires on the day the house was destroyed, began about three weeks or a month prior to the Perrow fire. All of this testimony was offered to show that defendant company at the time of the fire was operating a defective engine or engines, or else was negligently operating engines in approved condition. In either case it would be liable for resulting fires."

"To repel the case for the plaintiff the company showed by its witnesses that the engineers in charge of the extra were competent men, experienced in their vocation, that the engines were in good condition, equipped with approved preventive fire arrangements, and their trains were operated with due or reasonable care to prevent injury to the property of others."

This evidence clearly raised an issue of fact as to the condition and equipment of the engines and the character of their operation. The two instructions given for the plaintiff, together with those given for the defendant company, fairly submitted the case to the jury. The defendant company stands in this court as upon a demurrer to the evidence, and it cannot be said that the conclusion reached by the jury was clearly incorrect. Unless palpably erroneous, the verdict cannot be disturbed.

For these reasons, the judgment complained of must be affirmed.

RICHMOND PASSENGER & POWER CO. v. RACKS' ADM'R.

(Supreme Court of Appeals of Virginia, June 11, 1903.)

[44 S. E. Rep. 709.]

Evidence.

Evidence is inadmissible, in an action against an electric railroad for injuries to a person on the track, to show the distance in which a car could be stopped, which is entirely different from that by which the injury was caused, and differently equipped.

Trespassers on Track—Duty of Railroad Company.*

No duty is owing by a railroad company to a trespasser on its track, except, after it knows of his danger and peril, to exercise reasonable care to avoid injuring him.

Error to Law and Equity Court of City of Richmond.

Action by Racks' administrator against the Richmond Passenger & Power Company. Judgment for plaintiff. Defendant brings error. Reversed.

*See foot-note appended to *Brooks v. Pittsburgh, etc., Ry. Co. (Ind.)*, 1 R. R. R. 521, 24 Am. & Eng. R. Cas., N. S., 121.

Richmond Passenger & Power Co. v. Racks' Adm'r

H. Taylor, Jr., for plaintiff in error.

Wm. L. Royall, for defendant in error.

CARDWELL, J. Royall Racks, administrator of Frances Racks, deceased, brought his suit in the law and equity court of the city of Richmond, and recovered a judgment against the Richmond Passenger & Power Company for the sum of \$500 damages by reason of the death of the said Frances Racks, caused, as alleged, by the negligence of the defendant.

The circumstances under which the plaintiff's intestate lost her life are as follows:

On the afternoon of March 2, 1902, she, accompanied by her daughter, about 13 years of age, and two other small colored girls, walked out from her home, in the city of Richmond, to look at the highwater in the river, and in returning home they were diverted from their route by boys throwing stones at them, and wandered away into the county of Henrico and got lost. About dark they found themselves upon the county road leading from Richmond City to Seven Pines, in the county of Henrico, upon which the defendant's track is laid, and on which it operates electric cars for the transportation of passengers between Richmond City and Seven Pines, and they undertook to follow this road back to Richmond. After going a short distance the party discovered some one with a lamp near the road, and called to him to know the way they should go in order to reach Richmond, and were told to "follow that road; that will put you to Richmond," or "to keep the county road and go straight ahead." A short way from where these instructions were received, the county road deflects to the north for the purpose of crossing a stream that has high banks directly in front of the place of deflection, whilst the electric railroad runs straight along, and crosses the stream upon a trestle, which is about 60 feet high and 415 feet long. This trestle has no walkway upon it, but a person crossing it must step from joist to joist, the joists being about 18 inches apart, with nothing between them, or under the spaces between them; and there is not room enough on either side of the railway track for a person to stand while one of the defendant's electric cars is passing. Upon reaching the point where the county road and railway track separate, the deceased, with the little girls accompanying her, followed the railway track; and upon reaching the trestle, and finding that they could not walk across it, they got on their knees and hands, and attempted to make their passage over it by crawling from joist to joist; and, when they had gotten beyond the middle of the trestle, one of the defendant's electric cars on its return from Seven Pines to Richmond ran upon and over them, killing the deceased, Frances Racks, at a point about 65 feet from the western end of the trestle.

The approach of the railway track from the east of the trestle is on a downgrade, while the trestle itself is level; and upon approaching the trestle the current of electricity is

turned off, and the car allowed to roll of its own motion until it reaches about midway of the trestle, when the current is gradually turned on again, to restore sufficient speed to ascend the grade beginning at the west end of the trestle.

It is not controverted that under these circumstances the deceased was a trespasser, and no duty was owing to her by the defendant, except, after it knew of her danger and peril, to exercise reasonable care to avoid injuring her; and therefore the only question in the case is whether or not the motor-man in charge of the car did all that he could do in the exercise of reasonable care to stop his car after he discovered her peril.

The undisputed facts proved are that the car of the defendant company which ran upon the deceased is about 42 feet long; that the night of the accident was very dark and very damp—"almost raining"; and that, by reason of the dampness, the track was in the very worst of all conditions for stopping the car.

With the view of proving the distance within which the car might have been stopped, the plaintiff introduced several expert witnesses—among them, T. E. Felt, superintendent of the Richmond & Petersburg Electric Railway Company, who testified in regard to stopping the cars on his road; and, when recalled a second time for examination, he was permitted, in answer to a question by plaintiff's counsel, over the objection of the defendant, to state that when the current of electricity has stopped the wheels of one of his cars from revolving, or the wheels are made to reverse, so that the car is moving only by its own momentum, it would stop in 40 feet. Evidence having been introduced as to the construction and equipment of the cars of the defendant operated on the Seven Pines Road, showing that they had entirely different machinery from the machinery of the cars on the Richmond & Petersburg Electric Railway, as described by the witness Felt, and that no comparison could properly be made between the equipment or appliances upon the cars operated upon the respective roads, the defendants moved the court to exclude the testimony of Felt, as to stopping cars, which motion was overruled, and this ruling is made the foundation of the defendant's first bill of exceptions.

The court is of opinion that this exception is well taken. No foundation had been laid for the testimony of the witness objected to, by showing similarity between the cars of which he was speaking and the car involved in the accident out of which this suit arises. On the contrary, it had not only been shown that the cars were dissimilar, but that the circumstances existing at the time of the accident were different from those under which the witness testified as to stopping cars on his road. Testimony as to what could be done to avoid injury to a person on an electric car track, with different cars, differently equipped, and under different conditions, instead of being

Richmond Passenger & Power Co. v. Racks' Adm'r

helpful to the jury in reaching a right conclusion as to whether the motorman in charge of the car in question negligently failed to do all in his power to avoid injury to the deceased after he discovered her peril, was well calculated to lead them away from the pertinent and relevant testimony in the case, into the field of conjecture, which, as has often been repeated, cannot be permitted. An inference cannot be drawn from a presumption, but must be founded upon some fact legally established. *N. & W. Ry. Co. v. Cromer*, 99 Va. 794, 40 S. E. 54.

The two remaining exceptions taken by the defendant may be considered together. The one relates to the giving of an instruction asked by the plaintiff, and the other to the refusal of the court to award a new trial on the ground that the verdict is contrary to the law and the evidence.

The instruction referred to, and the only instruction given for the plaintiff, is as follows:

"The jury are instructed that if they believe from the evidence that the motorman in charge of the defendant's car on the evening of March 2, 1902, could, by the exercise of ordinary care, have prevented said car from running on the deceased after he saw her, that they are instructed that it was his duty to prevent said car from running on the deceased, and if they believe further from the evidence that he neglected said duty, and that the death of deceased was due to such neglect of duty, the defendant is liable for such neglect of duty, and in that case their verdict should be for the plaintiff."

It is not claimed that the instruction propounds an incorrect proposition of law, but the contention is that there was not sufficient evidence to warrant the court in giving it. We do not deem it necessary to consider this contention, as we are called upon to determine whether or not the evidence is sufficient to sustain the verdict of the jury.

The first witness for the plaintiff was R. A. Powell, the motorman of the car. He testified that he was not certain as to where he was when he first saw these people on the trestle; it was hard to tell in the dark, and he could not be positive. But he explains that, in order to reduce the speed of the car when entering upon the trestle, so as to go upon it at a low rate of speed, the current of electricity is cut off, which so reduces the headlight that nothing could be seen in front until the current was put on again, when the headlight is revived; that, as was usual, the current had been cut off, and he began to feed his car up (by applying the electricity) about the center of the trestle, or when he supposed he was about the center, and it takes some time to feed it up to nine points, needed to ascend the grade beginning at the west end of the trestle; that he had fed it up to 9 points, and was running on nine points when he first saw these people. He thereby explains that he was several car lengths past the center of the trestle

Richmond Passenger & Power Co. v. Racks' Adm'r

when he saw them, and instantly applied his brake, reversed his current, and made the best stop he could, using all the means in his power to prevent the accident. In answer to the question: "There is no guessing on your part that instantly you saw those people you tried to stop that car in every way you could?" the witness says: "I did in every way I could to prevent the accident. I don't believe a man ever worked on a car more faithfully than I did, trying to stop it."

The car, as we have observed, was about 42 feet long, and the deceased was run over 65 feet from the western end of the trestle; that is, about 142 feet from the middle of the trestle, approaching from the east. The witness was not asked how close he thought he was to those people when he first saw them, nor as to how far the car ran beyond the point of the accident before it stopped; but, from the explanation he makes as to how he handled the car (that the headlight would only light the trestle in front about 40 feet when feeding the car up), if he had run, as he stated, $2\frac{1}{2}$ car lengths past the middle of the trestle while feeding the car up, the only inference that could have been drawn was that he was in less than 40 feet of the people when he first saw them. The statement of the witness of the defendant, L. V. Mayor, who was a passenger standing by the motorman, Powell, in no way conflicts with the latter's testimony, but corroborates the statement he made that the car was too close when the people were seen to be stopped in time to avoid running over them. Mayor says that the reversing of the car attracted his attention, and, looking forward, he saw the people about 40 feet off.

Another witness for the defendant, who was a passenger on the car, and standing near the motorman, also corroborates the latter in the statement that he did everything in his power to stop the car before reaching these people.

Plaintiff's witness R. W. Jennings testified that a car running 8 miles an hour, the supposed speed of the car at the time of this accident, on a dead level and a dry rail, could be stopped in 40 feet; on a wet rail, with the use of sand, it would take only 5 feet further, but, if you did not have sand, it would take 10 feet more, may be longer than that. He could not tell, however, about a slick rail—as was the case here—how long it would take to stop the car, and he concurs in the statement of other witnesses that the current of electricity cannot be reversed, so as to bring the wheels to a dead stop, or make them go back instantly, as it takes it at least two seconds to give it time to "get in"; that is, to take hold and have effect.

Annie Racks, the 13 year old daughter of the deceased, as a witness for the plaintiff, testifies that the light on the car went out just as the car reached the eastern end of the trestle, and that the light came on no more until the accident was over

Richmond Passenger & Power Co. v. Racks' Adm'r

and the car had gotten across the trestle. She, as stated by all the other witnesses, says that it was a dark night, and in this darkness, while she was crawling upon her hands and knees, over the trestle, she claims that she saw the motorman turning "all around the brakes" (meaning, doubtless, turning the brakes around) when the car was the distance of the width of Broad street from her; that the light did not go out until the car was as close to her as across Broad street; and that they were then about the middle of the trestle. It appears that the witness saved her life by swinging under the trestle at the point where her mother was killed, while one of the remaining two of the party jumped off the trestle, and the other was knocked off; and all this occurred at a point, as we have seen, 65 feet from the western end of the trestle, and at least 142 feet west of its center, so that, in the very nature of things, as well as by the plaintiff's other evidence in the case, it is impossible that this witness' statement that the lights on the car went out as it entered upon the east end of the trestle, and never came on again until it had passed over the trestle, can be true. But if the statement be accepted as true, it neither proves as a fact, nor warrants the inference, that the motorman in charge of the car failed to do, as he states he did, all in his power to stop his car after he discovered these people on the trestle. On the contrary, the plaintiff's other evidence conclusively proves that if the statement of Annie Racks be true—that the lights on the car went out as it entered upon the east end of the trestle, and remained out until it passed entirely over it—it was impossible that the motorman could have at any time seen these people on the trestle before running over them. It is not pretended that he saw them from the east end of the trestle, where, as Annie Racks claims, the light went out, and never came on again, for, if such was the case, he wantonly or recklessly ran his car upon them; and it is conceded by counsel in argument here that such was not the case, the contention being only that when the motorman saw the deceased's peril he became so awe-stricken that he lost ability to deal effectually with the situation.

Subjecting the whole evidence to the most rigid application of the rule governing demurrers to evidence, no other conclusion could rightly be reached than that the death of the deceased was due solely to her own reckless intrusion upon the defendant's trestle and right of way as a trespasser.

It follows that the judgment of the lower court refusing to set aside the verdict of the jury and award the defendant a new trial it must be reversed and annulled, and the cause remanded.

JEFFERSON *et al.* v. CHICAGO & N. W. RY. CO.*(Supreme Court of Wisconsin, April 17, 1903.)*

[94 N. W. Rep. 289.]

Railroads—Fires—Liability.

A railroad corporation permitted a lumber company to connect its private logging track with one of its own tracks. The lumber company ran its engine onto one of the railroad company's tracks to get some logging cars and take them away into the woods for loading. While on the railroad company's tracks, the lumber company's engine, which was defectively equipped, set fire to property of plaintiff, piled near by: *held*, that the railroad company was liable.

Appeal from Circuit Court, Ashland County; John K. Parish, Judge.

Action by Rufus C. Jefferson and another against the Chicago & Northwestern Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

This is an action to recover the value of a large quantity of posts and poles destroyed by fire alleged to have been caused by the negligence of the defendant. The action was tried before a jury, and the facts were not seriously in dispute. It appeared by the evidence that on July 19, 1901, the plaintiffs owned a large quantity of posts and poles, which were piled upon land immediately north of the defendant's right of way tracks in the village of Cedar, Iron county, Wis.; that at this point the defendant's railroad runs nearly east and west, and three tracks are maintained, one of the tracks being a main track, the next one to the north being a passing track, and the next one north of that being the loading track, immediately north of which the plaintiffs' posts and poles were piled. It further appears that the Montreal River Lumber Company, a private corporation, also owned and operated a private logging track, which was connected with the defendant's passing track at a point just west of the plaintiffs' piles of posts and poles, and that said private logging track extended north from the point of connection several miles into the woods; that said Montreal River Lumber Company operated upon this track a small locomotive, which it owned, and which was used to bring its logs loaded on cars over said private logging track, and to place them upon the defendant's loading track for transportation by the defendant, and also to take empty cars from the defendant's track into the woods to be loaded; that this was done by permission of the defendant, and for the purpose of delivering said logs to the defendant for shipment over its railroad, and that defendant had no other interest in the operation of the lumber company's engine; that on July 19, 1901, the lumber company's engine was moved by its employees upon the defendant's loading track, and was coupled to several empty logging cars standing thereon, and took them away over said private track into the woods for loading; that immediately after this operation

Jefferson v. Chicago & N. W. Ry. Co

a fire started among the plaintiffs' posts and poles, and a large part of them were destroyed; that the spark arrester upon the lumber company's engine was so defective that fire could easily escape from it; that the defendant had no notice of this fact; and that all of the defendant's engines which were used at this station at the time in question were in proper condition. A motion to direct a verdict for the defendant was denied, and a special verdict was rendered by the jury, by which it was found (1) that the plaintiffs owned the property in question; (2) that said property was destroyed by fire which escaped from the engine of the Montreal River Lumber Company while it was being operated upon the track of the defendant with its consent; (3) that said fire escaped by reason of a defective spark arrester upon said engine; (4) that said Montreal River Lumber Company was guilty of want of ordinary care in permitting said spark arrester to be in such defective condition; (5) that said want of ordinary care was the proximate cause of said fire; (6) that the value of the property destroyed was \$5,624.49. Motions for judgment upon the verdict for the defendant and for a new trial were successively overruled, and judgment was rendered for the plaintiffs for the value of the property destroyed, with costs, and the defendant appeals.

Edward M. Hyzer, for appellant.

Ben. S. Smith and Owen Morris, for respondents.

WINSLOW, J. (after stating the facts). It appears that the defendant company allowed a private corporation to use a part of its tracks with a dangerously defective engine, by reason of which the plaintiffs' property was destroyed. The defendant now seeks to avoid liability for the loss because the private corporation was engaged in its own business, and the defendant did not know that the engine it used was defective. It cannot thus escape liability. Leaving out of consideration the fact that the act of drawing loaded cars upon the loading track or transportation, or taking empty cars therefrom for loading, was essentially an act in the course of the defendant's own business, and partly, at least, for its own benefit, the principle is well established that, when a railroad company permits another to make joint use of its track, it is liable for injuries caused to person or property by the actionable negligence of such licensee. 2 Elliott on Railroads, § 477; *Railroad Company v. Barron*, 5 Wall. 90, 18 L. Ed. 591. It has received its franchise to operate a railroad subject to certain well-defined duties as to the machinery which it uses. It cannot, while exercising those franchises, allow others to come in with defective machinery and use the quasi public highway jointly with it, and escape the duty laid upon it by its charter to use safe machinery. Such a rule would open a door by which public servants, while reaping all the pecuniary benefits of their franchises, could easily escape from a considerable portion of their correlative duties by licensing

Murray v. Boston & M. R. R

irresponsible third persons to transact certain portions of their business. In the present case it is clear that while the lumber company was moving its engine over the defendant's side tracks it was operating the franchises of the defendant with its consent. It was as much the duty of the defendant company to see that this engine was not defective while using such tracks as to see that its own were not defective. The judgment is fully sustained by the verdict.

Judgment affirmed.

MURRAY v. BOSTON & M. R. R.

(*Supreme Court of New Hampshire, Hillsborough, Feb. 3, 1903.*)

[54 Atl. Rep. 289.]

Res Gestæ—Declarations of Injured Brakeman.*

Declaration of one within two minutes after he was run over by a car, and while he was lying between planks, with his legs nearly cut off, that it happened from his falling over the planks, is part of the res gestæ.

Injury to Brakeman—Obstruction near Track—Assumption of Risk.

Whether a brakeman who was run over by cars, he having stumbled over a "jigger stand," consisting of two planks, for a hand car, close to the track, and within 10 feet of a switch which he was about to operate, knew or ought to have known of the stand, negligently placed there, so that he can be held to have assumed the risk, is a question for the jury, though he had been over the road 10 or 12 times within two months of the accident; men who had worked with him during that time testifying that they had not noticed it before, and it appearing that such stands are seldom placed near switches, and usually lead into car houses, which afford notice of their presence, while in this case there was no such house,

Same—Same—Contributory Negligence.

Whether a brakeman, who, stumbling over a jigger stand within 10 feet of a switch, was run over by the cars, exercised reasonable care in the performance of his work, is a question for the jury, he, when last seen before the accident, having been getting down with his lantern over the side of the car nearly opposite the switch, for the purpose, evidently, of setting the switch, as was his duty, he having had extensive experience as a brakeman, a very brief time having elapsed from the time he alighted till he cried out, and it being competent to infer that he was proceeding to reach the switch in the way an experienced brakeman would adopt under the circumstances, and that this would be a reasonably prudent way.

Exceptions from Superior Court; Young, Judge.

Action by Michael Murray, administrator, against the Boston & Maine Railroad. Verdict for plaintiff. Defendant excepts. Exception overruled.

Case, for negligently causing the death of Baker, the plaintiff's intestate. Trial by jury, and verdict for the plaintiff. At the close of the plaintiff's evidence, the defendant's motion for a nonsuit was denied, subject to exception. Transferred from the May term, 1902, of the superior court by Young, J. The plaintiff's evidence tended to prove the following facts:

*See note appended to *Louisville & N. R. Co. v. Landers* (Ala.), 6 R. R. R. 96, 29 Am. & Eng. R. Cas., N. S., 96.

Murray v. Boston & M. R. R

At the time of the accident, and for some time prior thereto, Baker was in the employ of the defendant as a freight brakeman. The crew to which he belonged had no regular run, but worked on extras on the lines of the defendant's road running out of Nashua. During the two months before the accident, they had been over the road from Nashua to Keene about a dozen times. The accident occurred in the yard at Greenfield, at about 2 o'clock in the morning, while the crew were engaged in making up their train. Baker was the "middle man," and it was his duty to throw a switch after certain loaded coal cars had been drawn from a side track upon the main track. While the cars were in motion, some one with a lantern was seen by one of the men on the car next to the rear one, and when nearly opposite the switch the lantern disappeared, going down by the side of the car, on the side of the track opposite the switch. On this side of the track there was a "jigger stand," about six feet from the switch, consisting of two planks placed at right angles with the track, and within two or three inches of it, and extending back some fifteen feet. Such appliances are used by the section men in running their cars from the track. There was no car house at this point, and the stand had not been used for two or three years. Just after the lantern disappeared, and as soon as the car passed the switch and stopped, Baker was heard to cry out and groan; and one of the witnesses at once ran to him, and found him lying between the planks, his back to the track, with both legs nearly severed from his body. Another witness, who reached the place in less than two minutes after he heard the outcry, asked Baker what the matter was, and he replied that he had lost his legs. The witness asked, "How did you do that?" and Baker replied, "I fell over these old planks." This testimony was admitted, subject to the defendant's exception. Baker died in a few hours thereafter. The broken pieces of his lantern were found near him between the planks, and there was blood on the rail at the end of the planks, and on one of the car wheels. Jigger stands are of frequent occurrence on the defendant's various roads on which Baker had worked, but in a great majority of cases they are opposite car houses, and not in the immediate vicinity of switches. One of the trainmen who worked with Baker testified that he had not noticed this jigger stand before the accident. It did not appear whether Baker had ever operated this switch, or whether he had ever got off his car at this point on the side where the stand was. The stand had been there from seven to ten years. It appeared that some years ago Baker went over the road as brakeman a large number of times, but had not worked there in recent years until about two months before the accident.

Doyle & Lucier, for plaintiff.

Hamblett & Spring and Burns & Burns, for defendant.

WALKER, J. It is claimed that Baker's statement, made directly after the infliction of his injury, was not admissible. If the declaration was merely a narrative of a past event, the evidence of it would be inadmissible, upon the ground that ordinarily hearsay evidence is not received in proof of the truth of an assertion. The uniform practice of the courts in common-law jurisdictions has resulted in the establishment of this principle, as a necessary and useful rule in the investigation of questions of fact. But when the declaration of one not a sworn witness upon the trial is something more than mere narrative—when its probative force is derived in part, at least, from sources other than the credibility of the declarant—an opportunity is afforded for the argument that it does not fall within the strict rule against hearsay evidence, or that it constitutes an exception to the rule. It is then possible to say that the declaration, while verbally a mere narrative, is something more, and may be, for that reason, of such probative force as to be admissible as evidence upon a material issue. It may be so connected with other controverted facts as to be itself a fact or circumstance naturally growing out of, and in some sense attested by, them. The verbal statement of a person made under some circumstances may be a part of the actual occurrence, and be entitled to as much weight as evidence as any other part of the transaction. This is the principle, it is believed, that is involved in the somewhat obscure doctrine of *res gestæ*, which is often resorted to, apparently, more on account of its convenient indefiniteness than for its scientific precision. But the principle, whether expressed in an abbreviated Latin phrase or otherwise, is an important one in any system of evidence whose object is the ascertainment of facts. Its development has been promoted, in modern times, by an effort to afford the triors of fact all reasonable means of ascertaining the truth, instead of withholding from them all information possible by the rigid application of certain rules of exclusion. The question is not now, how little, but how much, logically competent proof is admissible?

In cases of this character it is important to ascertain what, if any, relevancy the declaration has—in other words, what it tends to prove; for unless its natural effect is to prove or explain a point in issue or a controverted fact, it is not admissible. In this case the burden was upon the plaintiff to establish, by a balance of the probabilities, that his intestate received his injury in consequence of the negligence of the defendant. This, in a broad general sense, was the issue tried; but it involved a material inquiry as to the manner in which the accident happened. If it is assumed that suffering the planks to be where it is admitted they were was a negligent act of the defendant, it was important for the plaintiff to show that they were the proximate or effective cause of the accident. If, in the exercise of due care, the deceased

Murray v. Boston & M. R. R

would not have received the injury complained of but for the existence of the planks at that particular place and time, the plaintiff would have sustained the burden assumed by him. On the other hand, if the cause of the accident was something other than the planks, as manifestly might have been the case, his failure in this respect might have been fatal. *Nashua Iron & Steel Co. v. Railroad*, 62 N. H. 159. The controversy was whether the planks caused the deceased to stumble and fall, and thus to suffer the injury inflicted upon him by the car wheel running over his legs. The plaintiff's evidence was that the deceased was found almost immediately after the accident lying between the planks, with his legs practically severed from his body; that the fragments of his broken lantern were on the ground near him; and that blood and bits of flesh were found upon the car wheel and near the planks. These are all physical facts which, as evidence, affords some information as to how the accident happened. They are relevant details or results of the main fact. In the strictest sense, they may not together constitute or fully evidence the fact in controversy; but in law they are said to be a part of it. The admission of evidence of this character is placed upon the ground that it discloses to the jury the facts and circumstances which attended the principal fact. In a not inappropriate sense, they are a part of the *res gestæ*, and exist as evidence of it. *Willis v. Quimby*, 31 N. H. 485; *Tucker v. Peaslee*, 36 N. H. 167, 181; *Wyman v. Perkins*, 39 N. H. 218; *Willey v. Portsmouth*, 64 N. H. 214, 219, 9 Atl. 220.

When, instead of attendant physical facts and circumstances, the evidence consists of a declaration, made by a person at the time of the event or transaction which is under investigation, its admission depends upon a similar principle. If its materiality or relevancy is conceded, the question whether it is a part of the *res gestæ* arises; that is, whether it occurred in such intimate connection with the event in issue as to constitute it in a reasonable and proper sense a part thereof. If it does, it is, in its probative bearing, superior to mere hearsay remarks, and may, for that reason, be admissible. "Its connection with the act gives the declaration greater importance than what is due to the mere assertion of a fact by a stranger, or a declaration by the party himself at another time. It is a part of the transaction, and may be given in evidence in the same manner as any other fact." *Hadley v. Carter*, 8 N. H. 40, 43. "Where evidence of an act done by a party is admissible, his declarations, made at the time, having a tendency to elucidate or give a character to the act, and which may derive a degree of credit from the act itself, are also admissible, as a part of the *res gestæ*." *Sessions v. Little*, 9 N. H. 271, 276.

After approving the statement quoted above from *Hadley v. Carter*, the court, in *Wiggin v. Plumer*, 31 N. H. 251, 267, state the principle as follows: "When a fact is offered in

evidence, their whole transaction, if it consists of many particulars, may and ought to be proven. Every additional circumstance proved may vary the effect of the evidence, may neutralize it, or give it point. What is then said by the parties, and what is said by others to them, relative to the subject of the transaction, is a part of the transaction itself. It is admissible on the same principle that every other part of it is, that the whole matter may be seen by the jury. * * *

Contemporaneous, but otherwise unconnected conversation, is rejected, on the same ground as other unconnected facts. If the statement offered in evidence does not tend to elucidate or give character to the acts proved, it is to be rejected. If it is upon the same subject and relative to the act in proof, it should be received." See also, to the same effect, *Mahurin v. Bellows*, 14 N. H. 209, 212; *Tenney v. Evans*, 14 N. H. 343, 350, 40 Am. Dec. 194; *Morrill v. Foster*, 32 N. H. 358.

But while admitting that the foregoing statements of the law are substantially correct, the defendant insists that a declaration of the character received in this case, in order to be admissible, must have been strictly and literally contemporaneous with the fact it was intended to elucidate or explain. In other words, it is in effect conceded that if, while the car wheels were passing over Baker's legs, he had exclaimed, "I fell over these old planks," that statement would have been admissible as a part of the *res gestæ*; but it is claimed that, although made within two minutes after the actual infliction of the injury, while he was lying between the planks, groaning on account of the pain, and while no substantial change had occurred in the attendant circumstances, it is not admissible, because the accident was then a past event, and the statement a mere narrative. But this technical refinement is not based upon a reasonable view of the principle involved. No satisfactory reason is assigned for the distinction suggested. If the statement of a party made while a serious injury is being inflicted upon him is regarded as an evidentiary fact throwing light upon the manner of the occurrence, why does not the same statement, made immediately after the principal event, as an intimately connected and natural result or detail thereof, in the presence of all the physical facts of the accident, constitute an equally admissible part of the proof? Why may it not be as much a part of the *res gestæ* as the fact that the declarant is found at the same time lying in a place and position indicating the manner of the accident? His position as well as his declaration may be to some extent subject to his volition. If the very short period of two minutes after a man's legs have been severed from his body in a railroad accident prevents his declaration then made from being deemed a part of the transaction, it is difficult to understand why his position, which may be as much subject to his intelligent control during that brief and trying interval of time as his power of verbal communication, should

Murray v. Boston & M. R. R

be regarded as a competent evidentiary fact explaining the manner of the accident. The fact is that both his declaration and his position may be, under the circumstances, credible and admissible evidence, for very similar reasons; and that to exclude the evidence in the one case, because it may be fabricated, would furnish a reason for its exclusion in the other. The possibility of its being unreliable would seem to relate to the weight, rather than to the admissibility of the evidence. That the doctrine of exact coincidence in such cases is not followed in this state is plainly indicated in *Caverno v. Jones*, 61 N. H. 623, 624, in which it was decided that, in trespass for assault and battery, threats to do the plaintiff bodily harm, made by the defendant so soon after the alleged assault as to constitute a part of the transaction, are competent. Nor do any of the decisions in this jurisdiction warrant the assumption that the defendant's theory has been adopted here. See cases above cited.

Cases in other states and in England, it must be admitted, are not in accord. Some adopt an unreasonably strict construction of the rule (*Reg. v. Bedingfield*, 14 Cox, C. C. 341; *State v. Davidson*, 30 Vt. 377, 73 Am. Dec. 312; *Eastman v. Railroad*, 165 Mass. 342, 43 N. E. 115, 3 Am. & Eng. R. Cas., N. S., 435; *Louisville, etc., R. R. v. Pearson*, 97 Ala. 211, 215, 12 South. 176; *Cleveland, etc., R. R. v. Mara*, 26 Ohio St. 185); others admit statements only remotely connected with the principal fact (*Insurance Co. v. Mosley*, 8 Wall. 397, 19 L. Ed. 437; *Commonwealth v. McPike*, 3 Cush. 181, 50 Am. Dec. 727; *Craig v. State*, 30 Tex. App. 619, 18 S. W. 297); while others adopt what seems to be the more rational view, as stated in *Commonwealth v. Hackett*, 2 Allen, 136, 140, that statements are admissible when "it appears that they were uttered after the lapse of so brief an interval, and in such connection with the principal transaction, as to form a legitimate part of it, and to receive credit and support as one of the circumstances which accompanied and illustrated the main fact" (*Rawson v. Haigh*, 2 Bing. 99; *Rouch v. Railway Co.*, 1 Q. B. 51; *Reg. v. Lunny*, 6 Cox, C. C. A. 477; *Waldele v. Railroad*, 95 N. Y. 274, 19 Am. & Eng. R. Cas., N. S., 400, 47 Am. Rep. 41; *Martin v. Railroad*, 103 N. Y. 626, 9 N. E. 505; *Estell v. State*, 51 N. J. Law, 182, 17 Atl. 118; *Mayes v. State*, 64 Miss. 329, 1 South. 733, 60 Am. Rep. 58; *Pittsburg, etc., Ry. v. Wright*, 80 Ind. 182; *Wood v. State*, 92 Ins. 269; *Keyes v. State*, 122 Ind. 527, 23 N. E. 1097; *Chicago, etc., Ry. v. Becker*, 128 Ill. 545, 21 N. E. 524, 15 Am. St. Rep. 144; *Lambert v. People*, 29 Mich. 71; *People v. Gage*, 62 Mich. 271, 28 N. W. 835, 4 Am. St. Rep. 854; *People v. O'Brien*, 92 Mich. 17, 52 N. W. 84; *Christianson v. Company*, 92 Wis. 649, 66 N. W. 699; *Fish v. Railway*, 95 Iowa, 702, 65 N. W. 995; *McMurrin v. Rigby*, 80 Iowa, 322, 45 N. W. 877; *State v. Rider*, 95 Mo. 474, 8 S. W. 723; *People v. Vernon*, 35 Cal. 49, 95 Am. Dec. 49. See, also, Professor Thayer's

article on *Bedingfield's Case*, 14 Am. Law Rev. 817; *Id.*, 15 Am. Law Rev. 71).

The seriousness of the injury, the character of the accident, and the surrounding physical circumstances and results of the occurrence, attending the declaration as well as the principal fact, are necessary matters for consideration in the determination of the question of the admissibility of the declaration. When a person receives a sudden injury, it is natural for him, if in the possession of his faculties, to state at once how it happened. Metaphorically, it may be said, the act speaks through him and discloses its character. It is as if it were a part of the act itself. This view of the common experience of mankind shows that, if the declaration has that character, it possesses an important element of reliability and significance which is foreign to narrative remarks made so long after the event as to derive directly no probative force from it, and that it should be admitted like any other material fact or evidentiary detail. If this principle of evidence may be difficult of application in practice, its soundness is not thereby weakened. A discriminating observance of it will promote the successful discovery of truth, which, without its aid, is often involved in great obscurity.

It is not contended that Baker's statement was not relevant, or that it did not tend to show how the accident happened; that is, the proximate cause of it. It was not mere hearsay, depending alone for its truthfulness upon the credibility of an unsworn witness. It was directly connected in point of time with the main fact, and was made while Baker was in the place where the force of the collision presumably threw him, and in view of all the surrounding physical facts connected with his misfortune. It cannot be said, therefore, as a matter of law, that his remark did not derive credit from the occurrence with which it was so intimately connected, or that it was not in a reasonable sense a part thereof and admissible in evidence. Although in form it was a narrative, it could not be excluded for that reason alone, if in other respects it was competent. Nor does the fact that it was made in answer to the witness' question deprive it of its character as a part of the *res gestæ*. *Fish v. Railway*, 96 Iowa, 702, 707, 65 N. W. 995; *Crookham v. State*, 5 W. Va. 510. To exclude it "would be practically to say that no declaration or statement, however near to the principal fact, or however important and material as giving to it color and significance, could ever be admitted in proof." *Commonwealth v. Hackett*, 2 Allen, 140. How far the question of the admissibility of such testimony may be determined by the trial court as a matter of discretion, it is unnecessary in this case to decide; for the exception to its admission presents no error. In *Commonwealth v. McPike*, 3 Cush. 181, 184, 50 Am. Dec. 727, it is said that, "in the admission of testimony of this character, much must be left to the exercise of the sound discretion of

Murray v. Boston & M. R. R

the presiding justice''; while the contrary of that proposition seems to be maintained in *Lund v. Tyngsborough*, 9 Cush. 36, 41.

The defendant insists that the motion for a nonsuit should have been granted, because Baker must be held to have assumed the risk in consequence of which he was injured. This contention, in effect, concedes that the defendant was negligent in permitting a jigger stand to be where this one was, and that it was an operating cause of the accident; but it is claimed the plaintiff cannot recover, for the reason that the danger incurred was one of the incidents of his intestate's employment. If the latter did not know of the existence of the jigger stand near the switch which he was about to operate, or if, in the exercise of ordinary care in the performance of his duties, he was not chargeable with such knowledge, he cannot be held responsible for consequences resulting from his failure to take such precautions for his safety as a knowledge of the danger would have suggested to a man of ordinary prudence. Otherwise he is precluded by the doctrine of the assumption of risk. "The plaintiff was bound to prove that the special danger causing the injury was not known to" Baker, "and in the exercise of ordinary care by him would not have come to his knowledge." *Burnham v. Railroad*, 68 N. H. 567, 44 Atl. 750.

If the fact that the accident happened is not alone sufficient evidence of the injured party's want of knowledge of the existence of the defective appliance causing it, or of his exercise of due care (*Huntress v. Railroad*, 66 N. H. 185, 34 Atl. 154, 49 Am. St. Rep. 600; *Gahagan v. Railroad*, 70 N. H. 441, 50 Atl. 146, 55 L. R. A. 426; *Waldron v. Railroad*, 71 N. H. 362, 52 Atl. 443), the manner of its occurrence, when that is in part disclosed by the evidence, may warrant an inference in his favor upon these points. In this case the plaintiff's evidence (which, upon this motion, is to be taken as true) showed that it was Baker's duty to set the switch which was near the jigger stand. This stand consisted of two planks about 15 feet long, placed at right angles with the track. When nearly opposite this place, at about 2 o'clock in the morning, Baker, who was on a car, went down over the side of the car to set the switch. The night was a dark one. Very soon thereafter he made an outcry, the car wheels passed over his legs, and he at once said he stumbled over the planks. His position immediately after the accident, the blood on the rail between the planks, as one witness testified, the pieces of his broken lantern near him, corroborated and supported the statement that he stumbled over the planks. If he had known that there was a jigger stand at that place, he would have known that some care was necessary to avoid falling over it in the performance of his work. It is hardly conceivable that he would have knowingly encountered that danger—that is, knowing the obstruction was directly in his way,

Murray v. Boston & M. R. R

he would have stumbled over it. The act of stumbling usually implies the existence of an object in a traveler's way of which he was at the time unconscious. It is no answer to say that Baker must have known of this obstruction because he had been over the road as a brakeman 10 or 12 times within 2 months of the accident; for it appeared that men who worked with him during that time had not noticed it before the accident. It was not so conspicuous as necessarily to attract the attention of brakemen. It is at least apparent that fair-minded men might reasonably draw the inference from the evidence (*Hardy v. Railroad*, 68 N. H. 523, 536, 41 Atl. 179, 12 Am. & Eng. R. Cas., N. S., 565; *Whitcher v. Railroad*, 70 N. H. 242, 245, 46 Atl. 740, 20 Am. & Eng. R. Cas., N. S., 540), that Baker did not know that his approach to the switch lay over a jigger stand.

But it is urged that he ought to have known it. His experience for many years as a freight brakeman must have afforded him the information that such stands are of frequent occurrence on the line of a railroad, and that they are necessary appliances at certain points for the use of the section-men. But while it appeared from the cross-examination of the plaintiff's witnesses that these appliances are numerous on lines of road on which Baker had worked, it also appeared that they are seldom placed near a switch, and usually lead into car houses, which would afford some notice of their existence. Upon the evidence, it might be found that a brakeman ought to know that in the vicinity of a car house there would in all probability be a jigger stand, and that its existence near a switch and away from a car house was so unusual as to make it unreasonable to say that a brakeman ought to anticipate such an arrangement at every switching point. It was not unreasonable for the jury to infer from the evidence that men of ordinary prudence in Baker's position, and possessing his knowledge of the means employed in the business of railroad-ing, would not anticipate the existence of a jigger stand at this particular point. If upon this subject fair-minded men might differ, the question should be submitted to the jury. It does not appear that Baker ought to have anticipated the peculiar obstruction which caused him to stumble.

The further contention is made that there is no evidence that Baker exercised reasonable care in the performance of his work at the time of the accident—a fact that the plaintiff was bound to prove by competent evidence. But it is not necessary that the evidence should be direct. The fact may be inferred from circumstances; and, in the absence of direct proof, the question is whether the circumstances legitimately warrant an inference of the fact. *Hutchins v. Macomber*, 68 N. H. 473, 44 Atl. 602; *Burnham v. Railroad*, 69 N. H. 280, 282, 283, 45 Atl. 563, 16 Am. & Eng. R. Cas., N. S., 320. When Baker was last seen before the accident, he was getting down over the side of the car nearly opposite the switch, for

Moser v. Union Traction Co

the purpose, evidently, of setting the switch. He was attending to his duty. He had had extensive experience as a brakeman, and understood perfectly how to perform his work with reasonable safety under ordinary circumstances. The time that elapsed after his lantern disappeared over the side of the car until he cried out was very brief. What he was doing during that short space of time is not a mere matter of conjecture. It was competent for the jury to infer that he was proceeding to reach the switch in the way an experienced brakeman would adopt under the circumstances, and that such a way would be a reasonably prudent one—not the opposite. The evidence was sufficient to warrant that finding, in the absence of any evidence tending to show that he was negligent. *Hutchins v. Macomber*, supra.

As there is no contention that the evidence did not warrant a finding of the defendant's negligence in permitting the jigger stand to be near the switch in question, no error is apparent in the trial, and the verdict must stand.

Exception overruled. All concurred.

MOSER v. UNION TRACTION CO.

(Supreme Court of Pennsylvania, May 4, 1903.)

[55 Atl. Rep. 15.]

Accident at Crossing—Directing Verdict.

Evidence in action against a street railway to recover damages for a collision at a street crossing with plaintiff's horse and wagon examined, and *held* to justify the court in directing a verdict for defendant.

Crossings—Stop, Look and Listen.*

The failure to look for an approaching street car is negligence per se, and the duty is not performed by looking when first entering on a street, but continues until the track is reached.

Appeal from Court of Common Pleas, Philadelphia County.

Action by William C. Moser against the Union Traction Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Edward A. Anderson and John H. Fow, for appellant.

Thomas Leaming and Charles Biddle, for appellee.

POTTER, J. Upon the trial of this case it appeared that the plaintiff did not look for an approaching car at the moment when he was about to cross the track, nor did he see that the car which struck him was near until after the collision occurred. For this reason, at the close of the plaintiff's testimony the learned trial judge entered a judgment of compulsory

*See foot-note appended to *Keenan v. Union Traction Co.* (Pa.), 2 R. R. R. 64, 25 Am. & Eng. R. Cas., N. S., 64.

Moser v. Union Traction Co

nonsuit. He was entirely justified in so doing. The plaintiff testified that as he came up Thirtieth street, to the southern line of Girard avenue, he stopped his horse and wagon at a point about opposite the building line, and waited for an east-bound car upon the track on Girard avenue nearest him to take on a passenger. While waiting there he looked up, and saw a west-bound car approaching upon the other track at Twenty-Ninth street. He made no move until the car going east had passed, and then he started his horse and wagon at a slow walk across Girard avenue, but did not look again for the approaching west-bound car, nor did he notice its position as he was entering upon the track in front of it, nor did he see it until after it struck his wagon. It was apparent that the plaintiff acted in disregard of the simple but effective rule of safety, which required him to look for the car just before he entered the track. The rule has often been declared by this court, and is reiterated in *Burke v. Union Traction Company*, 198 Pa. 497, 48 Atl. 470, as follows: "The duty to look for an approaching car is an absolute duty, and failure to do so is negligence per se. This duty is not performed by looking when first entering on the street, but continues until the track is reached. *Ehrisman v. East Harrisburg City Passenger Railway Company*, 150 Pa. 180 [24 Atl. 596, 51 Am. & Eng. R. Cas. 190, 17 L. R. A. 448]; *Omslaer v. Pittsburg, etc., Traction Company*, 168 Pa. 519 [32 Atl. 50, 47 Am. St. Rep. 901]; *Smith v. Electric Traction Company*, 187 Pa. 110 [40 Atl. 966, 12 Am. & Eng. R. Cas., N. S., 422]." The opinion emphasizes the fact that no question arises as to the proper place to look, in the crossing of the tracks of electric roads in cities, but that clearly the duty is to look just before crossing. The excellence of this rule as a measure of safety is so apparent that it needs no argument in its justification. No possibility of collision exists until the entry upon the line of the track is made. The driver of a wagon may stop so close to the track of a street railway that the nose of his horse may almost touch the passing car, and yet be safe. But when he undertakes to look for an approaching car while he is yet some distance away from the track, he can be guided by nothing more than conjecture as to the varying rates of speed with which both car and wagon are approaching a common point. Nothing is more commonly erroneous than the estimate of distance passed over by a continuously moving body in a short space of time. In the present case the plaintiff saw the car, which afterwards struck him, while it was yet some distance away. But he probably failed to take due note of the fact that it was steadily nearing, at a rapid gait, the point at which he wanted to cross its track. When he saw it, his team was standing at a point about opposite the southern building line of Girard avenue, waiting for an intervening car to pass out of his way. When it did so, he started his horse. To do this, with a slow-moving animal, would

Texas & Pacific Ry. Co. v. Watson

take an appreciable amount of time. He then drove slowly across the space between the line of the sidewalk and the first track, and across the first track, and upon the second track, without looking again to see where the car was. He was not justified in this indifference to the approach of the car. It was his plain duty to look for it and observe its position before driving upon the track in front of it. For his disregard of this duty, the trial court held that he could not recover in this action.

The judgment is affirmed.

TEXAS & PACIFIC RAILWAY COMPANY, Plff. in Err., v.
SAMUEL E. WATSON.

(Argued and Submitted March 20, 1903. Decided May 4, 1903.)

[23 Sup. Ct. Rep. 681.]

Fires Set by Locomotives—Evidence—Other Fires.*

Evidence that, at or about the time of a fire and of the passing of a locomotive which is claimed to have caused it, other fires were observed at various nearby points along the railroad track, is admissible on the issue of the liability of the railroad company for the value of the property destroyed by such fire, as tending to establish that such fire was caused by the locomotive in question, and as tending to show negligence in its construction or operation.

Same—Negative Evidence.

The testimony of witnesses to the effect that they did not know of or see any opportunity for certain cotton to have caught fire except from a passing locomotive is not inadmissible on the question of the liability of the railroad company for the value of such cotton, if objected to, not because of any omission to state the facts which induced the witnesses' belief, but because negative in character, irrelevant, and in the nature of a conclusion.

Same—Origin—Expert Testimony.

A competent expert witness may, on the trial of an action to recover the value of cotton claimed to have been destroyed by a fire set by a passing locomotive, give his opinion on a hypothetical state of facts based on the evidence as to whether a locomotive which in moving $4\frac{1}{4}$ miles should set from five to eight fires and should emit live cinders was properly operated or constructed, where there is evidence that it is impossible, even with the most effective spark arresters, to prevent the escape of sparks.

Evidence—Depositions.

Permitting the deposition of a witness to be read when the witness is actually in court and his presence is known is not prejudicial error, where he is subsequently called by the objecting party, and gives fully his explanation of the deposition and his testimony as to the subject to which it related.

Fires Set by Locomotives—Spark Arresters—Instructions.

An instruction that a railroad company was not liable for a loss from a fire set by a passing locomotive, if it used "the most approved spark arrester, at the time in good condition," and the engine was then and there operated with ordinary care and prudence; but that it was so liable if it failed "to use the most approved spark arrester and apparatus connected with the engine as in ordinary use by properly conducted

*See foot-note appended to *Abrams v. Seattle & M. Ry. Co.* (Wash.), 2 R. R. R. 465, 25 Am. & Eng. R. Cas., N. S., 465.

Texas & Pacific Ry. Co. v. Watson

railways to prevent the escape of fire," so far as it could consistently be done in its business,—is not open to the objection that it left the jury to consider the original construction of the spark arrester irrespective of its condition at the time of the fire.

Same—Contributory Negligence—Liability—Instructions.

A requested instruction that a person storing his cotton near a railroad assumed the risks which were to be anticipated from engines properly equipped with appliances for preventing the escape of sparks when properly operated need not be given in an action to recover the value of such cotton claimed to have been destroyed by a fire set by a passing locomotive, where the jury are told that no recovery could be had if the railroad company was not negligent in respect to the equipment and operation of the engine, and were fully instructed as to contributory negligence and its effect.

Same—Exemptions from Liability—Who Entitled to Benefit.

Stipulations and exemptions from liability for loss caused by fire, contained in a lease under which the lessee holds possession and occupancy of a storage platform near a railroad, are not binding on one not in privity with such lessee, who, without knowledge of such stipulations, stores his cotton on such platform.

In Error to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Eastern District of Texas establishing the liability of a railroad company for the value of cotton claimed to have been destroyed by a fire set by a passing locomotive. Affirmed.

See same case below, 50 C. C. A. 230, 112 Fed. 402.

Statement by MR. JUSTICE WHITE:

This action was originally commenced in a Texas state court by the appellee Watson, to recover the value of 64 bales of cotton, less insurance thereon. The cotton was alleged to have been destroyed by fire on January 3, 1896, while stored upon what was known as the O'Neil cotton platform near the depot of the railway company at Clarksville, Red River county, Texas. The fire was averred to have been occasioned by the negligence of the railway company in the use of a defectively constructed locomotive and in the careless operation thereof while passing said platform. Subsequently the insurance company was joined as plaintiff, and recovery was asked of the full value of the cotton. Upon application of the defendant, based upon the fact that it was incorporated under the laws of the United States, the cause was removed to the United States circuit court for the eastern district of Texas. In the latter court an amended answer was filed. This pleading contained general and special demurrers, a general denial, and a special answer setting up various defenses.

The general and special demurrers were subsequently overruled, and defendant excepted. A trial was had, and it was shown by the evidence that at the point where the fire in question occurred the track of the railway company ran east and west, and the train which it was asserted caused the fire in question was moving eastward, and a strong wind was blowing from the north. A verdict was rendered in favor of

Texas & Pacific Ry. Co. v. Watson

the plaintiff Watson and against the railroad and against the plaintiff insurance company in favor of the railroad. Judgment was entered on the verdict; the judgment was affirmed by the circuit court of appeals for the fifth circuit (50 C. C. A. 230, 112 Fed. 402), and the cause was then brought to this court by writ of error.

Messrs. David D. Duncan, John F. Dillon, and Winslow S. Pierce for plaintiff in error.

Messrs. J. W. Bailey, E. S. Chambers, and Amos L. Beaty for defendant in error.

MR. JUSTICE WHITE, after making the foregoing statement, delivered the opinion of the court:

The various assignments of error relied upon in the brief of counsel for plaintiff in error will be disposed of in the order therein discussed.

First. In several assignments it is claimed that the circuit court of appeals erred in holding that the trial court properly admitted the evidence of witnesses to the effect that at or about the time of the fire complained of, and about the time of the passing of the locomotive which it was charged occasioned the fire, the witnesses observed other fires at various points not far removed from the place where the cotton was burned and south of and near to the railway track. In the light of the decision of this court in *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454, 470, 23 L. Ed. 356, 362, we think this evidence was competent as having a tendency to establish that the destruction of the property of the plaintiff was caused by the locomotive in question, and as tending to show negligence in its construction or operation.

Second. In an assignment of error it was contended that the appellate court erred in holding that the trial court properly admitted testimony to the effect that certain witnesses did not know of and saw no opportunity for the cotton to have caught fire except from the locomotive in question. The evidence in the record is in narrative form, and that portion relating to the criticized testimony merely recites that at the time said evidence was offered from each witness "defendant then and there objected, because the evidence was of a negative character and would not be relevant, and further, because it was in the nature of a conclusion of the witness to the effect that the fire had originated from the engine." Whether the question which elicited the testimony complained of was objectionable cannot be determined from the record, nor does the objection seem to have been addressed to an omission to state the facts which induced the belief that no other opportunity existed for the cotton to have caught fire than was afforded by the operation of the locomotive. Evidence of the surrounding circumstances and conditions which by process of exclusion would have tended to establish that the burning of the cotton could not have been caused other than by the locomotive in question would, we think, have

been clearly relevant. As the record stands, we think the assignment in question was without merit.

Third. A further contention is that the appellate court erred in permitting a question to be answered despite the objection that "the evidence sought to be elicited was not such as was the subject of expert testimony, but the endeavor was to substitute a conclusion of the witness for that of the jury, and it was not allowable by a hypothetical question, such as this and the answer thereto, to prove the bad equipment of the engine in the face of the actual testimony that the equipment was all in good order." The following is the question referred to:

"Suppose an engine should come along, and in the course of 4 miles and $\frac{1}{4}$ should set out, say, eight fires, should set fire to the grass in some of these places, set fire to shavings 60 feet from the right of way, set cotton on fire, and that live cinders could be seen falling and did fall and smoked after falling on the round, over the work benches and things and over platforms, would you say there was anything wrong about the operation or construction of that engine, or would you say it was all right? And suppose, instead of being eight fires, there were five under the conditions named to you, what would you say?"

The question was proper. The witness was foreman of the boiler department at the main shops of the defendant, having to do with the building of boilers, and was in special control of the part of the shops which had to do with spark arresters. The hypothetical question was based upon evidence, and if the witness was competent—as the evidence showed he was—to testify whether or not an engine so conducting itself was or was not in good working order or properly operated, we think the jury should have had the benefit of his opinion. Inasmuch as there was evidence to the effect that it is impossible, even with the use of the most effective spark arresters, to prevent the escape of sparks, a case was presented justifying the introduction of expert testimony to aid the jury in determining the ultimate fact whether an engine was in good repair and properly operated which conducted itself as the evidence tended to show this locomotive did. *Eastern Transp. Line v. Hope*, 95 U. S. 297, 298, 24 L. Ed. 477.

Fourth. It is asserted that the appellate court erred in holding that prejudicial error was not committed in permitting the deposition of a witness to be read when the witness was actually in court and his presence was known to the plaintiff. We adopt as our own the language of the circuit court of appeals on this point:

"In view of the facts that the witness was called by the defendant after the deposition had been admitted over the defendant's objection, and gave fully his explanation of the deposition and his testimony as to the subject to which it related, we conclude that the error committed is not sufficiently grave in its results to require us to reverse the case."

Fifth. It is claimed that the appellate court erred in hold-

Texas & Pacific Ry. Co. v. Watson

ing that the trial court rightly left it to the jury to determine that, if the railway company failed to use the most approved spark arrester, and plaintiff was free from contributory negligence, he could recover. This contention is based upon the assumption that there was no evidence tending to show that the most approved spark arrester was not used. We do not pause to analyze the evidence on the subject, because we think it not necessary to do so. The proposition, considering it in the light most favorable for the plaintiff in error, is but an abstraction, and assumes that, because it may be that at one time the spark arrester was of the most approved pattern, it continued to be such, even although it was not in good repair at the time of the fire and such defective condition occasioned the loss complained of. The court instructed that the jury must give a verdict for the railroad if it was found that it "did use the most approved spark arrester, at the time in good condition, and that the engine was then and there operated with ordinary care and prudence;" and, in stating the converse of the proposition, said: "But if the railroad failed to use the most approved spark arrester and apparatus connected with the engine as in ordinary use by properly conducted railways to prevent the escape of fire, in so far as it could consistently be done with the business" which the railroad was carrying on, a verdict should be returned against the railroad, provided it was found that the plaintiff Watson had not contributed to the injury. This charge as a whole we think is not amenable to the objection that it left to the jury to consider the original construction of the spark arrester, irrespective of its condition at the time of the fire. The expression, "as ordinarily used by properly conducted railways," of necessity implied that the apparatus must have been kept in proper condition for use. To construe to the contrary would presuppose that conflicting measure of liability were given to the jury by the court when it pointed out the opposing views which the jury were authorized to deduce from the proof. Thus rightly construing the charge, there was beyond peradventure evidence to be weighed by the jury in determining whether the spark arrester was or was not in satisfactory working order at the time the cotton was set on fire. Several witnesses testified that the engine emitted considerable fire and cinders, and the evidence upon which the hypothetical question quoted in subdivision third of this opinion was based clearly rebuts the assumption that there was not evidence of circumstances to be considered by the jury in connection with the evidence introduced by the defendant of the condition of the engine, spark arrester, etc., as disclosed by an inspection thereof. So, also, the answer to the hypothetical question clearly contained matter pertinent for the consideration of the jury in determining whether the engine was properly equipped and operated. The witness said:

“An engine that will do as you have stated is doing something unusual, very unusual. If there was dry and combustible material close to the track a spark from the ash pan might drop among it and set fire. What you said might have occurred, but it would be very unusual. I could not say that there would be anything wrong in the operation of the engine, but there might have been something deranged about the ash pan is the only way I could account for it. If the engine did set out sparks in the manner stated by you, I cannot believe that the engine was in quite perfect condition.”

Sixth. A further assignment of error is to the effect that the appellate court erred in holding that error was not committed in refusing to charge the jury that plaintiff, in placing his cotton upon the platform, assumed the risks which were to be anticipated from engines properly equipped with appliances for preventing the escape of sparks and properly operated, and in saying to them that contributory negligence and assumed risk amount to the same thing. But the court charged the jury that, even though the cotton was set on fire by sparks communicated from the engine, yet, if the defendant used the most approved spark arrester, and the engine was operated with ordinary care and prudence, the plaintiff could not recover. As the court also fully instructed the jury as to what would have constituted contributory negligence on the part of Watson as respected the storing of his cotton on the platform, and informed the jury that recovery could not be had if there was such contributory negligence, it is quite clear that the jury could not have been misled by the failure of the trial court to point out the distinction between assumed risk and contributory negligence. It is not perceived, for instance, how the jury could have been aided in reaching a conclusion if, in addition to being informed that the plaintiff could not recover if the railway company was not negligent in respect to the equipment and operation of the engine, they were told that the plaintiff “assumed the risks which were to be anticipated from engines properly equipped with appliances for preventing the escape of sparks, and properly operated.”

Seventh. The remaining assignment of error is to the effect that error was committed by the appellate court in affirming the judgment despite the fact that the trial court refused to admit in evidence the stipulations and exemptions from liability for loss caused by fire contained in the lease under which the lessee held possession and occupancy of the storage platform on which the cotton in question was when destroyed by fire. As Watson was not in privity with the lessee,—and it is conceded he had no knowledge of such stipulations when he stored his property on the platform,—there was no tenable ground on which to contend that he was in anywise bound by the stipulations in question.

Judgment affirmed.

JOHNSON, NESBITT & CO. *v.* GULF & CHICAGO R. CO.*(Supreme Court of Mississippi, April 27, 1903.)*

[34 So. Rep. 357.]

Freight—Delivery to Stranger—Trover—Right of Action—Right to Waive Tort—Assignment of Owner's Claim.

Where a carrier who by mistake delivered cotton to a stranger had the right to sue in its own name in trover, it could waive the tort and sue for value, without averment and proof of an assignment to it by the consignor of his interest.

Same—Same—Right of Action—Assignment of Claim.

Where cotton belonging to T. & Co. was delivered by a carrier to a stranger by mistake, an assignment by T. of his interest therein transferred his right to sue to the carrier.

Appeal from Circuit Court, Tippah County; P. H. Lowrey, Judge.

Action by the Gulf & Chicago Railroad Company against Johnson, Nesbitt & Co. Judgment for complainant, and defendants appeal. Affirmed.

Johnson, Nesbitt & Co. were cotton buyers in Birmingham, Ala., and in the fall of 1897 they had an agent at Pontotoc, Miss., buying cotton. J. W. Taylor & Co., of Corinth, Miss., had bought some cotton at Pontotoc, which was on the Gulf & Chicago Railroad, and in November, 1897, 26 bales of their cotton were delivered to the agent of the Gulf & Chicago Railroad Company, and by some mistake of the agent this cotton was shipped to Johnson, Nesbitt & Co., via the Southern Railway Company, to Decatur, Ala., to be compressed, and was delivered to the Decatur Compress Company. The compress company afterwards shipped the cotton out for Johnson, Nesbitt & Co. In January, 1900, the Gulf & Chicago Railroad Company paid Taylor & Co. for the 26 bales of cotton, and Taylor & Co. assigned their interest in the claim to the Gulf & Chicago Railroad Company. The proof as to assignment is as follows: "It was an assignment from J. W. Taylor, and a statement of the receipt of the money for this cotton Mr. Young shipped and was lost for the G. C. R. R. Co., and an assignment of his interest in it." In March, 1900, the Gulf & Chicago Railroad Company brought this suit against Johnson, Nesbitt & Co. for the conversion of the 26 bales of cotton to their use. Appellants admitted the receipt of the cotton, and the delivery of the cotton to the Decatur Compress Company on their order, but deny liability to the appellee, because they say at the close of the cotton season of 1897-98 they returned to the Decatur Compress Company the proceeds of the cotton. The court gave a peremptory instruction to find for the plaintiff. It is contended for appellants that appellee had no right of action against them, because the assignment by J. W. Taylor to the Gulf & Chicago Railroad was only for his interest in the cotton, and

Boulden v. Pennsylvania R. Co

no claim against Johnson, Nesbitt & Co. was assigned by Taylor & Co.

Jones, Speight & Knox, for appellants.
J. W. T. Falkner, for appellee.

CALHOON, J. If the appellee could have sued in its own name in trover under 26 A. & E. Enc. of Law (1st Ed.) p. 755, and note to Harker v. Dement, 52 Am. Dec. 678, 679, it could waive the tort and sue for value, and averment and proof of the assignment by Taylor were unnecessary. But we think the evidence shows such assignment by Taylor of his interest as carried his right to sue, even if such right did not exist before. The case of Gabbert v. Wallace, 66 Miss. 621, 5 South. 394, is not similar to this. The case before us is not the case of assignment of debt secured by trust deed. We think the damages sufficiently shown.

Affirmed.

BOULDEN v. PENNSYLVANIA R. CO.

(*Supreme Court of Pennsylvania, March 30, 1903.*)

[54 Atl. Rep. 906.]

Wrongful Death—Right of Action—Foreign Administrators.

A New Jersey administrator may maintain an action for wrongful death in Pennsylvania, where the cause of action arose in New Jersey, without an ancillary administration being appointed in Pennsylvania.

Same—Mitigation of Damages—Relief Department.

In an action for wrongful death, brought by an administrator of an employee of a railroad company, defendant cannot show, in mitigation of damages, that the mother of the deceased would receive from the relief department of the road, of which deceased was a member, certain death benefits.

Mitchell, J., dissenting.

Appeal from Court of Common Pleas, Philadelphia County;
Davis, Judge.

Action by Kate R. Boulden, administratrix of Frank R. Boulden, against the Pennsylvania Railroad Company. Verdict for plaintiff, and defendant appeals. Affirmed.

The court overruled an offer of defendant's counsel to prove by John C. Van Rodan, and by the documents by him to be produced, that Frank R. Boulden, the decedent, was a member of the Pennsylvania Railroad Voluntary Relief Department, and had agreed to be bound by the regulations of said department; that he had directed that the benefits payable upon his death should be paid to his mother, Madeline Boulden; that he had agreed in the stipulations signed by him that the acceptance of benefits from the relief fund for injury or death should release all claims for damages against the company defendant arising from such injury or death; that after the death of said Boulden the claim for death benefits was made by the beneficiary, to wit, his mother,

Boulden v. Pennsylvania R. Co

Madeline Boulden, who was one of the persons entitled to damages, if any, under the Acts of Assembly of the State of New Jersey; that a release by the said Madeline Boulden was duly executed on the payment and receipt by her of the sum of \$500, to which she, as the beneficiary named by the decedent as a member of the second class of the relief association, was entitled; furthermore that the company defendant paid all the expenses of the relief association, amounting to \$130,000 annually; that the said company is responsible for any deficiencies, without which contribution and guaranty the relief association could not exist; that the members of the relief association number 60,000; and that the foregoing offers were proposed to be followed by putting in evidence the regulations of the relief department, and also the other papers produced by the witness. The court refused binding instructions for the defendant. Verdict for plaintiff for \$15,500. Judgment was entered for \$12,000, all above having been remitted.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

George Tucker Bispham and John Hampton Barnes, for appellant.

Augustus Trask Ashton, for appellee.

MESTREZAT, J. Frank R. Boulden, a resident of New Jersey, was seriously injured in a collision between two trains while being carried on the defendant company's road as a passenger between Camden and Trenton, in that state, on February 21, 1901, and as a result of which injuries he died two days thereafter. He left to survive him a widow and a mother, both residing in New Jersey, where letters of administration on his estate were duly granted to his widow, Kate R. Boulden. No administration was raised in this state. It was admitted that the collision in which Boulden was injured was caused by the negligence of one of the company's employees, and that the defendant would have been liable to Boulden for the injuries he received if death had not ensued.

As appears by the statement filed in this case, "the plaintiff, Kate R. Boulden, administratrix of the estate of Frank R. Boulden, deceased, as the personal representative of said Frank R. Boulden, deceased, brings this suit against the Pennsylvania Railroad Company to recover damages for the exclusive benefit of the widow and next of kin of the said Frank R. Boulden, deceased, by reason of the death of the said Frank R. Boulden through the negligence of the defendant, the Pennsylvania Railroad Company, its servants, agents, or employees." The action was instituted in pursuance of a statute of New Jersey of March 3, 1848 (P. L. 151), as amended by that of March 31, 1897 (P. L. 134), which is, *inter alia*, as follows:

"Section 1. Whenever the death of a person shall be caused

Boulden v. Pennsylvania R. Co

by a wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

“Sec. 2. Every such action shall be brought by and in the names of the personal representatives of such deceased person; and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate: * * * provided, that where such deceased person has left or shall leave him surviving a widow, but no children, or descendants of any children and no parents, the widow shall be entitled to the whole of the damages, which she shall sustain and which shall be hereafter recovered in any such action, and the same shall be paid to her.”

The trial of the cause in the court below resulted in a verdict and judgment for the plaintiff. The defendant company has appealed.

The second and third assignments of error were abandoned on the argument of the case. The other assignments raise two questions: (1) Was the defendant company entitled to show in mitigation of damages that the deceased was a member of its relief department, and that his mother, as his beneficiary, received the death benefits to which his membership therein entitled her? (2) Could the plaintiff, as administratrix, duly appointed in New Jersey, without ancillary letters having been granted in this state, bring an action here under the New Jersey statute to recover damages resulting from the death of her intestate?

1. Both of these questions were determined by the learned trial judge in favor of the plaintiff, and we think rightly so. It will be observed that this action was brought in pursuance of the provisions of a statute of New Jersey. The beneficiaries named in the statute are the widow and next of kin, who in this instance appears to be the mother of the deceased. Whatever damages may be recovered will be distributed between the widow and the mother in the proportion provided by the intestate laws of New Jersey. The individuals, however, who are beneficiaries under the statute, are not named in, nor parties to, this suit, which was instituted, pursuant to the statutory requirement, “by and in the name of the personal representative of the deceased.” The mother, therefore, was not a party to the action; nor, so far as the plead-

Boulden v. Pennsylvania R. Co

ings disclose, was she entitled to receive any part of the damages that might be recovered. The only questions in the case were whether a right of action had accrued to the personal representative of Boulden by reason of his death having been caused "by the wrongful act, neglect, or default" of the defendant company, and, if so, the amount of the damages thus sustained. If the first proposition were answered in the affirmative by the jury, their verdict would necessarily be in favor of the personal representative for the full amount of the damages, irrespective of the amount to be awarded the several distributees named in the statute. The jury was not required to determine, as part of the issue submitted to them, whether one of the beneficiaries had received her share of the damages recoverable by the personal representative. If it be conceded that one of the parties interested in the damages had received her share, it could not defeat the right of the plaintiff to have determined in this action the amount of damages caused by the death of the intestate. No release or acquittance given by one of the parties having a beneficial interest, therefore, could be interposed as a defense in this action of trespass. What persons are entitled to participate in the distribution of the sum recovered in the action, and the amount to be awarded each of the distributees, must be determined after this suit has been successfully terminated. The right of the defendant company to the whole or any part of the share of any beneficiary in the fund may then be considered and determined.

2. We have held that a suit will lie here for a cause of action arising in another state out of the alleged negligence of the defendant in that state, resulting in death. *Knight v. West Jersey R. Co.*, 108 Pa. 250, 26 Am. & Eng. R. Cas. 485, 56 Am. Rep. 200. It has also been expressly decided by this court, in a case arising under the New Jersey statute in question here, that the only proper plaintiff in such action in Pennsylvania is the individual in whom the right of action is vested by the laws of the state where the injuries were inflicted. *Usher v. West Jersey R. Co.*, 126 Pa. 206, 17 Atl. 597, 41 Am. & Eng. R. Cas. 508, 4 L. R. A. 261, 12 Am. St. Rep. 863. The New Jersey statute provides that the "action shall be brought by and in the names of the personal representatives of such deceased person." This action was brought, in compliance with the statute, in the name of the personal representatives of Frank R. Boulden, the deceased, and the statement avers that the damages are recoverable for the exclusive benefit of his widow and next of kin. It would therefore appear that in this action the plaintiff has followed strictly not only the statutory requirement, but our construction of it. The defendant company contends, however, that the letters of administration granted the plaintiff in the state of New Jersey do not confer upon her authority to bring an

Boulden v. Pennsylvania R. Co

action here without having taken out letters ancillary in this jurisdiction. This contention is based upon the sixth section of the act of March 15, 1832 (P. L. 136; Purd. Dig. p. 407, par. 13), which provides as follows: "No letters testamentary or of administration, or otherwise, purporting to authorize any person to intermeddle with the estate of a decedent, which may be granted out of this commonwealth shall confer upon such person any of the powers and authorities possessed by an executor or administrator, under letters granted within this state." It is unquestionably true that the plaintiff is not authorized to intermeddle with the assets of the decedent within this state. Our statute plainly forbids her assuming any such authority. But in this action, as we have seen, she is not seeking to recover the assets of the decedent, nor any money in which the decedent, or those claiming through him, have any interest whatever. No heir, legatee, or creditor of the decedent can have any claim on the fund collected in this suit. The statute of 1832 therefore has no application to the facts of the case. The right of action for damages resulting from death did not survive at common law. This action, therefore, is purely statutory; the right to recover here being founded on a statute of New Jersey. It created the cause of action, named the party who should enforce it, and designated the beneficiaries under it. It is elementary law that the statute must be strictly pursued, and hence the rights secured by it can only be enforced by an action in the name of the party therein specially authorized. As we have seen, the New Jersey statute confers the right of action in cases of this kind on the personal representative of the deceased. He acts, therefore, not by the authority which the probate court gave when it granted him the power to administer the estate of the deceased, but solely by virtue of the authority vested in him by the statute. It designated the personal representative of the deceased, whoever he might be, as the party to enforce the right of action given by the statute. In bringing this suit, therefore, the plaintiff does so not as the personal representative of her deceased husband, and by virtue of the authority conferred upon her as such, but as the representative or trustee of the parties for whose benefit the action was instituted, and by the authority conferred upon her by the statute. The right of action might have been conferred upon the beneficiaries themselves, or upon any private person or public official; and, if it had been, it is too clear for argument that there could be no question of the right of the person or official thus designated to maintain the action. The fact that the Legislature of New Jersey saw proper to invest the right to bring the action in the person acting as the personal representative of the deceased, instead of conferring the authority upon some other person or official, does not make the person the representative of the deceased in prosecuting the case,

Chicago, etc., Ry. Co. v. Sporer

and therefore bring him within the prohibition of the act of 1832.

We think it is clear that the plaintiff, who is the personal representative of the deceased in the state of New Jersey, could bring this action without having taken out ancillary letters of administration in this state. The assignments of error, therefore, are overruled, and the judgment is affirmed.

MITCHELL, J., dissents.

CHICAGO, R. I. & P. RY. CO. v. SPORER.

(*Supreme Court of Nebraska, May 6, 1903.*)

[94 N. W. Rep. 991.]

Directing Verdict.

The trial court is not required to submit a case to the jury unless the evidence supporting it is of such a character that it would warrant the jury in basing a verdict upon it.

Conflict of Evidence—Question for Jury.

Conflicting evidence is for the jury, and where there is a conflict of evidence upon a material issue it is error to direct a verdict for either party.

Conflicting Evidence.

Evidence may be said to be conflicting where there is substantial evidence upon either side in the controversy. A fact may be so conclusively established that slight evidence, suspicious and uncertain, will not be allowed to overthrow it.

Crossings—Care Required in Constructing.

It is the duty of a railroad company in constructing its crossings over a highway to take all reasonable precautions to lessen the danger to the public in crossing its road.

Speed of Train—Question for Jury.

In this case it was for the jury to determine the rate of speed at which defendant's train was running at the time of the accident, and whether, under the conditions obtaining at the crossing, the company was negligent in running its train at such rate of speed.

Instructions.

Conflicting instructions are erroneous, and one which misstates the law upon a vital issue is not cured by another which states the law correctly.

(Syllabus by the Court.)

Error to District Court, Cass County; Ramsey, Judge.

Action by William Sporer, administrator of Henry J. Hennings, against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

W. F. Evans, S. M. Chapman, Billingsley & Greene, Wm. V. Allen, and W. E. Reed, for plaintiff in error.

H. D. Travis and J. L. Root, for defendant in error.

SEDGWICK, J. The plaintiff's intestate was killed by one of the defendant's trains while he was driving across its track between the stations of Murdock and South Bend, in Cass county. He recovered a judgment for damages in the

district court of Cass county, which the company has brought here for review. Defendant's passenger train No. 6, running from Lincoln to Omaha, left Murdock about 10 minutes behind its schedule time, and at the second section line crossing from Murdock the accident occurred. The petition alleged that the defendant was negligent in constructing its railway at the crossing of the highway, and that it so negligently and carelessly operated its train that "no whistle was sounded or bell rung before it approached said crossing," and was carelessly running its train at a high rate of speed, to wit, about 60 miles per hour. The defendant denied these allegations of negligence, and alleged contributory negligence on the part of the deceased.

Just south of the highway on which the deceased was driving there is a rise of ground or hill from 300 to 400 feet in height. The railway runs in a northeasterly direction from Murdock, and as it passes along on the east side of this hill it bends toward the north, and crosses the highway nearly at right angles, and extends therefrom eastward in a straight line for a distance of from one-half a mile to a mile. It has a downward grade continuously from Murdock until after the crossing in question is passed, and as it passes the crossing in question runs through a deep cut along the brow of the hill, which at a distance of about 1,200 or 1,500 feet from the crossing is 16 feet in depth. From this point to the crossing the depth of the cut gradually diminishes until, when the track reaches the crossing, it is not more than 4 feet in depth. In making this cut the earth was thrown up in embankments, and the ground is cultivated in crops, so that in June, when this accident occurred, a train approaching through this cut cannot be seen by a person approaching the crossing from the west when more than 200 feet from the crossing. The deceased was driving with a team and single-seated covered buggy with his little girl, five or six years old, who was sleeping in the forward part of the box of the buggy, and approached this crossing from the west. The team was struck by the train, and the horses and driver were instantly killed and the buggy destroyed. The child seems not to have been injured.

1. It is contended that there was negligence shown on the part of the company in running the train. The conductor, engineer, and fireman and other employees of the railroad company testified positively and clearly that the whistle was duly sounded at the proper distance from the crossing, and continuously, until the train approached the crossing, and that the bell rang also continuously. The evidence of these witnesses should, of course, have been given its proper weight in determining that question.

We quote from the evidence of some of the other witnesses upon this point, as follows:

John Stroy, Sr., who was a farmer, and had lived on an

adjoining section for 22 years, was asked: "Q. Do you know where the crossing is? A. Yes, sir. Q. At the time of the accident how far were you from the crossing? A. About eighty rods. Q. Which way? A. East of the track. Q. What were you doing? A. Going over crossing there to my son's place. Q. Go ahead in your own way and tell the court and jury just what you saw and what you heard in the way of sounding the whistle. A. I went over across to see my son. I saw the train coming out of the cut—not this cut up to the crossing, a little cut a little further south—and when the train came out of that cut, and before she got to the whistling post, I saw the steam pipe up, and I heard the whistle, and they did that four times, but the last time I couldn't see the steam because they got behind the grove. I am positive that they whistled four times before they got to the crossing. Q. You know where the whistling post is, do you? A. Yes, sir. Q. You had known the railroad at this point ever since it was constructed? A. Yes, sir; I know every foot. Q. You speak of the train coming out from the cut. What cut do you mean? The cut south of the whistling post. Q. The one you speak of is south of the whistling post? A. Yes, sir. Q. The whistling post is between two cuts? A. Yes, sir. Q. State whether it was coming out of the south cut when you first saw it. A. Yes, sir. Q. State whether or not, Mr. Stroy, the train was coming out of the south cut when it first whistled, and whether or not it was before it reached the whistling post. A. It came out of the south cut, and before it seemed to come to the whistling post, as I said before, I saw the steam pop up on the engine, and then directly the sound came from the whistle. Q. How far would you say that whistle could be heard—what distance? A. I should judge about two or three miles. Q. Was it plain and distinct. A. Just as plain as could be. Q. You had no difficulty in hearing it? A. No, sir. Q. How far were you from it? A. Eighty rods." In an able and searching cross-examination his evidence was strengthened rather than discredited.

Henry Baumgardner was plowing corn in a field just east of the crossing at the time of the accident, and testified as follows: "Q. Do you remember the time of the accident in question? A. Yes, sir. Q. Where were you at that time? A. Plowing corn. Q. Who for at that time? A. Mr. Stroy. Q. And when [where] were you plowing corn? A. About twenty or thirty rods east of the railroad track. Q. You know where the crossing is in question? A. Yes, sir. Q. You know where the whistling post south of that crossing is? A. Yes, sir. Q. Which way were you from the crossing? A. East side of the railroad. Q. How far from the railroad? A. About twenty or thirty rods. Q. Did you see the train that collided with the team? A. No, sir. Q. I mean the train that was in the collision; did you see that train that day? A. Yes, sir. Q. Where did you first see it? A. I saw

the train coming through the cut. Q. Which cut do you speak of? A. The cut where the accident happened. Q. Where did you first see the train? Where was it when you first saw it? A. North of that grove there, when it passed the grove. Q. Was it north or south of the whistling post? A. A little bit north. Q. When did you hear the train whistle, if at all? A. It was south of the whistling post. Q. How many times did you hear the train whistle? A. Several times. Q. How long did it continue to whistle? Where was the train when the whistling stopped? A. It whistled all the way through the cut. Q. Commenced whistling, you say, south of the whistling post? How far south of the whistling post was it when you heard it whistle? A. I couldn't say how far it was south. Q. Was it a loud whistle? A. Oh, I couldn't say that, how loud it was. Q. How far do you think a person could hear the whistle? A. A couple of miles.

J. C. Stroy, Jr., who was also plowing corn in a field but a few rods from where the accident occurred, testified as clearly and directly to the same effect. Also Mr. Lefler, who was buying grain at the time and was driving across the country with his team, and was about a mile east of the crossing where the accident happened, who testified that he saw the train when it was leaving Murdock, heard it whistle at the crossing a mile from Murdock, and heard it whistle at the crossing in question. He says that he heard it whistle several times while it was south of the crossing, and that there was several blasts each time. He could hear it plainly. Several others who were working in the field near by the accident testified clearly and positively to the same facts. Also some passengers upon the train gave clear and positive testimony to the same effect. The plaintiff produced but one witness who testified upon that point. This was Henry Hollenbeck, a passenger on the train, who was asked: "Q. State whether or not they whistled or rang the bell before reaching the crossing. A. No, sir; I don't think they did." And upon cross-examination he was questioned and answered as follows: Q. How far was the train north of the crossing when you heard the whistling? A. They had commenced slacking up. Q. About how far north of the crossing? A. Probably a quarter of a mile. Q. When you heard the whistle the first time? A. Yes, sir. Q. Now, prior to that time, all you know is you didn't hear any bell or whistle? A. No, sir; I didn't hear any whistle or bell. Q. This is all you know about it, that you didn't hear any whistle or bell? A. I know I didn't hear it. Q. This is all you do know about it, isn't it? A. I don't think they whistled. Q. You don't know? A. I am willing to swear that they did not whistle." On redirect examination he was asked: "Q. With reference to the time you felt this jolt, when did the whistle sound? A. Some after. Q. Right after? A. Yes, sir." The defend-

ant then asked him: "Q. About a quarter of a mile from the crossing? A. Yes, sir; I should think so." He was then asked by the plaintiff: "Q. You wish the jury to understand that the train didn't commence whistling until about the time it stopped?" Defendant excepted as leading and suggestive, and the court said, "State the facts;" whereupon he answered: "A. Yes, sir; they commenced whistling. Well, after they commenced to stop, the first I heard after I felt the jar, I heard the whistle."

This was all of the testimony given by this witness upon this point. It is to the effect that he heard the whistle after the train had passed the crossing about a quarter of a mile, and that he did not hear the whistle before that time.

"Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence." *Commissioners of Marion County v. Clark*, 94 U. S. 278, 24 L. Ed. 59. "Conflicting evidence is for the jury to weigh, and when there is a conflict in evidence upon a material issue it is error to direct a verdict for either party." *Paxton v. State*, 60 Neb. 763, 84 N. W. 254.

The rule has been similarly stated in many decisions of this court, in some with language possibly not so accurate. To say that evidence is conflicting is to imply that there is substantial evidence upon either side of the controversy. A fact may be so conclusively established by evidence that slight and suspicious evidence will not be allowed to overthrow it. We cannot upon this record say that the jury must have found that the plaintiff had established the fact of negligence of the company in not sounding the whistle or ringing the bell. The verdict is a general one, and the jury may have reached its conclusion, under the instruction given by the court, as will be hereinafter shown, without finding this allegation in favor of the plaintiff. We will not assume that against such overwhelming testimony the jury has found a fact to be established by negative testimony of such character as this, where the finding and verdict may be accounted for on other grounds.

2. It is insisted that it follows that the court should have instructed the jury to return a verdict for the defendant. The evidence is meager and unsatisfactory as to the condition of the highway as it approached this crossing from the west. It appears that there is a descent in the grade immediately before the crossing is reached, but its extent or precipitancy are not shown. It also appears that the highway passes over a "hill" as it approaches the crossing, but the altitude or decline of this hill is not shown, nor does its distance from the crossing appear except that it was not more than 40 rods distant. As before shown, the track as it approached the cross-

ing is in the form of a curve around the base of a hill 300 or 400 feet in height and through a deep cut. As to the velocity of the wind, and possibly as to other facts that it may be obscured the sound of the whistle, there is a conflict in the evidence.

The train was running at a high rate of speed. The conductor, engineer, and fireman of the train unite in testifying that the speed was not greater than 45 miles per hour. Notwithstanding the weight that is to be given to this testimony on account of the experience of these men in running passenger trains and their acquired ability to make close estimates of the rapidity of the motion of such trains, still it is more or less a matter of judgment or estimate, there being no evidence that any unusual attention was given to the matter by them at the time, or that they had any opportunities for special observation or comparison. The engineer testified that it is a continuous down grade from Murdock to the crossing; that he used some steam during the first mile from that station, but afterwards used no steam, the train apparently accelerating its rate of speed of its own momentum; it being, as he said, a heavy train, carrying altogether about 350 tons weight. There were other witnesses who saw the train, and estimated that its speed was much greater than 45 miles an hour.

Railroad crossings are always places of danger. It is the duty of the company to take all reasonable precautions in constructing crossings to lessen the danger to the public in crossing its road. Whether under the circumstances the deceased can be charged with negligence in not observing the signals given by the engine was a question for the jury. Under these conditions it cannot be said that the speed at which the train was running might not, of itself, render it impossible for one crossing the track at this point to avoid such an accident. The whole question as to whether under all the circumstances, the speed of the train was such as to constitute negligence on the part of the defendant, should have been submitted to the jury under proper instructions. The court, therefore, did not err in refusing to direct a verdict for the defendant.

3. The plaintiff presented 14 requests for instructions to the jury, and the defendant presented 15. It appears that the trial court made selections from these requests in framing his charge to the jury, and the result was an irreconcilable conflict in the instructions upon several vital points.

In the second instruction given by the court the jury was told: "The gist of this action is the alleged negligence and wrongful construction of defendant's alleged railroad over and across an alleged highway in Cass county"—"the alleged negligence of the failure of the defendant to construct and maintain a suitable crossing over its road at such point and to

Chicago, etc., Ry. Co. v. Sporer

keep such crossing in proper repair.” And this was repeated in the same instruction as follows: “You are instructed, therefore, that the issues for you to decide are: Was the defendant negligent in the construction of said crossing, and by cutting of the excavation at said point, and the construction of said crossing, did it negligently expose the deceased to unnecessary danger at such?” But in the seventh and tenth instructions the court said:

“(7) The jury are instructed that there is no evidence in this case showing, or tending to show, that the defendant, the railway company, carelessly or negligently constructed its railway at the point where the collision occurred, or for about a mile to the southwest thereof, and the allegation in the plaintiff’s petition in this regard you should disregard and dismiss from your consideration.”

“(10) The jury are instructed that the plaintiff in this petition alleges that because of the configuration of the grounds at and about the crossing where the collision occurred, and the manner in which the railway approached and crossed the highway, it was necessary, in order that said crossing might be safe, that it should have been constructed either beneath or above said track, or turned north along defendant’s right of way 20 rods and parallel with said railway. In this connection you are instructed that no evidence has been offered by the plaintiff tending to prove this allegation in the petition, and you will disregard the same in considering your verdict.”

It was alleged in the petition and stated in the instructions that when the defendant constructed the railway across the highway it carelessly and negligently constructed the same at a point a half mile to a mile to the southwest of the crossing, and that the road approached the highway through a deep cut and a steep down grade, and on a heavy curve; that the said cut continued up to and beyond the highway crossing; that the defendant carelessly and negligently “caused the earth taken from said cut to be piled up on its right of way immediately west of said cut and parallel therewith for a long distance southwest, to wit, about five hundred feet, and thereby caused the track of said road to be buried deep from sight of the traveling public approaching the said railway along the said highway and to the west of said track,” and that because of the negligent and careless construction of said railway it was impossible for the traveling public approaching said crossing from the west to see trains approaching said crossing from the southwest from any point along the highway within one mile west of said crossing, and “that because of the configuration of the grounds at and about said crossing, and the manner in which the defendant’s railway approached and crossed said highway, it was necessary, in order that the said crossing might be safe and convenient for use, that the

Chicago, etc., Ry. Co. v. Sporer

said highway where the said railway crossed the same should have been constructed either beneath or above said track, or that it should have been turned north along defendant's right of way, about 20 rods and parallel with the said railway, where it could have been constructed under said railway, and then turned south till it would have intersected the said highway on the west side of said railway; that said highway could have been so changed and arranged without great expense, and the crossing thereof by the defendant's line of railway made safe and secure, yet the defendant, regardless of its duties to the public, negligently and carelessly omitted to do so, but negligently and carelessly permitted its said crossing to remain a dangerous and unsafe way for the traveling public."

There is no evidence that the location of the tracks or making the cuts and embankments were improper or unnecessary in the construction of the road. If, therefore, the defendant in the construction of the crossing neglected reasonable and proper precautions to guard the safety of the public in passing over this crossing, it should have been shown to the jury in support of the allegation of negligence on the part of the company. The plaintiff attempted to do this by showing that "it is practicable to construct either an underground or an overhead crossing for a highway at the point where the Rock Island Road crosses the town line road."

The witness Hilton, who was a surveyor and civil engineer, testified it was not practicable to do either. He stated no reason for his conclusion; but being the plaintiff's witness, and the only one on this point, the plaintiff is clearly bound by this testimony, so that the seventh and tenth instructions, above quoted, were applicable to the evidence. It was the duty of the jury to follow these instructions of the court, and the court erred in giving instruction No. 2, in conflict with these instructions. "An instruction which misstates the law is not cured by other instructions stating it correctly, because the jury would be left in doubt as to which paragraph was correct." "In such case it is impossible to say which instruction the jury followed, and the correct instructions do not cure the error." *Richardson v. Halstead*, 44 Neb. 606, 62 N. W. 1077.

There are 726 assignments of error, largely relating to alleged errors in rulings upon the reception and exclusion of evidence. These questions are not liable to arise upon another trial of the case, and their discussion at this time is unnecessary. Other assigned errors are disposed of in the foregoing discussion.

The judgment of the district court is reversed, and the cause remanded.

VOGEL *v.* NORTH JERSEY ST. RY. CO.*(Supreme Court of New Jersey, Feb. 25, 1903.)*

[54 Atl. Rep. 563.]

Injury to Child—Sui Juris—Contributory Negligence.*

Whether a child seven years old, run over by a street car, was sui juris, and if so, whether, considering his years, he was guilty of contributory negligence, are questions for the jury.

Allowing Case to Be Opened.

Allowing plaintiff, after closing his case, to open it and introduce evidence, is matter of discretion, and not reviewable.

Error to Circuit Court, Essex County.

Action by Joseph Vogel against the North Jersey Street Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Argued November term, 1902, before GUMMERE, C. J., and VAN SYCKEL, FORT, and PITNEY, JJ.

Chauncey H. Beasley, for plaintiff in error.

Samuel Kalisch, for defendant in error.

PER CURIAM. The defendant in error, the plaintiff below, sued to recover for personal injuries received by him by being run over by a car of the defendant company. At the close of the plaintiff's case there was a motion to nonsuit him on the ground that he was sui juris and was guilty of contributory negligence. The court refused to nonsuit, and this is assigned as error. We think the nonsuit was properly refused. The plaintiff was a little over seven years old. Whether he was or was not sui juris was a question for the jury. So, too, it was for the jury to say, even if they found him to be sui juris, whether, taking into consideration his tender years, he was guilty of contributory negligence.

It is further alleged for error that the trial court, after the plaintiff had closed his case, permitted the case to be opened, and further evidence introduced on his behalf. Such action on the part of the trial court is purely discretionary, and affords no ground for review.

As the evidence stood at the close of the case, it was clearly for the jury to determine whether or not the plaintiff was entitled to recover. This being so, there was no error in the refusal of the trial judge to direct a verdict for the defendant.

We find no error in the charge of the court as delivered, nor in its refusal to charge certain of the requests submitted to it on behalf of the defendant.

The judgment below should be affirmed.

*See foot-note appended to *Chicago City Ry. Co. v. Tuohy* (Ill.), 4 R. R. R. 1, 27 Am. & Eng. R. Cas., N. S., 1.

KOENIG *et ux.* v. UNION DEPOT RY. CO.*(Supreme Court of Missouri, Division No. 2, March 31, 1903.)*

[73 S. W. Rep. 637.]

Injury to Child on Street Car Track—Speed—Evidence.

Whether the fact that a car ran about 125 feet before coming to a stop after striking a child would indicate that it had been moving faster than 10 or 12 miles an hour, or that the motorman did not apply the brakes or reverse power properly, was a question for the jury, and not for expert witnesses.

Same—Res Gestæ.

Evidence that immediately after the stopping of a car which ran over a child the motorman came back to where the child was, and in answer to the question, "Are you blind, to run over a child like that?" replied, "I didn't see the child; I was looking at the car coming east," was not part of the *res gestæ*.

Witnesses—Attorneys—Cross-Examination.

Rev. St. 1899, § 4652, provides that "no person shall be disqualified as a witness in a civil suit by reason of his interest in the event of the same as a party or otherwise, but such interest may be shown for the purpose of affecting his credibility": *held*, that the court erred in not requiring an attorney, who had testified as a witness for his client, to testify as to what financial interest he had in the suit.

Street Railways—Care Required of Motorman to Avoid Collisions—Pleading.

If injury to a child results from failure of those in charge of an electric car to sound a bell or give other warning of the approach of the car to a crossing, or to keep a proper lookout for persons at that point, the company is liable, and it is immaterial that the petition does not allege negligence of such employees after becoming aware, or after they ought to have known, of the child's danger.

Crossings—Lookouts—Negligence—Pleading.

An allegation "that the servants in charge of the car failed to keep a proper lookout for persons crossing" the tracks at a certain crossing does not present the issue that such servants were negligent in failing to see, when by reasonable care they might have seen, the person injured.

Same—Signals.

Where there is no law directing those in charge of a street car to ring a bell on approaching a crossing, failure to do so becomes negligence only when the circumstances render the ringing of the bell necessary, and is a question for the jury.

Same—Care Required of Motorman.*

The motorman of an electric car approaching a crossing is bound only to use such care as a person of ordinary prudence and caution, according to the usual and general experience of mankind would exercise in the same situation and circumstances, in respect to keeping a lookout for persons crossing the track.

Appeal from Circuit Court, St. Louis County; R. Hirzel, Judge.

Action by Charles A. Koenig and wife against the Union Depot Railway Company. Judgment for plaintiffs, and defendant appeals. Reversed.

This is an action by plaintiffs, husband and wife, for dam-

*See note appended to *Robinson v. Louisville Ry. Co.* (C. C. A.), 1 R. R. 838, 24 Am. & Eng. R. Cas., N. S., 838.

Koenig v. Union Depot Ry. Co

ages for the negligent killing of their minor child, Amelia Koenig.

The petition alleges that on the 8th day of May, 1899, Amelia Koenig was struck and killed by one of defendant's street railway cars at the intersection of Arsenal street and Compton avenue, in the city of St. Louis; the incorporation of the defendant, and its operation as a street car line; that said Amelia was about six years old, and that the plaintiffs were respectively father and mother of said Amelia. The actionable negligence charged is: (1) That the defendant was running its car at a rate of speed in excess of that permitted by the ordinance of the city of St. Louis. (2) That it ran said car so rapidly that it lost control so it was beyond the power of the brakes to stop the same at the crossing of Compton avenue. (3) That the servants of defendant in charge of said car failed to sound the bell or give other warning of the approach of the car. (4) That the servants in charge of the car failed to keep a proper lookout for persons crossing Arsenal at Compton avenue. (5) That the servants in charge of the car failed to lower the fender until after the deceased was struck. (6) That the servants in charge of the car failed to apply the brake until the deceased was struck. The answer is a general denial.

The facts, briefly stated, are that Amelia Koenig, who was about six years of age at the time, was killed by the defendant, a street railway corporation, at the intersection of Arsenal street and Compton avenue, in the city of St. Louis, on the 8th day of May, 1899, by being run over by the cars of defendant company. At that time defendant's car, proceeding westward on Arsenal street, run upon Amelia Koenig at the crossing of the west line of Compton avenue, and struck her with such force that she died from the effects thereof in an hour or so thereafter. From Michigan avenue—the first street east of Compton avenue—to Compton avenue is a steep grade, down which defendant ran its cars which caused the death of the child with such rapidity, as plaintiff claims, as to lose control, and place it beyond the power of the brakes to stop the car at crossing of Compton avenue. It is also claimed by plaintiff that while running down said grade defendant failed to sound the bell, or give other warning of the coming of the car, and neglected to keep a proper lookout for persons crossing at Compton, and neglected to lower the fender, and neglected to apply the brake until Amelia had been struck. From Michigan west to Virginia, beyond Compton, there was nothing to obstruct the view, so that persons approaching Arsenal street at Compton avenue could be seen more than a block away.

Mrs. Lizzie Koenig, the mother of the child, testified that the child was born on the 12th day of March, 1893; that she was killed about two blocks away from home; that she had been from home about half an hour; that she was sent for,

Koenig v. Union Depot Ry. Co

and saw the little girl at the place of the accident. When the mother arrived, the child was unconscious, and died an hour or two afterwards.

The little girl who met with the accident was ordinarily bright for her age, and had been often sent out before, and nothing had ever happened to her. She was not sent out on this occasion, but was bringing something to her grandmother. She wore at the time a blue calico sunbonnet, and was going to her grandmother's, who was living on Virginia and Arsenal, about two blocks away.

Joseph C. Dashman, a witness for plaintiff, testified that he witnessed the accident to this child; that he was at the corner of the old Holy Ghost Cemetery, where there was a hole under the fence, about 20 feet west of Compton on Arsenal. The witness was standing on the south side of Arsenal, and the child was on the north side, walking east on the sidewalk towards Compton avenue, 75 or 100 feet from Compton avenue. He first saw the car that came in collision with the child about a block and a half east of where he was, on Arsenal street. When he first saw the child, the car was a block away. He saw the child walking down the sidewalk. She came down the sidewalk, and in place of walking direct to the crossing—"there is six feet of sidewalk left about three feet above the grade of the street, and there is a little slant there, and she was walking down there, and I didn't pay any attention to her, and she went up in the air." She was five or six feet from the corner when she started to walk across the street. When she stepped off the sidewalk, the car was just the other side of the east crossing of Compton avenue; the witness judged about the width of the street, 75 or 100 feet—he estimated about 75 or 100 feet—east of the child, and on being pressed by counsel for the plaintiff extended it to 110 feet. The witness heard no signal by the motorman, no shouting or anything. He saw the car when it struck the little girl and knocked her 10 or 12 feet, and then he could not see any more. The car was between him and the child, and he saw no more of the child until the car crossed over it, and the little foot was all crushed up, and the blood was there. The witness then walked over there. The car ran about 100 or 125 feet, and came to a stop, and the motorman and conductor came back. They left the child there for a few minutes on the sidewalk. Then some man picked it up, and tried to stand it up on the street and put it by the telegraph pole, and some lady came out of a house, and said bring it into the house and put it in bed. That was the house on the north side of Arsenal street, and the first house west of Compton, next to the vacant block on the corner. The car stopped, with reference to this house, right in front of the house, with the rear or east end of the car about parallel with the door of the first house. He didn't see the fender dropped. Just before the child was struck, the motorman had his face turned

Koenig v. Union Depot Ry. Co

to the south, looking towards where the witness was standing. Witness did not see him drop the fender, and did not notice the fender after the car came to a stop.

Mrs. Amelia Purcell was also a witness. At the time of the accident this witness was living with her mother at 3004 S. Compton avenue, about 100 or 125 feet from where the little girl was injured. She was coming along Compton avenue, intending to board the east-bound car. She was either running or walking fast, and she saw both cars coming, and didn't cross over because the west-bound car was coming on at a very high rate of speed, and she was afraid to cross, so she didn't see the west-bound car strike the little girl, and heard no warning or signal given. She was about 30 feet from the corner of Compton avenue and Arsenal street when the little girl was struck, and on the east side of Compton. There was at least the width of the street between them, because the child was struck on the west side of Compton. The car came to a very sudden jerk after it struck the child, but this witness did not notice any slackening before the child was struck. The car stopped before the first house that they took the child into. She didn't see the little girl until after she was struck. She didn't pay much attention to the car until it came to a sudden stop, and from her position could not see the motor-man, or what he was doing.

The plaintiffs next introduced Henry Slevin, who was working in the Cemetery of the Holy Ghost, and did not see the accident. He saw the car after it struck the child. He was about 100 feet in the cemetery from Arsenal street, and says that the car, after striking the child, went about 125 feet. The front end of it was nearly past the west side of the house into which the child was taken. He noticed the car before it reached Compton avenue up as far as Michigan, a whole block to the east, and did not hear any alarm given by the gong, or any other kind of alarm by that car. On cross-examination he said he was not 100 feet from Arsenal, but was 100 feet from Compton, and but 50 feet from Arsenal, and that he was on the west side from Compton. He was 100 feet west of Compton, and 50 feet south of Arsenal. The way he came to notice the car from Michigan avenue up was that he was looking up that way. He was cleaning a lot in the cemetery and taking a "blow" (rest). There was nothing to draw this witness' attention to the fact as to whether the bell was sounded or not. The only time he noticed the witness Dashman there, was about an hour or so after the accident.

The next witness introduced was Mr. Minor Meriwether, who stated that he had made certain measurements on the corner of Arsenal and Compton avenue with reference to the width of Compton avenue and the width of Arsenal street, and the distance from the northside of Arsenal street to the street railway tracks. Compton avenue is 60 feet wide.

From the sidewalk on the north side of Arsenal to the north rail of the track is 16 feet; that is, from the granitoid walk to the nearest rail. From the west crossing on Compton avenue to the point on the granitoid walk where there is a slant that starts down to the middle of the street, it is 5 feet. It is 125 feet to the east side of the first house west of Compton avenue on the north side of Arsenal street. That house is between 20 and 25 feet front. The distance from where Dashman said he first observed the car was 250 feet. There was no obstruction from Michigan to Virginia avenue. He did not measure the width of Arsenal street. The north sidewalk was elevated $2\frac{1}{2}$ feet, and, when he said that the slant began 5 feet to the west, he meant west of the west building line of Compton. He thought Arsenal was about 60 feet in width from curb to curb.

Joseph C. Dashman, recalled, said that it was a minute or two after the child was struck before the car came to a stop, and the motorman returned to where the child was picked up. The motorman came back immediately after his car had stopped. The weather was clear the day of the accident, and the tracks were dry. There was a heavy grade, which ceased right at Compton avenue and began about three blocks east of that. Dashman estimated the speed of the car at 10 or 12 miles an hour.

Plaintiffs next introduced Harvey C. Montgomery, who testified that he was a conductor on the Lindell Railway for a few months. Besides working as conductor, had noticed the operation of and operated cars, but not as an employee. He acted as motorman on the St. Louis & Suburban, and thought that his experience as a motorman and conductor enabled him to speak as an expert in reference to the methods in which cars can be stopped, and in what distances they can be stopped. He only operated the car as a motorman about a month and 10 days on the Suburban, and that was the extent of his experience in stopping cars as a paid motorman. He then testified as to the general style of motors used upon St. Louis cars, and that at the end of his short service as a motorman on the Suburban he had his leg broken in an accident, and has not been able to run a car since. On the hypothesis of a dry track, a grade of $3\frac{1}{2}$ feet in 3 blocks, the car empty, running 10 or 12 miles an hour, this witness thought the car could be stopped in about 60 feet, perhaps even in 50 feet, and that, if it had 20 or 30 passengers added to it, it would not make a great deal of difference. He then said that it could have been stopped, going at that rate, by using the reverse, in about 40 feet. Among others, this question was asked of this witness: "Q. Supposing a car moving at the rate of ten miles or twelve miles an hour, on a dry track, just as has been described to you, and on a grade such as Judge Hirzel has suggested to you—about three and a half feet in three blocks—supposing such a car, moving at

such a rate of speed, should strike a six year old child, and should then proceed a hundred and twenty-five feet before coming to a stop, what would the fact that it had proceeded that distance indicate, with reference to the manner in which the motorman of that car had brought it to a stop? Mr. Robert: We object to that on the ground that it is a question for the jury, and not the witness. Court: You may answer it. (To which action and ruling of the court the defendant, by counsel, then and there duly excepted, and at the time saved exceptions.) A. I think it would indicate that the car was then moving at a higher rate of speed than 10 or 12 miles an hour, or the motorman didn't apply the brakes or reverse power promptly, at the time the accident occurred. Q. Exclude the latter hypothesis about not applying the brakes properly—supposing that had been done—what rate of speed would it require to carry the car a hundred and twenty-five feet if the brake was applied properly? A. I should judge twenty or twenty-five miles an hour."

Mr. Minor Meriwether was recalled, and testified that a car running at the rate of 10 miles an hour would go 14 feet and 8 inches in a second, and a child walking at the rate of 3 miles an hour would go 4.4 feet in one second. If the car was moving at the rate of 12 miles an hour it would go 17.6 in one second, and if a child was walking at the rate of 4 miles an hour it would go 5.87 of a foot in one second.

This was all of the evidence for plaintiffs in chief.

The defendant then introduced John Beirne, the motorman in charge of the car which struck the little girl. He first saw her on the granitoid sidewalk on the north side of Arsenal street. She was walking east at the time, and when she left the sidewalk his car was about 14 feet from her, as near as he could estimate it. His car was then pretty near to the west crossing. The little girl rushed from the sidewalk to cross the street. The motorman had rung his gong on approaching Compton avenue, and as soon as he saw her start out from the sidewalk he started to apply the brakes, reversed the power, and hollered at her. She didn't seem to notice him, but rushed from the sidewalk, and struck against the corner of the dashboard. The corner of the platform struck her in the side, and she fell in the street, and he stopped the car about 60 feet past the crossing. The dashboard struck her head after the platform struck her in the side. He said that he could not stop the car any sooner. He cried out to her as soon as he saw her making a motion to leave the sidewalk, and she was six or eight feet west of the crossing. She stood first and faced west. She had a bucket in her hand, and looked west. She wore a sunbonnet on her head; and an east-bound car attracted her attention, and as the east-bound car passed her she rushed across the street—made an attempt to cross—she dashed off of the sidewalk. This witness picked up the little child, and took her on the sidewalk, and held her in

Koenig v. Union Depot Ry. Co

his arms. He was the first person there. He picked her up as soon as he could get back to her. He held her in his arms a little while, "and I asked— The conductor said, 'What will we do?' and I said, 'Get a doctor,' and a lady coming west on Arsenal street came over and took her in her arms, and asked another lady standing by if she wouldn't take her into the house, and they took her into the house. My conductor went after a doctor." When the car reached Compton avenue the motorman was looking ahead of him west. He never saw Mr. Dashman at all.

Hugh Farrelly was the conductor upon the car that struck the little girl. He stated that the motorman rang his gong as he approached Compton; that at the time of the accident he was walking towards the front of his car on the inside, preparing to issue transfers. When he first saw the little girl, she was coming towards the track from the north side of Arsenal street, and a little west of the west crossing; that is, where the crossing ought to be, a few feet west of that. He described her dress, and said she was running, and that she ran right into the car—into the front corner of it; the front part of the car, about the bumpers on the outside; the bumper that projects out in front of the dashboard; the corner of the dashboard. Her body, he thought, struck the car, and she didn't get to the track at all, and when he got to her she was lying outside the track on the north side of the track, about 8 feet from the west crossing, as near as he could estimate it, and about 25 feet behind where the car had stopped. The motorman picked her up. He heard the motorman holler, but did not pay any particular attention to anyone else.

Defendant next introduced Mrs. Sarah Lynch, the wife of James Lynch, who is employed by the Cupples Woodenware Company, who said that she was on the car that struck the little girl, and occupied the front seat on the side the little girl was struck on—the north side. When she first saw the little girl she was standing still on the pavement on the north side of Arsenal, and had on a sunbonnet, and was swinging a little bucket, and when she moved it was south across Arsenal, and she ran right into the car—into the front part of the car. She didn't exactly see her. She got up when she saw her coming so close, and screamed as loud as she could, and she never looked up at all. She heard the motorman holler, and he was ringing his bell so you could not hardly hear anything in the car. The child never got to the track or the fender. It didn't strike her. Witness was positive it was the side of the car that struck the child. "The motorman rang his gong as he approached Compton. At the time the little girl was running towards the car the motorman seemed to be watching the child, and I head the noise of the fender drop, and heard him scream at the time, and he worked his hands; that is, turned his brake. He tried to stop the car at the same time he was hollering. He done that in a very quick

Koenig v. Union Depot Ry. Co

way, and the car slowed up before the child struck it, and was in the act of stopping when the child struck it."

Defendant next read the deposition of Miss Josephine Lack, who was on the car which injured Amelia Koenig in May, 1899. She was sitting in the south second seat near the front, in the middle of the car, next to the window. The motorman rang his gong as he approached Compton avenue. The car was running at the usual rate of speed. She estimated at 8 or 10 miles an hour. She saw Amelia on the pavement before she was struck—on the north pavement of Arsenal street. She was a little ways from the crossing. When witness first saw her, she was about 25 feet west of the west crossing. She had a little sunbonnet on, and a tin bucket on her arm, and she was standing still, and looking north. When she started to cross Arsenal street, she made a very quick move, and paid no attention to the ringing of the bell, and the shouting, and the car was going, of course, and he could not stop it any quicker than he did. The little girl was running as she crossed. The witness did not see her strike the car. She don't think the little girl got in front of the car, because, if she got in front of same, she could have seen her; but did not see her in front of the car. Prior to the accident this witness heard the bell rung, heard them shut off the brakes—that is, power—and felt the jar of the sudden applying of the brakes. She heard the lady in the front part of the car shout, and the conductor shouted at the same time. She afterwards explained that by the conductor she meant the motorman. The child did not get over the north rail.

Edward Woodson testified on behalf of the defendant that he was driving a garbage wagon, and was about 50 feet from Compton avenue, on Arsenal, on the south side of the street, driving east. When he first saw the little girl, she was on the sidewalk on the north side of Arsenal. She was going slowly towards the south across Arsenal, and all at once she kind of started in a hurry; that is, a half run and a half walk, as the witness called it. She had on a little sunbonnet, and she was undertaking to cross five or ten feet west of the west crossing. This witness saw her as she struck the car. The motorman rang his bell on the car that hit her, and the motorman he hollered, and the witness hollered also, but it seemed like the little girl did not notice that car. It seemed like she was going ahead and didn't notice it. The motorman rang his bell before the little girl rushed to the car. He could not tell exactly what part of the front of the car the little girl collided with, because when the collision came the car was somewhat between the witness and the little girl; but he was positive that she did not reach the track, and he did not know whether it was the dashboard or the fender. By the fender he meant the side of the fender.

The defendant next introduced Thomas W. Cogan, who testified that he was a motorman, and was a passenger on the

Koenig v. Union Depot Ry. Co

car in question, occupying the last seat on the south side of the car. He heard the gong as he was approaching Compton avenue ringing extra loud, and that was what drew his attention to it. He didn't see the child until after the accident, and didn't notice what the motorman in charge of the car was doing as he crossed Compton, but heard "extra loud ringing as we were crossing Compton avenue." The motorman of the car had picked up the child. He thought the ringing was about the middle of the street. He thought the child was picked up from 12 to 16 feet east of the rear platform of the car. When he looked out at the window, he saw a wagon standing in the street, and he knows that the house and wagon were farther west than the front of the car.

Otto E. Miller, a witness for defendant, testified that he was a letter carrier for the United States, and had been for several years, and that he was on this car about the fourth seat from the rear, on the south side of the car. He remembered hearing the sounding of a bell as the car approached Compton avenue, but could not say on what car it was. He was positive he heard the gong rung. When he first saw the child she was about 12 feet from the front end of the car, and it seemed to the witness that she was in the act of turning around, and then made a sudden plunge for the car. He could not see where the child struck the car. She did not get on the track in front of the car. It seemed to the witness that she was about to fly under the front trucks. He thought the fender had passed her. This witness did not notice what the motorman did, but thought that he did his duty from the way the car shook. When the witness saw the child leave the sidewalk, he attempted to get up, and the sudden stopping of the car jerked him back, and that is what caused him to think that the motorman was bringing his car to a stop. The motorman picked the child up. This witness did not see Mr. Dashman there. There was no one near her when the motorman picked her up afterwards. When he first felt the shock of the car being stopped, the car was about 12 feet from the child. His judgment was that the rear end of the car, when it stopped, was about 25 feet west of the west crossing. He further testified that he showed the spot where the car struck to Mr. Meriwether.

Defendant then recalled Mr. Beirne, who stated that the accident happened about five minutes after two. The defendant here rested.

Plaintiffs then offered in rebuttal witness Dashman: "Q. Mr. Dashman, is it true or not true that immediately after the car came to a stop the motorman came back to where the child was, and that you asked the motorman this question: 'Are you blind, to run over a child like that?' and that he replied: 'I didn't see the child. I was looking at the car coming east?' Mr. Roberts: We renew our objections. (The objection had been made to

Koenig v. Union Depot Ry. Co

anything the motorman may have said to this witness after the accident, when he was first upon the stand.) The Court: You may answer it. (To which action and ruling of the court defendant then and there excepted, and at the time saved exceptions.) A. Yes, sir; he did.'

Mr. H. C. Montgomery was recalled, and testified as to the measurements he made at the point designated by Mr. Miller as the point where the rear end of the car came to a stop, and said that it was 27 pretty fair length paces or steps.

Mr. Minor Meriwether was recalled, and testified that, if the car was going at the rate of 11 miles per hour, it could go 16.13 feet in one second.

Mr. Lee Meriwether was then called by the plaintiffs and testified that at his request Mr. Montgomery accompanied him to the scene of the accident, and showed him the grade, and while there they met Mr. Miller, the letter carrier, and asked him the spot at which the rear end of the car stopped after the accident when the car had been brought to a full stop. "Mr. Miller showed me a spot which he told me was the right place, and I also paced it off, and found that it was twenty-seven good, long paces, and I am five feet eleven and three-quarter inches high." On cross of Mr. Lee Meriwether this question was asked him: "Q. What is your interest in this case, Mr. Meriwether? A. How do you mean? Q. To what extent are you financially interested in this case? Mr. Meriwether: I object to answering that. Mr. Robert: I insist. He has offered himself as a witness. Court: You are interested as an attorney? A. As an attorney I am interested in the case, and in having justice done to my client. Mr. Robert: Has your honor passed on the question? Court: I don't think he has to testify. Mr. Robert: We are entitled to know what Mr. Meriwether's interest is here, if he offers himself as a witness to facts in the case. Mr. Meriwether: Suppose, now, as an attorney, in that connection I would be privileged to call Mr. Robert to the stand. Court: I don't think it is necessary. I don't think he has to answer that. Mr. Robert: Save our exceptions. (To which action and ruling of the court defendant then and there duly excepted, and at the time saved exceptions.)"

The court at the instance of plaintiffs, and over the objection and exception of defendant, instructed the jury as follows:

"The court instructs the jury that it is the duty of defendant to keep a lookout in approaching all street crossings, and to use reasonable care to avoid injury to persons approaching or crossing the tracks at such points. If, therefore, you find from the evidence that defendant saw, or by reasonable care might have seen, a child of the age of the deceased, Amelia Koenig, approaching Compton avenue at the intersection of Arsenal avenue, where the defendant's tracks, while defendant's car was yet far enough away to have enabled the motor-

Koenig v. Union Depot Ry. Co

man to stop it, or to check its speed before coming to the crossing, and that he had reason to anticipate that the child would attempt to cross the tracks, then it was defendant's duty to have so managed and controlled the car as to be able to stop it in time to avoid striking the child, should the child start to cross the track. And if you find such reasonable care and control was not exercised by defendant's servants, and that, in consequence, defendant's car struck and killed the child, Amelia Koenig, then your verdict should be for the plaintiffs.

"(2) The court instructs the jury that was the duty of defendant's motoneer to sound his gong or bell when approaching Compton avenue, so as to give notice to persons desiring to cross said avenue of the approach of the car. And if you find from the evidence that said motoneer failed to sound his gong or bell or give any other warning when approaching said avenue, and that, but for his failure to sound his gong or bell or give some other warning, the accident complained of would not have happened, your verdict should be for the plaintiffs.

"(3) The court instructs you that the law requires defendant's servants to keep a lookout in approaching all street crossings, and to exercise reasonable care to avoid injuring persons approaching or crossing defendant's tracks at street crossings; and that, where they have reason to anticipate the sudden and unexpected appearance of a child upon or approaching the track, they should so manage the car as to be able to stop the car quickly and readily, should occasion require. If, therefore, under all the circumstances detailed in the evidence, you find that there was reason to anticipate the sudden and unexpected appearance of the deceased, little Amelia Koenig, upon or approaching at the intersection of Arsenal and Compton avenues, and you further find that the defendant's servants in charge of its car were not managing the car so as to be able to stop said car readily and quickly, should occasion require, and you further find that the death of plaintiffs' daughter was caused by the failure of defendant's servants so to manage said car, then your verdict must be for the plaintiffs."

"(5) The court instructs the jury that the demand for ordinary or reasonable care requires of a man the full performance of his duty under the particular circumstances; some circumstances being such as to demand a very high degree of vigilance under the requirements of ordinary or reasonable care. It is for you to determine from the evidence whether the defendant's motoneer exercised the care demanded by the circumstances. If you find from the evidence that he was not exercising such care, and that the deceased, Amelia Koenig, would have been seen by the said motoneer in a position of danger in time to have avoided running over and killing her had he exercised such ordinary or reasonable care, then your verdict should be for the plaintiffs."

Koenig v. Union Depot Ry. Co

The court, at the request of the defendant, gave to the jury the following instructions:

“(1) The court instructs the jury that the negligence with which the plaintiffs charge the defendant, and which negligence the defendant denies, is as follows: First. That the defendant was running its car at a rate of speed in excess of that permitted by the ordinance of the city of St. Louis. Second. That it ran said car so rapidly that it lost control, so that it was beyond the power of the brakes to stop the same at the crossing of Compton avenue. Third. That the servants in charge of said car failed to sound the bell or give other warning of the approach of the car. Fourth. That the servants in charge of the car failed to keep a proper lookout for persons crossing Arsenal street at Compton avenue. Fifth. That the servants in charge of the car failed to lower the fender until after the deceased was struck. Sixth. That the servants in charge of the car failed to apply the brake until after the deceased was struck. You are instructed that you must ignore the first, second, fifth, and sixth charges of negligence, and if you believe from the evidence the motorman did sound the bell and give warning of the approach of the car, and that he did keep a proper lookout for persons crossing Arsenal street and Compton avenue, your verdict must be for the defendant.

“(2) The court instructs the jury that if Amelia Koenig was walking or on the north sidewalk of Arsenal street, and there was nothing in her conduct to indicate that she intended crossing the street, and that then when she started south across Arsenal street the car was so near as to make it impossible to prevent the collision, that then the plaintiffs cannot recover, and the verdict must be for the defendant.

“(3) The court instructs the jury that they cannot infer negligence from the fact that the plaintiffs' child was injured by the defendant's car, but that negligence is a fact which must be proved, and the burden of proving the same by the greater weight of the evidence is upon the plaintiffs.”

“(5) The court instructs the jury that if they believe that any witness has willfully sworn falsely to any material fact, they are at liberty to disregard all or any part of the testimony of such witness.”

The court, of its own motion, also gave the following instructions to the jury:

“(4) If you believe and find from the evidence that plaintiffs' child was killed by and through an unavoidable accident, your verdict should be for defendant.”

“(6) You are instructed that if you believe from the evidence that the motorman saw the deceased child walking or standing on the north sidewalk of Arsenal street, west of Compton avenue, then there was nothing in that to warn him of danger, until she jumped or stepped off of the sidewalk, if you believe from the evidence she did so, and started south

Koenig v. Union Depot Ry. Co

across Arsenal street, and in such case as long as the child remained on such sidewalk west of Compton avenue, and did not in any manner indicate that she desired or attempted to cross Arsenal street, the motorman had no reason to anticipate that she would attempt to cross Arsenal street, or to stop the car, or attempt to stop it, but had the right to run the car at its regular speed.

“(7) If you believe from the evidence that, as soon as the danger to the deceased became apparent, or by the exercise of ordinary care would have become apparent, the motorman exercised ordinary care to set the brakes before striking her, and made every effort with the means on hand to stop the car in the shortest time and space possible, and you further believe from the evidence that the gong was rung as the car approached Compton avenue, or the deceased was otherwise warned of the approach of the car, then your verdict must be for the defendant.”

“(6a) If you believe and find from the evidence that Chas. A. Koenig and Lizzie Koenig, his wife, are the parents of Amelia Koenig, deceased, and that the said Amelia Koenig was run over and killed by a street car of the defendant by and through the carelessness and negligence of the defendant's employees, as explained and set forth in these instructions, then you will find the issues for the plaintiffs, and assess their damages at the sum of five thousand dollars.”

To the giving of which instructions the defendant then and there excepted at the time.

Under the instruction of the court, the jury found a verdict for the plaintiffs in the sum of \$5,000. Defendant in due time filed its motion for a new trial, which being overruled it appeals.

Geo. W. Easley and Boyle, Priest & Lehmann, for appellant.

Lee Meriwether, for respondents.

BURGESS, J. (after stating the facts). It is said for defendant that the court erred in permitting the witness Montgomery to testify that certain facts assumed by him to be true “would indicate that the car was then moving at a higher rate of speed than 10 or 12 miles an hour, or that the motorman did not apply the brakes or reverse power properly at the time the accident occurred.” The objection to this testimony should have been sustained, because it was not a question to be determined by expert testimony, but by the jury, who were just as capable to draw conclusions from the facts proven as the witness; and it is only when the jurors themselves are not capable, from want of experience or knowledge of the subject, to draw conclusions from the facts proven, that the evidence of expert witnesses is permissible. In *Ferguson v. Hubbel*, 97 N. Y. 507, 49 Am. Rep. 544, it is said: “In the class of cases where the opinion of a witness is competent evidence it becomes so not because the witness

Koenig v. Union Depot Ry. Co

may be supposed, when compared with the jury, to possess superior powers of perception, intuition, and judgment, or superior ability to draw correct inferences from proved facts, but because the nature of the question at issue is such that men of ordinary experience and intelligence must be supposed to be incapable of drawing conclusions from the facts in evidence without the assistance of some one who has special skill or knowledge in the premises." So, in *Benjamin v. Street Ry. Co.*, 133 Mo. 274, 34 S. W. 590, it is said: "An expert witness in a manner discharges the functions of a juror, and his evidence should never be admitted unless it is clear that the jurors themselves are not capable, from want of experience or knowledge of the subject, to draw conclusions from the facts proved."

Plaintiffs were permitted to prove by the witness Dashman, over the objection of defendant, that immediately after the car came to a stop the motorman came back to where the child was, and, in answer to this question by Dashman, "Are you blind, to run over a child like that?" that he replied, "I didn't see the child; I was looking at the car coming east." This ruling is assigned for error. What the motorman said was a narration of a past event, with respect to which he was not authorized to speak for his employer or master. His business was to control and manage the cars of which he had care, and for whose actions, within the scope of his employment, his employer was answerable, but for nothing he said which did not accompany or form part of the accident; in other words, the *res gestæ*. *Barker v. St. L., I. M. & S. Ry. Co.*, 126 Mo. 143, 28 S. W. 866, 26 L. R. A. 843, 47 Am. St. Rep. 646; *Price v. Thornton*, 10 Mo. 135; *Rogers v. McCune*, 19 Mo. 558; *McDermott v. Railroad*, 73 Mo. 516, 39 Am. Rep. 526; *Adams v. Railroad*, 74 Mo. 553, 41 Am. Rep. 333; *Aldridge's Adm'r v. Midland, etc., Co.*, 78 Mo. 559; *Devlin v. Railroad*, 87 Mo. 545, 28 Am. & Eng. R. Cas. 524; *State v. Hendricks* (not yet officially reported) 73 S. W. 194. This evidence was not offered for the purpose of contradicting the motorman; hence inadmissible for any purpose.

It is claimed by defendant that the court erred in not permitting the witness Lee Meriwether to testify as to what financial interest he had in the suit. Mr. Meriwether testified as a witness for his client for the purpose of contradicting the evidence of Otto E. Miller, a witness for defendant as to where the car stopped after striking the child. Section 4652, Rev. St. 1899, provides that "no person shall be disqualified as a witness in any civil suit or proceeding at law or in equity, by reason of his interest in the event of the same as a party or otherwise, but such interest may be shown for the purpose of affecting his credibility." That this provision of the statute applies to any and all persons who testify as witnesses to anything other than mere formal matters in the trial of any proceeding in law or equity is too plain for argument. But,

Koenig v. Union Depot Ry. Co

aside from the statute, the interest of a witness in the result of a suit may be shown as affecting his credit (*Waddingham v. Hulett*, 92 Mo. 528, 5 S. W. 27; *Stillwell v. Patton*, 108 Mo. 352, 18 S. W. 1075), "but the extent to which a witness may be examined touching his interest in the suit rests in the discretion of the trial court." *Stillwell v. Patton*, *supra*. The same rule, however, as to the extent to which a witness may be examined applies in a large measure to all witnesses. Our conclusion is that the court erred in not requiring this witness to answer the question.

It is insisted that the first instruction given for the plaintiffs is erroneous in that it is not based upon any allegation of the petition; that the first instruction given for defendant defined the issues, and eliminated all allegations of negligence except the third and fourth; that the third alleges a failure to sound the gong or bell; and the fourth that the defendant's servants in charge of the car failed to keep a proper lookout; and that it nowhere alleges any negligence of those in charge of the car, after becoming aware, or after they ought to have known, of the danger of the little girl. If it be true, as alleged in the petition, that the servants in charge of the car failed to sound the bell or give other warning of the approach of the car at the crossing of Arsenal street and Compton avenue, and it was their duty to do so, or they failed to keep a proper lookout for persons crossing Arsenal street at that point, and by reason thereof the injury occurred, it was entirely unnecessary that the petition allege negligence of those in charge of the car, after becoming aware, or after they ought to have known, of the danger of the child, for the negligence consisted, if at all, in the failure of those in charge of the car to sound the bell or give other warning of its approach, or in failing to keep a proper lookout for persons crossing the street at Compton avenue. Therefore, if defendant's position be correct, it may run its cars at any time or place in utter disregard of the rights of persons on the streets, without being responsible for injuries sustained by reason thereof, provided that it was not negligent after becoming aware, or after it ought to have known, of the danger, as in this case, of the little child, who, on account of her age and want of knowledge of the danger, could not be guilty of contributory negligence. The alleged negligence consisted in the failure of defendant's servants in charge of the cars to sound the bell or to give other warning of its approach, and a failure to keep a proper lookout for persons crossing Arsenal street at Compton avenue, and not in the negligence of those in charge of the car, after becoming aware, or after they ought to have known, of the danger to the little girl. It would be a strange doctrine if, by defendant's neglect of duty in the first place, the life of the child was endangered, that it could not be held liable unless it was further shown that those in charge of the car were guilty of negligence in failing to stop the car after becoming aware,

Koenig v. Union Depot Ry. Co

or after they ought to have known, of the danger of the child. It is clear from the evidence that defendant's motorman did not become aware of the danger of the child until about the time of or after she had been run over by the cars and fatally injured, which might, in this instance, have been avoided by the keeping a proper lookout for persons crossing the street where the collision occurred, as to which the evidence was conflicting.

But this instruction is vicious because of the fact of its not being in accord with the allegations of the petition upon which the case was submitted to the jury. It is bottomed upon the theory of defendant's negligence in failing to see, when by the exercise of reasonable care it might have seen, a child of the age of the deceased, Amelia Koenig, approaching Compton avenue at the intersection of Arsenal street, when no such issue is presented by the pleadings, unless it be by the fourth allegation of negligence "that the servants in charge of the car failed to keep a proper lookout for persons crossing Arsenal at Compton avenue"; and we are of the opinion that it does not do so. Moreover, it authorized the jury to find for plaintiffs for not anticipating, while the child was walking eastwardly on Arsenal street towards Compton avenue, that before reaching the west crossing of that avenue she might turn south to cross the track.

The second instruction given on the part of plaintiffs is complained of on the ground that it declares as a matter of law "that it was the duty of defendant's motorman to sound his gong or bell when approaching Compton avenue." As the law imposed no duty upon defendant's motorman to sound the gong or bell at the approach of a street crossing, and there is no law making a failure to do so negligence per se, "such failure becomes negligence only when the circumstances render the ringing of the bell necessary, and, if the circumstances are in dispute, whether the occasion is such as calls for the sounding of the bell is a question of fact for the jury." *Schmidt v. St. Louis Ry. Co.*, 163 Mo. 645, 63 S. W. 834, 22 Am. & Eng. R. Cas., N. S., 711. In the case at bar it is not clear from the circumstances that the ringing of the bell or sounding the gong were such as to require the motorman to do one or the other on approaching Compton avenue, therefore that question should have been submitted to the jury. That there are many similar crossings in the city of St. Louis which are much used by pedestrians and vehicles, at the crossings of which by street cars without the bell being rung or the gong sounded by the motorman in charge on approaching them would be negligence per se, must be admitted, but it is not at every crossing that a failure to do so would amount to such negligence, much depending upon the use of the street at the time.

Plaintiffs' third instruction is challenged upon the same grounds as their first, and is open to the same criticisms that were passed upon that instruction.

Pittsburgh, etc., Ry. Co. v. Wilson

The fifth instruction given on the part of plaintiffs is bad for the reason that it incorrectly defines the degree of care required of defendant as "being such care as to demand a very high degree of vigilance," when the law only exacted of defendant the exercise of ordinary care; that is, in this case, such care as a person of ordinary prudence and caution according to the usual and general experience of mankind would exercise in the same situation and circumstances as those of the motorman in charge of the car. *Reardon v. Mo. Pac. R. R. Co.*, 114 Mo. 384, 21 S. W. 731; *Stanley v. Union Depot R. R. Co.*, 114 Mo. 606, 21 S. W. 832; *Lloyd v. St. Louis, I. M. & S. R. R. Co.*, 128 Mo. 595, 29 S. W. 153, 31 S. W. 110; *Tetherow v. St. J. & Des M. R. Co.*, 98 Mo. 74, 11 S. W. 310, 14 Am. St. Rep. 617; *Cohn v. Kansas City*, 108 Mo. 387, 18 S. W. 973; *Kelley v. U. R. & T. Co.*, 18 Mo. App. 151.

In order that this case may be properly presented to a jury, the judgment of the circuit court is reversed, and the cause remanded. All of this Division concur.

PITTSBURGH, C., C. & ST. L. RY. CO. v. WILSON.

(*Supreme Court of Indiana, March 31, 1903.*)

[66 N. E. Rep. 899.]

Fires Set by Locomotives—Negligence—Pleading.

Where, in an action against a railroad for damage to property by fire alleged to have escaped from defendant's locomotive, the complaint alleges that the injury was caused "wholly by the negligence of defendant," the complaint is good as against a demurrer for want of facts, notwithstanding its failure to state in detail the facts constituting negligence.

Same—Same—General Verdict—Interrogatories—Conflict.

Where, in an action against a railroad company for damages from fire alleged to have escaped from defendant's locomotive, the jury found for plaintiff, and, in answer to interrogatories, found that there was a sufficient spark arrester, but that there was negligence in the operation of the locomotive, the answers to the interrogatories were not in conflict with the general verdict.

Appeal—Review.

Where on appeal the evidence is not all in the record, its sufficiency to sustain the verdict cannot be considered.

Same—Same.

Where an appellant fails to comply with rule 22, cl. 5 (55 N. E. vi), requiring that the statement in the brief shall contain a condensed recital of the evidence, in narrative form, the sufficiency of the evidence to sustain the verdict cannot be considered.

Origin of Fire—Evidence.*

In an action against a railroad for damages from fire alleged to have escaped from its locomotive, the fact that the fire was caused by negligent operation of the locomotive may be proved by either direct or circumstantial evidence, or both.

*See foot-note appended to *Crissey & Fowler Lumber Co. v. Denver & R. G. R. Co.* (Colo.), 2 R. R. R. 412, 25 Am. & Eng. R. Cas., N. S., 412.

Pittsburgh, etc., Ry. Co. v. Wilson

Appeal from Circuit Court, Porter County; John H. Gillett, Judge.

Action by John Wilson against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for plaintiff, defendant appealed. Transferred from the Appellate Court under section 1337u, Burns' Rev. St. 1901 (Acts 1901, p. 590). Affirmed.

N. O. & G. E. Ross, for appellant.

Herbert S. Barr, for appellee.

MONKS, J. Appellee brought this action against appellant to recover damages for property destroyed by fire alleged to have escaped from a passing engine. A trial of said cause by a jury resulted in a general verdict in favor of appellee, and over appellant's motion for a judgment in its favor on answers to the interrogatories, notwithstanding the general verdict, and its motion for a new trial, judgment was rendered against appellant on said general verdict. The errors assigned called in question the action of the court in overruling appellant's demurrer to each paragraph of the complaint, its motion for a judgment on the answers to the interrogatories, notwithstanding the general verdict, and its motion for a new trial.

The complaint was in two paragraphs, and each charged appellant with negligence in the operation of its locomotive; and the second paragraph charged, in addition, that the locomotive was not provided with a spark arrester, and was out of repair. It was alleged in each paragraph that the injury to appellee's property described therein was caused "wholly by the negligence of appellant, and wholly without any fault or negligence on the part of appellee." It is insisted by appellant that each of said paragraphs was bad, for the reason that the facts constituting appellant's negligence were not specifically averred, and that the general allegation of negligence was insufficient, because a mere conclusion of the pleader. It is the settled rule in this state that a failure to state in detail the facts constituting negligence does not render a pleading insufficient on demurrer, and that a general allegation of negligence is sufficient to withstand a demurrer for want of facts. Louisville, etc., R. Co. v. Cauley, 119 Ind. 142, 143, 21 N. E. 546; Ohio, etc., R. Co. v. McCartney, 121 Ind. 385, 386, 387, 23 N. E. 258, and cases cited; Pittsburgh, etc., R. Co. v. Jones, 86 Ind. 496, 497, 498, 11 Am. & Eng. R. Cas. 76, 44 Am. Rep. 334; Louisville, etc., R. Co. v. Hanmann, 87 Ind. 422; Louisville, etc., R. Co. v. Parks, 97 Ind. 307, 309.

The jury, by their answers to the interrogatories, found that the locomotive which set the fire "was provided and equipped with a spark arrester known as the extension front, of the most-approved style, and of the best known for the prevention of the escape of fire, and that the same was at the time

Guyer v. Missouri Pac. Ry. Co

of the fire in good condition and repair." These answers are clearly against appellee's allegation in the second paragraph of complaint as to the defect in the construction of the locomotive, and the negligent failure of appellant to keep the same in repair. Each paragraph of the complaint charged, however, that the fire was caused by the negligent operation of the locomotive, and the jury by their general verdict so found. Said answers to their interrogatories were not, therefore, in conflict with the general verdict as to the negligent operation of the locomotive, but in harmony therewith. The court did not err in overruling appellant's motion for judgment in its favor notwithstanding the general verdict.

The sufficiency of the evidence to sustain the verdict is challenged by the motion for a new trial. Appellant is not in a position to ask the decision of this question, for two reasons: (1) Because the evidence is not all in the record, under the rule declared in *Consolidated, etc., Stone Co. v. Summitt*, 152 Ind. 297, 303, 304, 53 N. E. 235; *Westervelt v. National, etc., Co.*, 154 Ind. 673, 681, 57 N. E. 552. (2) On account of its failure to comply with clause 5 of rule 22 (55 N. E. vi), which requires that the statement in the brief shall contain a condensed recital of the evidence, in narrative form, so as to present the substance clearly and concisely. *Security, etc., Co. v. Lee* (this term) 66 N. E. 745; *Boseker v. Chamberlain* (this term) 66 N. E. 448; *Indiana, etc., R. Co. v. Ditto*, 158 Ind. 669, 64 N. E. 222, 224. We have read the evidence, however, and under the well-established rule that the allegations that the fire was set by appellant's locomotive, and that the fire was caused by the negligent operation of the locomotive, may be proved by either direct or circumstantial evidence, or both, as held in *Pittsburgh, etc., R. Co. v. Indiana, etc., R. Co.*, 154 Ind. 322, 323, 56 N. E. 766, and cases cited, we are not prepared to say that the verdict in this case is not sustained by sufficient evidence or is contrary to law.

Judgment affirmed.

GILLET, J., took no part in the decision of this cause.

GUYER v. MISSOURI PAC. RY. CO.

(*Supreme Court of Missouri, Division No. 1, March 18, 1903.*)

[73 S. W. Rep. 584.]

Railroads—Injuries at Crossing—Contributory Negligence—Discovered Peril.*

Plaintiff's decedent, while driving a team drawing a heavy load, attempted to cross a railway crossing. Just before reaching the crossing he was compelled to ascend a grade, and his horses drew the load with difficulty, and could have been stopped almost instantly. For a distance of 26 feet from the track he had an unobstructed view, and

*See generally, foot-note appended to *Humphreys' Adm'x v. Valley R. Co.* (Va.), 5 R. R. R. 649, 28 Am. & Eng. R. Cas., N. S., 649.

Guyer v. Missouri Pac. Ry. Co

could have seen the engine, by which he was injured, 700 feet away; but he drove on the track without stopping, and was struck and killed: *held*, that an instruction that decedent's act in driving on the track was such negligence as would preclude a recovery unless the engine was far enough away for the person in charge of it, by the exercise of ordinary care, to have discovered his peril, and stopped the engine so as to have avoided the injury, was not justified by the evidence, as the engineer was entitled to presume that the driver would not attempt to cross in front of the engine.

Appeal from Circuit Court, Pettis County; Geo. F. Longan, Judge.

Action by A. D. Guyer against the Missouri Pacific Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Plaintiff's husband was killed by a locomotive on defendant's road at a street crossing in Sedalia, and this suit is to recover damages for the injury. The petition alleges several acts of negligence, viz., the failure to ring a bell; running at a rate of speed prohibited by city ordinance; running at a dangerous and reckless speed, without warning by bell or whistle; omitting to have an engineer on the engine, or fireman at his place of duty, or any one on the lookout at the end of the tender while backing. It was also alleged that the men in charge of the engine, after they saw, or by the exercise of ordinary care would have seen, the peril in which the plaintiff's husband was, could, by the exercise of ordinary care, have avoided the accident, if they had not been running faster than 10 miles an hour, in violation of the city ordinance. The answer was a general denial and a plea of contributory negligence. There was in evidence an ordinance of the city which prohibited the running of a locomotive faster than 10 miles an hour, requiring the bell of the engine to be rung on the approaching of crossings, and requiring, when the engine was backing, a man stationed on the end of the tender farthest from the engine, as a lookout, to avoid accidents. There was evidence on the part of plaintiff tending to show that those requirements of that ordinance were neglected in this case. The plaintiff's evidence also showed that her husband drove on the railroad track at the street crossing when the defendant's engine was approaching in plain view, and when it was obvious that the engine would strike him as it did. Plaintiff and defendant asked a number of instructions. Among those of the latter was one at the close of the plaintiff's evidence to the effect that the plaintiff was not entitled to recover. The court refused all the instructions asked, and submitted the case to the jury under an instruction of its own, designed to cover the whole case. In that instruction the jury were instructed that the act of the plaintiff's husband in driving on the railroad track was negligence, and would preclude a recovery, unless the engine was far enough away for the person in charge of it, by the exercise of ordinary care, to have discovered the peril of the plaintiff's husband,

Guyer v. Missouri Pac. Ry. Co

and to have stopped the engine in time to avoid the injury. Then the jury were instructed that, if they found from the evidence that such was the case, they should find for the plaintiff; otherwise for the defendant. There were a verdict and judgment for the plaintiff for \$5,000, and the defendant appealed.

Martin L. Clardy and Wm. S. Shirk, for appellant.

C. C. Kelly and Sangree & Lamm, for respondent.

VALLIANT, J. (after stating the facts). The case should not have been submitted to the jury on that theory, for the reason that there was no evidence to sustain it. According to the plaintiff's evidence, her husband was in the service of the city, in the work of street construction. He and other workmen were returning from their work near the close of the day. He was driving a team that was drawing a heavy street roller, and sitting on an improvised seat above the roller. There were other teams following in procession. He was leading. They were traveling on Mill street from north to south. The defendant's railroad tracks, running east and west, cross this street at right angles. It was a well-known and much-used railroad crossing. Going south, as these men were, the street was level until they reached a point 80 feet from the crossing. Then the grade begins to ascend, and so continues up to the crossing, which is 4 feet higher than the point from which the ascending grade begins. There are several railroad tracks at that crossing, but the evidence deals with only two of them—one called the "Mill Track," which is the first one reached; the other, the "Main Track," which is the one on which the collision occurred. The space between these two tracks is $7\frac{1}{2}$ feet. Going up that grade, one passes a small watch shanty, about 6 feet square, on the left or east side of the street. Near it on the south, and some 10 feet east, is an electric light pole. Except the shanty and pole, there is nothing to obstruct the view of the railroad tracks in every direction from the point above mentioned 80 feet north. From the south side of the shanty to the north of the mill track is 14 feet; from the same point to the north rail of the main track is 26 feet. After the plaintiff's husband passed the south line of the shanty and the electric light pole, there was a space of 24 feet between him and the north rail of the main track, in which he had a clear view of the railroad tracks to the east and to the west, and could have seen this engine as it came 700 or 1,000 feet away. Attached to the roller, behind, was an empty wagon; following was a team drawing a street grader; and, as they moved along the road, the roller, the wagon, and the grader made considerable noise. Drawing the heavy roller with the wagon attached up the grade was such a burden on the team that it was all they could do to move it. Thus driving, the plaintiff's husband approached

Guyer v. Missouri Pac. Ry. Co

the railroad crossing very slowly. Plaintiff's counsel think the team was not going faster than one mile an hour. A witness describes them as "just creeping." Moving in that manner, laboring with their heavy draught, there is no doubt but they could have been stopped in a space of time too short to estimate. The theory of the plaintiff is that the man running the engine saw, or ought to have seen, her husband as he was thus approaching the tracks. Suppose the engineer saw him; what did he have a right to presume? It was daylight. The engine coming was in as plain view to the man on the roller as he was to the engineer. There was nothing to suggest to the engineer that the other was oblivious to the situation, or that he had failed to use his eyes and see what every one else there saw. Any reasonable man in the engineer's position would presume that the man on the roller would stop before crossing, and let the engine pass. But the plaintiff's husband drove straight on. The horses got across the track, but the roller was still on the north rail when the engine struck it. An ingenious calculation is made by learned counsel to show that there was sufficient time after the horses has passed over the mill track, and before the accident, for the engineer to have stopped his engine if he had used the means at hand. But when a witness who is a causal onlooker comes to guess during the excitement of a shocking catastrophe at the rate of speed an engine was going, and that is made the basis of a calculation to show what could have been accomplished in two seconds by the energetic use of all appliances, the calculation is not reliable. Besides, the argument based on that calculation assumes that the engineer, if he had been watchful, would have realized as soon as the team crossed the mill track that the driver was not going to stop. But the engineer cannot be charged with such knowledge. Even though he saw the driver of the team approach dangerously near the crossing, yet he had a right to presume that the driver had used his eyes, and would act as a reasonable man under the circumstances would for his own preservation. If the team had been approaching rapidly, there might have been in that fact some suggestion that the driver intended to try to cross in front of the engine. But approaching as he was at a very slow pace, there was nothing to indicate that he would not or that he could not stop before going on the main track. This case does not fall within the doctrine laid down in *Kellny v. R. R.*, 101 Mo. 67, 13 S. W. 806, 43 Am. & Eng. R. Cas. 186, 8 L. R. A. 783, and *Morgan v. R. R.*, 159 Mo. 262, 60 S. W. 195, 20 Am. & Eng. R. Cas., N. S., 372.

The court should have given the instruction asked by the defendant in the nature of a demurrer to the evidence. The judgment is reversed. All concur.

WRIGHT *v.* SOUTHERN RY. CO.*(Supreme Court of North Carolina, April 14, 1903.)*

[43 S. E. Rep. 845.]

Care Required of Persons in Charge of Hand Cars to Avoid Injuring Trespassers.

The same rule of law in regard to persons in charge of a locomotive, when a trespasser or pedestrian is seen walking on a trestle, does not obtain with respect to persons in charge of a hand car.

Same—Assumption That Person on Track Will Avoid Car.*

One operating a hand car across a bridge or trestle has the right to assume that persons crossing thereon will step off the track and permit him to pass, where it appears that others have done so, and that there is sufficient room; and he owes no duty toward them until he discovers by their behavior or conduct that they cannot or do not intend to leave the track, and that behavior or conduct must manifest itself positively, and will not be inferred from their simply remaining on the track.

Appeal from Superior Court, Granville County; McNeill, Judge.

Action by Edna Wright against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Hicks & Minor and F. H. Busbee & Son, for appellant.

B. S. Royster and F. P. Hobgood, Jr., for appellee.

MONTGOMERY, J. The plaintiff brought this action to recover damages for personal injuries alleged to have been received through the negligence of defendant. She, together with three other persons, all women, was walking on a trestle, a part of the defendant's railroad, when a hand car under the management of one of defendant's section masters was driven upon the trestle and partly over the body of the plaintiff. The four were walking behind each other, the plaintiff being next to the rear, and the approach of the hand car was from that direction. The plaintiff had notice, and said to one of the party, "Don't be scared, Mr. Daniel will not run over us." One of the party crossed over the trestle in safety, and the two others than the plaintiff stepped to one side on the trestle. The plaintiff testified that on account of her nerves she could not step off and stand on the cross-ties. "I was," she said, "scared, and I knew I could not have stood on account of my nerves." The plaintiff said she saw a card stuck up at the end of the trestle, which contained a notice forbidding persons to go on the trestle, but she did not read it. All of the evidence on the size and construction of the trestle was that it was 11 feet wide, that the width of the track up to the outer edge of the rails was 5 feet, and that the car did not project beyond the rails. The track was straight for about 500 yards, and the section master saw the four persons on the trestle, and could have stopped the car with ease after he saw

*See foot-note appended to *Humphreys' Adm'x v. Valley R. Co.* (Va.), 5 R. R. R. 649, 29 Am. & Eng. R. Cas., N. S., 649.

Wright v. Southern Ry. Co

them. He said that he had frequently encountered people on the trestle, and that they always stepped aside on the approach of the car. He testified further: "When I first came in sight of the trestle about a quarter of a mile off, I saw four women on it. As I came nearer behind the women, I saw first one and then another get off, the speed of the car having then greatly slackened. When I saw the third person apparently did not intend to step off, but was apparently hurrying, I did everything in my power to stop the car. It stopped just about as it reached her, striking her slightly. Her leg slipped between the cross-ties. I saw her in plenty of time to stop if I had known that she would not step to one side, as the others had done. After I found that she apparently did not intend to step aside, which I saw after the two persons between her and the car stepped off, when she was about thirty feet from me, I used every exertion to stop, but could not prevent the car from slightly running against her."

The main question which the defendant's appeal presents for decision is, what, if any, is the degree of care which railroad companies are required to use, when operating hand cars upon their tracks, towards pedestrians crossing trestles? The defendant's counsel admitted that if, in the present case, the plaintiff's injury had been caused by the handling of a locomotive engine, the defendant would have been guilty of negligence, and the plaintiff would be entitled to damages, although she herself contributed to her own injury. But it is contended for the defendant that a different rule of law ought to be applied to the same facts where the injury has been caused by the operating of a hand car; and from that point of view his honor was requested to instruct the jury as follows: "(2) The rule of law in regard to persons in charge of a locomotive, when a trespasser or pedestrian is seen walking upon a trestle, does not apply to persons in charge of a hand car crossing a trestle, if the jury shall find there was a space three feet wide outside the rails, upon which inexperienced women could stand and did stand safely. (3) That persons in charge of a hand car have a right to presume that a woman walking on a trestle is in the possession of her faculties, and will step off the track to a place of safety, if there is such place in easy access, which any ordinary person could safely reach, and upon which such person could safely stand; and if such person be injured because, on account of her state of nerves, unknown to defendant's employees, she thought she could not stand on such place, the injury will not be attributed to defendant's negligence, if defendant acted upon the presumption that she would act as ordinary persons do." His honor refused to give the last sentence of the defendant's third prayer, and added to the first section, which was substantially given in the charge, these words: "And this assumption [that the plaintiff was in possession of her

ordinary faculties, and that on the approach of the car she would either leave the track, if she could, or get into a place of safety, if, under the circumstances, she could do so, and if there was such place] he, the section master, might act on until discovering the peril of a nearer approach, he then failed to use all the proper and necessary vigilance and care to check the speed of the car, and if in consequence of this failure the plaintiff was injured, you ought to answer the first issue [as to the negligence of the defendant] 'Yes.' " We are of the opinion that the prayer for instructions ought to have been given, and that the modification of the third prayer ought not to have been made. Railroad companies are entitled to the full and free use and enjoyment of their property, including the right to operate their trains and cars to fit their schedules, unrestrained and unfettered by individuals, and to use their hand cars to repair their tracks and construct new ones. Persons who use these tracks for private purposes, except at crossings, have no legal right to do so. In some of the decisions of the courts of the states of the Union the responsibility of railroad companies through their engineers in charge of moving trains as to persons on the track begins when the engineer actually sees the peril of the trespasser. But under the decisions of our court the engineer is required to keep a lookout, and, if he could have seen a person on the track, and failed to do so, and through that failure to keep a lookout an injury occurs, the company is negligent, and liable for the injury, except "where an engineer sees on the track in front of the engine, which he is moving, a person walking or standing, whom he does not know at all, or who is known by him to be in full possession of his senses and faculties, the former is justified in assuming up to the last moment that the latter would step off the track in time to avoid injury; and, if such person is injured, the law imputes it to his own negligence, and holds the railroad company blameless." The quotation is from *High v. Railroad*, 112 N. C. 385, 17 S. E. 79. The decisions to that effect, both before and after that of the case last mentioned, are numerous. Our decisions, however, as to the duty of engineers towards persons walking or standing on trestles or bridges, mark out a very different rule from that which prevails as to persons walking or standing on the track, but not on a trestle or bridge. The engineer is required to use such diligence and care to prevent injury to a person on a trestle or bridge as a reasonably prudent man would use under like circumstances. The reasons for this rule are apparent. Amongst them may be mentioned the terror and nervousness produced by the rapid movement of a heavy train—engine and cars—the danger from smoke and cinders and escaping steam, the narrow width of the structure, the insecure footing, and the peril of a leap from the structure. In such cases the law requires a strict lookout on the part of the engineer, and, although the person on the

Coleman v. Lowell, etc., St. Ry. Co

bridge or trestle is a trespasser, yet, because of the sacredness of human life, and then because of the circumstances above mentioned, proper and reasonable care must be taken that he be not injured. The reason of the rule which governs in those cases cannot be urged as applicable to the facts in this case now before us. The hand car was a simple platform on wheels, propelled probably by chain and crank, and just covering in width the rails. There was a space of three feet on each side of the car. The section master on the hand car had frequently met persons on that trestle, who invariably had stepped aside without injury. On the present occasion two of the party moved to one side, and were unhurt, and the plaintiff gave as her only reason for not doing as the others did that she was nervous, and afraid to stand to one side. That condition of the plaintiff was unknown to the section master. We cannot think that the same rule of liability ought in reason to obtain in a case like this as controls in a case where one is in peril upon a bridge or trestle upon the approach of the locomotive and train. We think the true rule is, and ought to be, in a case like the one before us, that the section master, the operator of the hand car, might assume that the pedestrian would step off, like other persons in possession of their faculties had done, and that he would owe no duty to a person on the trestle until he had discovered by the behavior and conduct of such person that he could not or did not intend to leave the track; and that behavior or conduct to manifest itself positively, and not to be inferred from simply remaining on the track. After discovering, as above described, that the plaintiff did not intend to leave the track, or could not, then it would be the duty of the section master to use every available means to prevent injury. This is what the section master testified he did, and there was no evidence to the contrary.

There was error, for which there must be a new trial.

COLEMAN v. LOWELL, ETC., ST. RY. CO.

(Supreme Judicial Court of Massachusetts, Middlesex, June 18, 1902.)

[64 N. E. Rep. 402.]

Street Railway—Personal Injuries—Contributory Negligence.

In an action for personal injuries caused by being struck by a street car, plaintiff testified that he judged the car to be a safe distance away when he attempted to cross the track. The evidence as to the distance and as to the speed of the car was conflicting: *held*, that the question of contributory negligence was properly left to the jury.

Action by Coleman against the Lowell, etc., Street Railway Company. From a verdict for plaintiff, defendant brings exceptions. Overruled.

Tort for personal injuries caused by a collision between a car of defendant and plaintiff's wagon. Plaintiff was crossing

Southern Electric Ry. Co. v. Hageman

a street in Lowell, and saw the car coming. He thought he had time to cross, and when part way over the railway track was struck. Plaintiff walked his horse a portion of the way across the track. The motorman testified that he could have stopped the car and avoided the collision had the rails not been wet and slippery. In the superior court, before Francis A. Gaskill, J., there was verdict for plaintiff, and defendant excepted.

John J. O'Connor, for plaintiff.

Geo. F. & Geo. R. Richardson, L. T. Trull, and F. N. Wier, for defendant.

BARKER, J. The only contention now made in support of the bill of exceptions is that the plaintiff was not in the exercise of due care. He testified without objection that he judged the car to be a safe distance away. There was conflicting evidence as to the distance of the car from the team when the plaintiff attempted to cross the track, and also as to the speed of the car. In our opinion, the question whether the plaintiff was in the exercise of due care was for the jury.

Exceptions overruled.

SOUTHERN ELECTRIC RY. CO. v. HAGEMAN.

(Circuit Court of Appeals, Eighth Circuit, March 9, 1903.)

[121 Fed. Rep. 262.]

Jurisdiction of Federal Court—Proof of Citizenship—Manner of Raising Issue.

A complaint filed in a federal court contained the requisite allegations showing diversity of citizenship. The answer was a general denial. No plea to the jurisdiction was filed, and there was some evidence tending to show diversity of citizenship. At the conclusion of the case the defendant asked an instruction directing a verdict in its favor, but the court was not advised that the instruction was intended to challenge the jurisdiction of the court or the sufficiency of the proof to show diversity of citizenship: *held*, that the instruction did not fairly challenge the jurisdiction of the court, and, as the record, considered as a whole, did not show want of jurisdiction, the refusal of the instruction was not erroneous.

Street Railroads—Action for Collision with Vehicle—Pleading Negligence.

A general allegation of negligence in a complaint in an action against a street railroad company to recover for injuries received by plaintiff by reason of a surrey in which she was riding having been struck by a street car, as that "one of defendant's motor cars, run and operated by defendant's motorman, * * * without notice or warning to plaintiff, was carelessly and negligently caused to run up to and against said surrey, * * * and that her said injuries were wholly occasioned by the carelessness and negligence of said defendant's motorman in so operating the defendant's said motor car as to cause it to strike said surrey," is sufficient, in the absence of a motion to require it to be made more specific, to entitle plaintiff to prove and rely on any omission of duty on the part of the motorman in the management of the car.

Same—Instructions.

The charge of the court, in an action to recover damages from a

Southern Electric Ry. Co. v. Hageman

street railroad company for injuries received by plaintiff by reason of the vehicle in which she was riding having been struck by a car, examined, and *held* not erroneous or misleading, as applied to the evidence, and, considered as a whole, to properly submit to the jury the questions of negligence and contributory negligence.

Same—Degree of Care in Operating Cars.*

A motorman in charge of a street car is under the same obligation to exercise care and prudence to avoid collisions and to avoid injuring people as they are to exercise care not to get in way of cars, each having an equal right to the use of the street.

Instructions—Refusal of Requests.

A court is not required to give an instruction prepared by counsel, no matter how correct it may be in the abstract, if the same principle, or substantially the same principle, has been enunciated in its charge, though in different language.

Sanborne, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

Walter H. Saunders and Frederick W. Lehmann (W. F. Boyle and H. S. Priest, on the brief), for plaintiff in error.

Seneca N. Taylor (S. C. Taylor and Charles Erd, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is an action to recover damages for personal injuries which Cora Hageman, the plaintiff below, sustained by being thrown from a vehicle in which she was riding, by a street car which belonged to, and was being operated at the time by, the Southern Electric Railway Company, the plaintiff in error. The collision occurred on South Broadway, in the city of St. Louis, in the month of November, 1898.

The persons who testified in behalf of the plaintiff at the trial, who witnessed the accident, and were acquainted with the circumstances under which the collision occurred, were the plaintiff herself and her two sisters, who were riding in the vehicle with her. These witnesses concurred in the following statement relative to the affair: That in the early evening of the day in question they were driving north along South Broadway in a one-horse surrey, on the east side of the defendant's street railway tracks, which were laid about in the center of the street; that the plaintiff was acting as driver and sat on the front seat while her two sisters occupied the back seat; that they reached a point in the street where, on the east side of the tracks, it was very muddy for a distance of about 200 feet; that to avoid the mudhole the plaintiff drove upon the east track; that as she did so her two sisters, who were on the lookout, looked back south, in the direction from which a street car might be expected to approach, but saw none until they had driven along the track about 50 or

*See foot-note appended to *Adams v. Wilmington & N. Electric Ry. Co.* (Del.), 4 R. R. R. 307, 27 Am. & Eng. R. Cas., N. S., 307.

Southern Electric Ry. Co. v. Hageman

60 feet, when the headlight of a car that was coming around a curve in the street, some 2 blocks or 900 feet distant from and in the rear of the surrey, was observed; that, anticipating no immediate danger, not knowing how fast the car was approaching, they continued to drive along the track a little distance, intending to turn off as soon as they had passed the mudhole; that after they had driven about 75 feet along the track, and the car had approached to within 60 or 75 feet, one of the sisters on the back seat discovered for the first time that the car was approaching very fast—faster than cars usually run, and at a rate of speed which she estimated to be near 30 miles per hour, whereupon she called to the plaintiff to drive off the track as quick as possible, and at the same time shouted to the motorman to stop, which he failed to do; that the plaintiff, when she was thus directed to turn off the track, attempted to do so immediately, but before the vehicle had cleared the track it was struck by the car and overturned; and that in consequence thereof the plaintiff sustained very severe injuries.

The witnesses who were produced by the defendant company, who were present when the collision occurred, were the motorman and the conductor of the car, the latter of whom, however, being on the rear platform did not see the surrey, as he admitted, until it had been overturned. The motorman made the following statement, in substance: That he was returning to the car shed with his car, intending to turn it in for the night; that he had no passengers, and did not stop on that trip to take up any passengers; that he was running his car at the rate of about 7 or 8 miles per hour, as he judged; that he saw the surrey in which the plaintiff and her sisters were riding, when he was about 400 feet distant therefrom; that the surrey was then proceeding north on the west side of the tracks, where the traveling was comparatively good; that as he neared the surrey, and was within 35 or 40 feet from the same, it turned east, and was driven by the persons in charge directly across the track in front of his car, and in the direction of the mudhole, which he admitted to be on the east side of the tracks; that he made every possible effort to stop his car, but failed to do so in time, and that it came into collision with the vehicle in the manner already described.

Two employees of the defendant company, one of them a track laborer and the other a motoneer, testified that shortly after the accident occurred, when the plaintiff and her sisters had been taken to the car sheds of the defendant company, they overheard one of the sisters remark, "Cora, I told you you could not cross in time;" but both of the plaintiff's sisters denied that they made any such statement, or that they were driving, prior to the accident, on the west side of the street.

It will be observed, therefore, that the evidence of three persons who testified in the plaintiff's behalf tended strongly to establish a case of culpable negligence on the part of the

Southern Electric Ry. Co. *v.* Hageman

defendant company—such negligence consisting in running the car in question along a public thoroughfare at an excessive rate of speed, and in the failure of the motorman to take such reasonable precautions to avoid a collision as ought to have been taken after he discovered the presence of the surrey—while the testimony of a single witness on behalf of the railway company tended to show that the collision was occasioned by an act of inexcusable negligence on the part of the plaintiff herself. Moreover, all of the four eyewitnesses of the occurrence must be esteemed interested witnesses, and no preference can be given to the statements of any of them on the ground that they were disinterested or impartial observers of the accident. The case, therefore, upon the merits, was one for the jury; and the finding of the jury on the issues submitted to them ought not to be disturbed unless it clearly appears that some action was taken by the trial court which misled the jury, and induced them to render a verdict that otherwise would not have been rendered.

The first ground upon which the plaintiff in error relies to obtain a reversal of the judgment below is that the plaintiff below did not prove the fact which she alleged in her complaint, namely, that at the time the present action was brought she was a citizen of the state of Illinois, and a resident of Tazewell county, in that state. It is claimed that the defendant below put this allegation in issue by its answer, and that, because it was not clearly proven on the trial, the lower court should have directed the jury to return a verdict in favor of the defendant company, as it was requested to do. This contention, we think, should be overruled for the following reasons: The jurisdictional question was raised in the trial court in no other way than by the peremptory instruction to return a verdict for the defendant to which we have last alluded, and that instruction neither advised the trial judge nor the opposing counsel that it was asked because the plaintiff had not proved that she was a citizen of the state of Illinois, and because the court was for that reason without jurisdiction. After carefully scanning the record, we have no reason to believe that the lower court acted upon the instruction with the understanding that it was intended to challenge the sufficiency of the evidence to establish that fact. Besides, if it had been given, and a verdict and judgment in accordance therewith had followed, the judgment would have operated as a bar to the further prosecution of the cause of action in any court, since the record would not have shown upon what ground a recovery was denied, whereas the necessary jurisdictional averments were contained in the plaintiff's petition. It goes without saying that the defendant was not entitled to a judgment that would have had such an effect, even if the point which it made was well taken. At most, it was only entitled to a judgment that the case be dismissed for want of jurisdiction. If the instruction in question was asked

Southern Electric Ry. Co. v. Hageman

with a view of challenging the jurisdiction of the court, it should have been so framed as to disclose that fact; that is to say, if counsel for the plaintiff in error believed that the plaintiff had failed to prove with sufficient certainty that she was a citizen of the state of Illinois when the action was instituted, they should have so advised the trial court, and not allowed it to act on the instruction in the dark. If the purpose of the request had been disclosed, and the evidence already introduced had been deemed insufficient by the trial court to establish her citizenship, the requisite proof that the plaintiff had in fact taken up her abode in the state of Illinois, with intent to make it her domicile, would undoubtedly have been forthcoming. As it was, the testimony which was introduced showed that she went to Illinois five months before the action was brought, and resided there continuously until the suit was filed, and for a month or more thereafter, when she returned to the city of St. Louis on a visit to her relatives, remaining a week or more, and that she then returned to Illinois, where she has ever since resided. This evidence was doubtless regarded as sufficient to establish the fact that she was a citizen of Illinois, inasmuch as no plea to the jurisdiction had been interposed, and the fact of citizenship had not been challenged otherwise than by a general denial of all the allegations of the complaint which was contained in the defendant's answer. This method of raising the issue was not calculated to attract serious attention. Moreover, it cannot be successfully maintained that upon the face of the entire record the judgment below appears to be void for want of jurisdiction. We accordingly hold that the instruction, in the form in which it was presented, did not fairly challenge the sufficiency of the evidence to warrant the jury in finding that the plaintiff was a citizen of Illinois, or to bring that question before us for review. The testimony to which allusion has been made was testimony which certainly had some tendency to show that the plaintiff was a citizen and resident of that state when the action was brought, so that the record, considered as a whole, cannot be said to disclose that the judgment is void for want of jurisdiction.

Another point on which counsel for the plaintiff in error seem to place some reliance is that the only negligence charged in the petition was the failure of the motorman to sound his gong as the car approached the surrey; and it is said that inasmuch as it appears that such omission of duty was not the proximate cause of the collision, because the plaintiff and her sisters saw the car when it was 900 feet distant, the trial court erred in not directing the jury to return a verdict for the defendant on the ground that the plaintiff had failed to establish the act of negligence on which she relied for a recovery. But this contention, we think, places a false construction on the averments contained in the petition. Nothing was said in the plaintiff's petition about a failure to

Southern Electric Ry. Co. v. Hageman

sound the gong being the cause of the collision. She averred in her complaint that:

"One of the defendant's motor cars, run and operated by defendant's motorman, and in his charge, * * * without notice or warning to plaintiff, was carelessly and negligently caused to run up to and against said surrey with force and violence as plaintiff was endeavoring to drive said surrey off the track, * * * and that her said injuries were wholly occasioned by the carelessness and negligence of said defendant's motorman in so operating the defendant's said motor car as to cause it to strike said surrey."

This was an allegation of negligence in a very general form, such as entitled the plaintiff to prove and rely upon any omission of duty on the part of the motorman in the management of the car; and especially is this so in a case where no motion was made to compel the plaintiff to make her complaint more specific, and where the case was tried throughout on the obvious assumption that she would be entitled to recover if she succeeded in showing that the motorman was guilty of any dereliction of duty, or of failing to take any reasonable precaution to avoid the collision which he might and ought to have taken. The peremptory instruction, therefore, cannot be sustained as a proper instruction on the ground last suggested.

The remaining questions to be considered relate to the charge of the trial judge, and, for convenient reference, the material parts thereof are quoted below in the margin.* The only portions of the charge to which exceptions were

*"You have seen from these pleadings that the injury complained of is charged to be the carelessly and negligently causing said car to run upon and against said surrey with force and violence while the plaintiff was endeavoring to drive it off the track, whereby her injury resulted. This allegation of negligence is put in issue by the general denial, and therefore the burden of proof is put on the plaintiff to establish all the allegations of the complaint, including that one; that is to say, she must show by the preponderance of the proof that her allegations are true.

"The defendant, in addition to denying the complaint, interposes the defense of contributory negligence; that is to say, it alleges that plaintiff's injuries, if any, were caused by her own negligence in driving in front of said car so close thereto that it was impossible for the motorman thereof to avoid a collision with the vehicle in which she was driving when by looking she might have seen, or by listening she might have heard, said approaching car, and might have avoided said accident; and the burden of proof is on the defendant to show by the weight of the evidence that she was guilty of contributory negligence, unless her own evidence establishes that fact.

"In trying these issues there are two theories: The first theory is that the plaintiff was driving on the west side of the track, and drove her vehicle in front of the car, and so close thereto that the defendant's motorman was unable, with the means and contrivances at hand, to stop the car until the collision had occurred.

"The second theory is that the plaintiff in this suit was driving on the east side of South Broadway street northwardly, and came to a pond of water or bad place in the road, through which she wished to avoid driving, and, to avoid it, drove her vehicle upon the railroad track

Southern Electric Ry. Co. v. Hageman

taken at the trial are those portions which have been italicized.

It will be observed, by a careful analysis of the instructions, that the issue as to whether the plaintiff and her sisters were driving along the west side of the railway tracks, and suddenly turned east upon the track, immediately in front of the approaching car, in the manner explained by the motorman, or whether they were driving on the east side of the track, and went upon the track for the purpose of avoiding a mud-hole, in the manner testified to by them, was fairly submitted to the jury; and we have little doubt that the latter view of the case was the one which the jury adopted, as being in most respects the more reasonable and probable. The jury were also instructed, in substance, that if the plaintiff went upon the track from the west side, immediately in front of the approaching car, and so suddenly that the motorman, by the exercise of proper care, could not stop his car, then the plaintiff was guilty of contributory negligence, and could not recover; furthermore, that, if the plaintiff drove on the track from the east side, it was her duty to be mindful of her surroundings, and to be on the lookout for cars, and to turn off on the approach of a car, so as not to delay it unnecessarily, and that if she failed in the performance of her duty in any of these respects, and directly contributed to the collision, she could not recover. On the other hand, the jury were

of the defendant, and drove along the track parallel with the water and mud and bad place in the road; that before entering upon the track her companions looked behind to see if any car was in sight, and, there being none in sight, she drove upon the railway track; and that while upon the railway track the defendant company, through its agent, negligently ran its car against the surrey, and upset it, and injured the plaintiff.

"It is for you to determine which, if either, of these two theories is true; and, in order to present them concisely, the court will say that if you find from the testimony in the case that the plaintiff was driving north on the west side of the track, and carelessly and negligently drove across the track in front of the defendant's car, which was running on the east track in the same direction, and so close thereto as that the motorman in charge thereof, in the exercise of proper care and diligence, with the means and contrivances at hand, could not stop the car until the collision had occurred, then the plaintiff cannot recover.

"But on the other hand, if you find that the plaintiff was driving on the west side of the track, as hereinbefore stated, and drove her vehicle across the track in front of defendant's car, yet if you further find from the evidence that defendant's motorman, by the exercise of proper care and vigilance, could have avoided the injury by stopping his car upon the first appearance of danger, and before the collision occurred, and negligently and carelessly failed to do so, then the plaintiff should recover.

"Now as to the other theory: If you find from the evidence that the plaintiff was driving a vehicle along the east side of defendant's street railway track, and came to a pond of water, or a muddy, bad place in the road, and wished to avoid it by driving along and upon the track, then the court tells you that it was her duty, or the duty of those who were riding in the vehicle with her, while she was driving along the defendant's track in the direction in which the cars were run thereon, to observe the surroundings, and from time to time to look behind to see

Southern Electric Ry. Co. v. Hageman

instructed, in substance, that if the motorman could have avoided the collision by the exercise of proper care and diligence in the management of his car after the danger of a collision became manifest, and he failed to do so, then the plaintiff could recover.

These were as specific instructions as could or ought to have been given, in view of all the circumstances of the case and the conflicting character of the testimony. They left the jury to judge as they thought proper of the conduct of the respective parties. Besides, the instructions were addressed to a jury who were familiar with the manner in which persons usually drive along the streets of large cities, and with the manner in which street cars are usually operated therein, and who for that reason were perhaps better qualified than the trial judge to decide intelligently concerning what was done and what ought to have been done by the respective parties to the transaction, and how, in the exercise of ordinary care, they should have acted. As the case was one, therefore, which called for the exercise of that knowledge which laymen acquire in the course of their daily experience, it was peculiarly a case for the jury; and a court ought to be very certain that an error was committed which was prejudicial to the party against whom the verdict was rendered, before it sets the verdict aside.

Counsel for the plaintiff in error criticise two excerpts from

whether a car was approaching on the track on which they were driving, and to turn off the track in time to enable the car to pass without being unnecessarily delayed, and this duty is imposed by law because the cars on their own tracks have the right of way; but because they have the right of way, and because it is the duty of pedestrians and persons riding in or driving vehicles to get off the track, so that the cars may not be unnecessarily impeded, this fact does not relieve the defendant's agents from keeping a strict lookout, and from using reasonable diligence and care to avoid injury to pedestrians or persons driving or riding in vehicles. The law requires each to exercise ordinary care and prudence—the one to avoid injury to himself, and the other to avoid inflicting an injury on others. So that if, from all the evidence, you find that the plaintiff, while driving along the east side of the track, in order to avoid the water and mud, as before stated, failed to exercise such care and diligence as I have just indicated, and by reason of such failure and negligence directly contributed to the injury complained of, then your verdict should be for the company, *unless you further find from the evidence that the defendant's motorman, by the exercise of proper care and vigilance, could have avoided the collision, by stopping his car, but negligently failed to do so, in which event the plaintiff should recover.*

“Upon the question as to whether or not the injury was a direct result of the plaintiff's negligence, or whether it resulted from the direct negligence of the motorman of the defendant in running and operating his said motor car on the occasion in question, you can take into consideration all the facts and circumstances as proved by the evidence to have existed at the time when and place where the injury occurred, and give to each fact and circumstance, and to the testimony of each witness, such weight only as you deem such fact, circumstance, or testimony entitled to, in connection with all the evidence in the case.

“In the determination of this question, you must not overlook the fact that because the railway company, as stated above, has the right

Southern Electric Ry. Co. v. Hageman

the charge, and only two, which we have italicized below, and assert that they embody erroneous propositions of law, which must perforce have misled the jury. These excerpts from the charge were framed, we think, by the trial judge, upon the theory that there was evidence in the case from which the jury might reasonably conclude that the motorman was aware of the vehicle being on the east track in front of him for such a length of time before the collision occurred that he ought to have taken the precaution to bring his car so far under control before it was too late that he could easily stop it if need be. These paragraphs of the charge were conceived, we think, upon the assumption that the jury might discredit the motorman's statement concerning the speed of his car, and the direction from which the plaintiff drove upon the track. They do not seem to have been framed with a view of declaring the law in case the jury credited the statement of the motorman that the plaintiff drove on the track from the west, immediately in front of his car, but rather with a view of defining the motorman's duty in case the other theory was adopted, that the plaintiff turned onto the track from the east, and that the car was moving at an excessive rate of speed. And upon the assumption, on which the learned trial judge seems to have acted in framing these ex-

of way on its tracks, that all persons in a town or city have the right to cross the tracks, or to drive upon them, so they don't abuse the right by unnecessarily delaying or impeding the progress of the cars. Each must exercise the right to use the streets with due regard to the rights of others, and hence, although you may believe from the evidence that plaintiff was negligent in driving the vehicle upon and along the defendant's railway track, yet if you further believe from the evidence that after she had driven her said vehicle upon the track the motorman operating defendant's motor car saw, or by the exercise of ordinary care might have seen, said vehicle upon the track a sufficient length of time before the collision occurred, as that by the exercise of ordinary care he could have avoided the collision, it was his duty to have done so, and if you find he did not, and the plaintiff was injured as the direct result of such negligence and failure on his part, then she is entitled to recover. *Nor does the law permit the defendant's motorman to speculate or experiment as to whether the vehicle can get off the track before his car strikes it. On the contrary, at the first appearance of danger it is his duty to take the necessary steps to avoid a collision; and if the plaintiff was on the track, and he saw the vehicle after she had driven on the track a sufficient length of time to enable him to stop his car, and to give her notice or time to get off the track before colliding with her vehicle, but negligently and carelessly permitted his car to go forward in the belief that she would get off the track before the collision would occur, and as the result of such conduct upon his part the collision did occur, and plaintiff was injured, then she is entitled to recover.*

"The court tells you that negligence is the failure to do what a reasonably prudent person would ordinarily have done under the circumstances of the situation, or doing what a person of ordinary care, under the existing circumstances, would not have done. Nor can you assume, gentlemen, even if you find that the collision was the result of defendant's negligence, that plaintiff was injured. In order to recover, the burden of proof is upon her to show she was injured, and to what extent, in addition to defendant's negligence."

Southern Electric Ry. Co. v. Hageman

cerpts from the charge, we think that he was fully justified by the evidence in giving the jury such directions as they contain. The motorman admitted that he saw the surrey when it was 400 feet distant. He seems to have been well aware that there was a mudhole on the east side of the track, on which side, following the rule of the road, those in the surrey would naturally drive. He could hardly expect them to turn out at once into this mudhole to permit him to pass the surrey, the surrey being near the north end of it, nor was the plaintiff required to do so. And as the motorman was running his car light, with no passengers, and with a view of turning in for the night, the jury may have concluded that his car was moving at a rapid pace. In view of this testimony, and all the conclusions of fact that a jury might draw therefrom, it was proper to advise the jury that the motorman was not entitled to speculate to take the chances of the vehicle getting off the track before he overtook it, and that the law cast on him the duty of exercising a degree of care and vigilance commensurate with the situation. If he saw this vehicle 400 feet in advance of him on the east track, as the jury may have concluded that he did see it, and knew that it was opposite to a mudhole, and if he was running his car very rapidly, as the jury may have concluded that he was doing, it was his duty to have slackened the speed of his car and brought it under such control as to forestall a possible collision.

In this connection it should be observed that the rules of law which prescribe the duties and liabilities of those who go on the track of a steam railroad at other places than street crossings have little, if any, application to those who go upon the track of a street railway. The former are trespassers, while the latter are not. One who has occasion to drive upon a public thoroughfare wherein a street railway track is laid at grade has the right to use any part of the street which he finds it necessary or convenient to use. He may drive along a street railway track, if occasion exists for so doing, the only limitation upon his rights in this respect being that he must not unnecessarily obstruct the movement of street cars; and, being free to move, he must turn off the track as soon as he can conveniently, if he sees a car approaching, and he must also be on the lookout at all times for cars. On the other hand, companies who operate street cars in the public streets owe certain duties to the public that are equally imperative. Those persons whom they place in charge of their cars must be on the lookout for vehicles and pedestrians who may be expected to be found traveling on the street, and who have an equal right with the railway company to use the street. They must take all reasonable and proper precautions to avoid running over pedestrians or into vehicles, and must not move at such a high rate of speed as will endanger the lives of others and imperil the safety of their own passengers. In other words, a motorman in charge of a car has no right to

Southern Electric Ry. Co. v. Hageman

act on the assumption that he is entitled to a clear track at all times and that pedestrians and vehicles are bound, at their peril, no matter what may be the inconvenience, to get out of the way. In short, a motorman is under the same obligation to exercise care and prudence, so as to avoid collisions and to avoid injuring people, as these are to exercise care not to get in the way of street cars, so as to be run over and injured. *Winters v. Kansas City Cable Ry. Co.*, 99 Mo. 509, 517, 12 S. W. 652, 40 Am. & Eng. R. Cas. 261, 6 L. R. A. 536, 17 Am. St. Rep. 591; *Robinson v. Louisville Ry. Co.*, 50 C. C. A. 357, 112 Fed. 484, 1 R. R. R. 838, 24 Am. & Eng. R. Cas., N. S., 838; *Cincinnati Street Ry. Co. v. Whitcomb*, 14 C. C. A. 183, 66 Fed. 915; *La Pontney v. Cartage Co.*, 116 Mich. 514, 74 N. W. 712; *Flannagan v. St. Paul Street Railway Co.*, 68 Minn. 300, 301, 71 N. W. 379; *Driscoll v. West End Street Ry. Co.*, 159 Mass. 142, 34 N. E. 171; *Cooke v. Baltimore Traction Co.*, 80 Md. 551, 31 Atl. 327; *Hays v. Tacoma Ry. & Power Co. (C. C.)* 106 Fed. 48, and cases cited.

We conclude, therefore, that if the jury found, as they may well have done, that the motorman saw this surrey on the east track, directly in front of him, when he was 400 feet distant; that he was at the time running his car at a high rate of speed, and was acquainted with the condition of the street opposite the point where the plaintiff was driving—then they might well have concluded that the motorman was guilty of culpable negligence in not arresting the speed of his car to some extent, so as to prevent a possible collision. The jury were the exclusive judges of what he ought to have done under the circumstances aforesaid, and the admonition of the court that the motorman had no right “to speculate or experiment as to whether the vehicle [would] get off the track before his car [struck] it,” or to take the chances of the plaintiff getting out of the way—was not out of place or misleading. The court did not undertake to tell the jury when there “was an appearance of danger,” but left the jury to determine that question in the light of all the facts and circumstances of the case, as it was their right and duty to do.

Complaint is also made because the trial court refused some of defendant's requests for instructions, and we are asked to reverse the judgment for that reason; but an examination of these instructions, and a comparison of the same with the court's charge, satisfies us that the principles of law therein declared, in so far as they were correct, were embodied substantially in the court's charge. And it is too well settled to require any citations of authority that in such cases a refusal to embody a rule of law in the precise language chosen by counsel affords no ground for a reversal. A court is never required to give an instruction prepared by counsel, no matter how correct it may be in the abstract, if the same principle,

Southern Electric Ry. Co. v. Hageman

or substantially the same principle, had been enunciated in its charge, though in different language.

Upon the whole, we conclude that the case was properly tried below, and that no errors are disclosed by the record which would warrant a reversal. The judgment is accordingly affirmed.

SANBORN, Circuit Judge (dissenting). After as careful an examination of the record and rulings in this case as I have been able to make, my mind has been forced to the conclusion that the trial below was unfair, and that some of the rulings of the court were erroneous. I have reached this conclusion (1) because the court refused to instruct the jury that the evidence of contributory negligence was conclusive, and entitled the defendant to the verdict; (2) because the court charged the jury that the plaintiff could recover, although her negligence directly contributed to the injury, if the negligence of the defendant also contributed to it, when the law is the converse of this proposition; and (3) because the court charged the jury that if "the motorman operating defendant's motor car saw, or by the exercise of ordinary care might have seen, said vehicle upon the track a sufficient length of time before the collision occurred, as that by the exercise of ordinary care he could have avoided the collision, it was his duty to have done so, and if you find he did not, and the plaintiff was injured as the direct result of such negligence and failure on his part, then she is entitled to recover. Nor does the law permit the defendant's motorman to speculate or experiment as to whether the vehicle can get off the track before his car strikes it"—and it refused the charge, as requested by counsel for the defendant, that "the plaintiff, when she saw the car approaching, or was advised by her companion that it was approaching, was in duty bound to turn from the track in ample time to avoid collision; and if she speculated upon the chances, and remained upon the track longer than was safe or necessary, when she might have driven out of it, and out of all danger to herself and her companions, then she was guilty of negligence in remaining upon the track so long as she did."

1. Conceding that the plaintiff drove upon the track from the east side, as she testified, conceding that the motorman was guilty of negligence, and conceding that every other fact and circumstance was as the plaintiff and her witnesses testified, these facts remained unquestioned: The plaintiff and her sisters drove upon the car track to avoid some mud in the driveway east of the track, which was neither impassable nor dangerous. When they passed upon the track, they could see for a distance behind them of at least 800 feet. It was a dark evening. When the car came upon the street upon which they were driving, it was more than 800 feet behind them, and it bore a bright headlight, which they could and did see, while the motorman could not and did not see

Southern Electric Ry. Co. v. Hageman

their buggy until he came within about 400 feet of it. They saw the headlight. They knew that it was the light of an approaching car, and that neither they nor any other person could tell the distance or the speed of the car, and the light it carried, from a view of it in the dark. The motorman could not turn the car from the track, and both parties knew that fact. The plaintiff could drive her surrey off the track into the mud without any danger, and both parties knew and acted in view of that well-known fact. The plaintiff and her sisters knew that the car was approaching when it was more than 800 feet from them, and that its collision with them was inevitable unless they drove from the track before it reached them or the car was stopped. To them, therefore, came the first notice of the peril, the danger, because they saw the headlight of the car before the motorman saw the surrey. Upon them the first and primary duty to avoid the accident was imposed, because the motorman could not turn his vehicle, and they could drive their vehicle from the track; because it was their legal duty to do so, and to avoid the collision; because the motorman had the right to presume that they would discharge that duty; and because they had the first notice of the danger. *McCann v. N. Y. & Q. C. Ry. Co.*, 56 App. Div. 419, 421, 67 N. Y. Supp. 748; *Holwerson v. St. Louis & Suburban Ry. Co.*, 157 Mo. 216, 227, 57 S. W. 770; *Morrissey v. Bridgeport Traction Co.*, 68 Conn. 215, 35 Atl. 1126; *Lockwood v. Bell City St. Ry. Co. (Wis.)* 65 N. W. 866; *McClellan v. Chippewa Valley Electric Ry. Co. (Wis.)* 85 N. W. 1018, 1019. This duty was imposed upon the occupants of the surrey the moment they saw the approaching headlight, and consequently knew the danger, and it continued to be until the accident occurred. How did they discharge this duty? They never discharged it at all, but simply neglected to do so, and voluntarily took the chance that the car might run too slowly to hit them, or the motorman might stop it before it reached them. They testified that they first saw the headlight when they had driven about 60 feet upon the track; that they knew it was the headlight of a coming car, and they could not tell its speed or distance by looking at it; that they watched it all the time until the car struck them; that after they saw it they continued to drive along the track upon a slow trot for a distance of 75 or 100 feet, and then for the first time tried to drive off the track, and at the same time screamed to the motorman to stop. There is no doubt or dispute about these facts, and to my mind they present a clear case of contributory negligence, which was the primary cause of the accident. It was certainly the duty of the plaintiff to drive from the track as soon as she knew that a car was coming, whose distance and speed she could not know. It was her duty to do this every instant of the time after the approaching car and the danger it threatened were first discovered. It was her failure to discharge this duty, her negli-

Southern Electric Ry. Co. v. Hageman

gence, that not only contributed to cause the accident, but was the primary, moving cause of it. If she had not been guilty of this negligence—if she had driven from the track at the time she first learned that the car and its inevitable danger were approaching, or at any time after that while she was driving the 75 or 100 feet which she subsequently traversed along the track—the accident could not have occurred. Nor does the fact, if it is a fact, that the motorman was negligent after he discovered the danger, condone or modify the fatal effect of this negligence of the plaintiff, because his negligence after discovery of the peril is met by the fact that after the plaintiff discovered the peril she was first and continually guilty of the negligence which was the primary and effective cause of the injury. Conceding all the negligence charged upon the defendant, the case is one in which each of two parties who owed relative duties to each other neglected his own duty, and relied upon the faithful discharge by the other party of his duty, so that the negligence of each directly contributed to cause the injury that resulted. In such a case it is always the duty of the court to instruct the jury that there can be no recovery. *Clark v. Zarniko*, 45 C. C. A. 494, 496, 106 Fed. 607, 608, and cases there cited.

2. It is a familiar principle of law that one whose negligence is one of the proximate causes of his injury cannot recover damages of another, even though the negligence of the latter also contributed to it. The question in such a case is not whose negligence was the proximate cause of the injury, but it is, did the negligence of the plaintiff directly contribute to it? If it did, that negligence is fatal to his recovery, and the negligence of the defendant does not excuse it. *Pyle v. Clark*, 25 C. C. A. 190, 192, 79 Fed. 744, 746, 747; *Motey v. Granite Co.*, 20 C. C. A. 366, 369, 74 Fed. 156, 159; *Chicago & N. W. Ry. Co. v. Davis*, 3 C. C. A. 429, 431, 53 Fed. 61, 63; *Railway Co. v. Moseley*, 6 C. C. A. 641, 643, 646, 57 Fed. 921–923, 925; *Reynolds v. Railway Co.*, 16 C. C. A. 435, 69 Fed. 808, 811, 29 L. R. A. 695; *Schofield v. Railway Co.*, 114 U. S. 615, 618, 5 Sup. Ct. 1125, 29 L. Ed. 224; *Railroad Co. v. Houston*, 95 U. S. 697, 702, 24 L. Ed. 542; *Hayden v. Railway Co.*, 124 Mo. 566, 573, 28 S. W. 74; *Wilcox v. Railway Co.*, 39 N. Y. 358, 100 Am. Dec. 440.

The charge of the court was that the converse of this proposition was the law of this case. It was, in effect, that the negligence of a plaintiff which directly contributed to cause the injury was no defense to a recovery if the negligence of the defendant also contributed to it. The court treated of this subject in four places in the charge: First, when discussing the theory of the defendant that the plaintiff drove upon the track from the west side, it said: If the plaintiff “negligently drove across the track in front of the defendant’s car, which was running on the east track in the same direction and so close thereto as that the motorman in charge

Southern Electric Ry. Co. v. Hageman

thereof, in the exercise of proper care and diligence, with the means and contrivances at hand, could not stop the car until the collision had occurred, then the plaintiff cannot recover." This was a charge that if the defendant was guilty of no negligence whatever, and the plaintiff's negligence was the sole cause of the injury, she could not recover. In the second place, the court, in treating of this entry upon the west side of the track, said that if plaintiff "drove her vehicle across the track in front of defendant's car, yet if you further find from the evidence that defendant's motorman, by the exercise of proper care and vigilance, could have avoided the injury by stopping his car upon the first appearance of danger, and before the collision occurred, and negligently and carelessly failed to do so, then the plaintiff should recover." That is to say, no matter how negligent the plaintiff was, yet, if the defendant was guilty of any negligence whatever—if the motorman could have avoided the injury by the exercise of even a reasonable degree of care—then the plaintiff could recover. His third charge upon the subject was when treating of the theory that the plaintiff entered the track upon the east side, and he closed that charge with these words:

"So that if, from all the evidence, you find that the plaintiff, while driving along the east side of the track in order to avoid the water and mud, as before stated, failed to exercise such care and diligence as I have just indicated, and by reason of such failure and negligence directly contributed to the injury complained of, then your verdict should be for the company, unless you further find from the evidence that the defendant's motorman, by the exercise of proper care and vigilance, could have avoided the collision by stopping his car, but negligently failed to do so, in which event the plaintiff should recover."

This is a plain and clear statement that, if the motorman of the defendant was guilty of any want of care or vigilance whatever, the plaintiff could recover, notwithstanding the fact that the jury found that the plaintiff was guilty of negligence that directly contributed to the injury. The fourth and last place in which the court discussed this question sums up the instruction to the jury upon this subject in these words:

"Hence, although you may believe from the evidence that plaintiff was negligent in driving the vehicle upon and along the defendant's railway track, yet if you further believe from the evidence that after she had driven her said vehicle upon the track the motorman operating defendant's motor car saw, or by the exercise of ordinary care might have seen, said vehicle upon the track a sufficient length of time before the collision occurred, as that by the exercise of ordinary care he could have avoided the collision, it was his duty to have done so; and if you find he did not, and the plaintiff was injured as the direct result of such negligence and failure on his part, then she is entitled to recover."

This is a declaration that however careless, however negli-

Southern Electric Ry. Co. *v.* Hageman

gent or reckless, the plaintiff may have been, yet if the motorman could, by the exercise of ordinary care, have seen the carriage and have avoided the collision, his negligence was fatal to the defendant, and the plaintiff could recover, notwithstanding her contributory negligence.

The rule given by the court in this case in these four excerpts from the charge is not modified or contradicted by any part of the instructions. It is, in effect, as a careful reading of it will demonstrate, that a street car company is liable for damages resulting to any one driving upon its tracks in every case in which the motorman could, by the exercise of ordinary care, see the carriage and stop the car before the collision, although the party driving upon the track in front of him may have been guilty of culpable negligence which was the direct and primary cause of the accident. This seems to me to be the direct converse of the law of contributory negligence which is sustained by the authorities and is thought to be consonant with reason.

Counsel for the defendant requested, and the court refused to give, the following instruction, which, in my opinion, correctly states the law upon this subject:

"The motorman in charge of the car had a right to assume that the plaintiff, while driving upon the track in the same direction in which the car was moving, would from time to time look back to ascertain whether a car was approaching, and would turn from the track in time to enable the car to pass without being delayed in its progress; and the motorman was under no legal duty to stop to check his car until he saw that the plaintiff was not going to turn from the track, or that the plaintiff could not turn from the track; and if the plaintiff knew that the car was approaching, and did not turn out to allow it to pass, and the motorman failed to observe that she was not going to turn off the track in time to avoid collision, and these acts of plaintiff and of the motorman concurred in causing the injury complained of, and the act of neither without the act of the other would have caused the injuries, then the plaintiff cannot recover, and the verdict must be for the defendant."

Morrissey v. Bridgeport Traction Co., 68 Conn. 215, 35 Atl. 1126; *McClellan v. Chippewa Valley Elec. Ry. Co.* (Wis.) 85 N. W. 1018; *McCann v. New York & Q. C. Ry. Co.*, 56 App. Div. 419, 67 N. Y. Supp. 748; *Winter v. Crosstown St. Ry. Co.* (Super. Buff.) 28 N. Y. Supp. 695, 5 Am. El. Cas. 515; *Vogts v. Metropolitan St. Ry. Co.*, 36 Misc. Rep. 799, 74 N. Y. Supp. 844; *Smith v. Crescent City Ry. Co.*, 47 La. Ann. 833, 17 South. 302.

3. The court refused to give the charge quoted in the earlier part of this opinion, to the effect that the plaintiff, when she saw the car approaching, was in duty bound to turn from the track in time to avoid the collision; that if she speculated upon the chances, and remained upon the track longer than

Southern Electric Ry. Co. v. Hageman

was safe or necessary, when she might have driven out of all danger, then she was guilty of negligence in remaining upon the track as long as she did. This was, in my opinion, a correct statement of the law, and the court should have given it to the jury. *McCann v. N. Y. & Q. C. Ry. Co.*, 56 App. Div. 419, 67 N. Y. Supp. 748. The court charged the jury:

“Nor does the law permit the defendant’s motorman to speculate or experiment as to whether the vehicle can get off the track before his car strikes it. On the contrary, at the first appearance of danger it is his duty to take the necessary steps to avoid a collision.

But it refused to charge that if the plaintiff speculated upon the chances, and remained upon the track longer than was safe or necessary, when she might have driven off of it, she was guilty of negligence in so doing. The first duty when the approaching car was discovered by the plaintiff, and the advancing surney was discovered by the motorman, was upon the plaintiff. It was her duty to drive off the track. The motorman had the right to presume that she would do so until it became apparent that she could not or would not take her vehicle from the railway. She had no more right to speculate upon the chances, and remain upon the track longer than was safe or necessary, nay, she had not as much right, as the motorman, because she could drive her vehicle from the track, and he could not remove his from the railway. It was consequently error, in my opinion, for the court to refuse to instruct the jury that speculating upon the chances, and remaining upon the track longer than was safe or necessary, was negligence on the part of the plaintiff.

The entire trial seems to me to have been conducted under the erroneous view that no negligence of the plaintiff, no matter how culpable or causal, could constitute any defense to the action, if the negligence of the defendant in any way contributed to it. The rule which permeates the charge, and which was given to the jury at least four times in the course of it, is that the plaintiff may not recover if her negligence is the sole cause of the injury, but that, if the negligence of the defendant concurs and contributes with her negligence to cause the injury, she may recover. The true rule is that the plaintiff may not recover in any case in which his own negligence and the negligence of the defendant each directly contribute to produce the damage for which the suit is brought. It was this error in the theory of the trial that in my opinion induced the erroneous rulings to which attention has been called, and prevented the defendant, as it seems to me, from securing a fair trial of its case.

TURNBULL *v.* NEW ORLEANS & C. R. CO.*(Circuit Court of Appeals, Fifth Circuit, February 17, 1903.)*

[120 Fed. Rep. 783.]

Death by Wrongful Act—Contributory Negligence—Proximate Cause.*

In an action for death by wrongful act, an instruction that the defense of contributory negligence will not avail if defendant, by the exercise of reasonable care, could have avoided the accident, correctly states the law, and is not objectionable as being too broad or misleading.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana, at New Orleans.

E. Howard McCaleb, for plaintiff in error.

Henry P. Dart, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. The plaintiff in error has assigned many alleged errors in the action of the Circuit Court on the trial of this case. We will notice only one of them. It is stated in these words:

"The court erred in refusing to charge the jury, as requested by plaintiff, as follows: 'In an action like this for damages against a railroad company by the surviving parent for the injury, suffering, and loss of his son, run over and killed by a car of the defendant company, the defense of contributory negligence will not avail if, by reasonable care on the part of those in charge of the electric car, the accident could have been avoided.' And the reasons assigned by the court for refusing said charge are contrary to the jurisprudence of the federal courts."

The reasons just referred to are shown in the record to be as follows:

"The trial judge states that his reason for refusing said charge was that the same was too broad and misleading. The trial judge stated the true rule to the jury in the general charges as follows: 'Therefore I say to you that in this case, if you find that the railroad company was at fault—that the fault of the railroad company caused the injury—that, however much the child was negligent, yet, if you find that the motoneer discovered the danger of the child in time to save the child, and did not do so, why the child could recover, notwithstanding the child's own contributory negligence. And I charge you further that if you find in this case that the conduct of the motoneer or the railroad company evinced such a reckless disregard of the life and safety of the child as to amount to a willful injury, then the child could recover, re-

*As to the duties and liabilities of a railroad company after discovering persons in perilous situation upon its track, see note appended to *Cottrell v. Southern Ry. Co.* (Miss.), 2 R. R. R. 641, 25 Am. & Eng. R. Cas., N. S., 641.

gardless of its own contributory negligence.' The instruction asked for is evidently based upon the case of *Davies v. Mann*, 10 Mees. & W. 546, which, as misunderstood by some, has been the cause of much trouble and confusion in cases for personal injuries. Beach on Contributory Negligence, 27, 28, 10, 11, 55, and 201. It is plain that the instruction asked for is a nullification of the doctrine of contributory negligence. The Supreme Court of Louisiana has so said. *Cowden v. Railway Co.*, 106 La. 238, 30 South. 747. The doctrine of *Davies v. Mann*, as incorrectly stated by some courts, has never been the law of the federal courts. On this point a number of cases could be cited. Mr. Thompson, in his recent excellent work on Negligence, shows that an instruction such as the one in hand leaves the jury without a guiding rule. 'All the authorities agree that a plaintiff cannot recover for personal injuries, if, by due care, he could have avoided the injury. Therefore an instruction to that effect should clearly be given to the jury. If thereupon the jury are told that the plaintiff can recover, notwithstanding his contributory negligence, if the defendant, by due care, could have avoided injuring him, it is clear that the instructions are conflicting, and the jury are left in hopeless confusion. Of course, when no question of contributory negligence on the part of the plaintiff is involved, it is proper and right to charge that the defendant is liable, even if he did not discover the danger, provided he could have avoided the injury by exercising due care. In such a case there is negligence only on one side. But whenever the plaintiff contributes to his own injury by his negligence he cannot escape the effect of his negligence by showing that the defendant could, by the exercise of due care, avoid doing the injury. It is simply a case of two persons at fault. If the doctrine of contributory negligence is to be maintained, it is clear that the instruction asked for was properly refused.'

The son of the plaintiff, for whose injury, suffering, and loss damages are claimed, was an infant eight years of age. The language of the requested charge assumes that it was applicable to the evidence on the point to which the request was directed, and the language of the charge given by the judge, set out in his reasons for refusing the request, must be taken as conceding that the evidence in the case called for a proper charge on the point. It appears from this action of the circuit court, and from its action on numerous other requests for charges submitted by the plaintiff and refused, or given only in part, or given as modified, that the mind of the very learned and careful trial judge had become settled in the conviction that the only cases in which a person who has been injured partly through his own negligence and the negligence of another can recover are those where, although the party injured was negligent, the party who did the injury saw the danger in time to have avoided it, and could have avoided it,

Turnbull v. New Orleans & C. R. Co

and did not do it. In the recent excellent work on Negligence of Mr. Thompson, to which the trial judge refers, that distinguished text-writer says, in substance, that the old rule on the subject of contributory negligence was that no recovery could be had where, by exercising ordinary care, the party injured could have avoided the consequences of defendant's negligence. He says that this was a harsh rule, but that it had the merit of certainty. It could seldom be misapplied by the court, or misunderstood by the jury; but it soon received at the hands of the courts a qualification so called, viz., that, although the plaintiff was guilty of the want of ordinary care contributing to the injury, yet this will not prevent him from recovering damages of the defendant, if the defendant might, nevertheless, have avoided the injury by the exercise of ordinary care on his part. Commenting on the old rule and this qualification, so called (as he describes it), he says these doctrines remain little more than metaphysical abstractions, tending to confuse the courts and juries, and to defeat the ends of justice, unless there can be extracted from them a definite practical rule or rules. He says that he is convinced, after further study of the adjudications of both the English and American courts, that the whole subject of contributory negligence remains in a state of great confusion and uncertainty; that the doctrinal formulas already laid down (in the preceding sections of his work) are reiterated in many judicial opinions, without their import being understood by the judges who make use of them, and that even those judges who, by study, seem to have acquired definite theoretical views of the import of these expressions, are unable to agree upon any definite rules with respect to their application; that nothing will better convince one of this than the diversity of opinion among the English judges and law lords in the case of *Radley v. London & Northwestern Railway Company*, 1 App. Cas. 754, wherein these judges and lords all appear to have agreed that the doctrine of *Davies v. Mann* was the settled law of England, but their opinions were diverse as to the application of the rule.

In further discussing the qualification of the old rule, Mr. Thompson says that when the defendant is driving an instrument of danger, such as a railway train, or is doing something of such a nature that, unless extreme caution is used, it is likely to lead to mischief, the law so far conforms to the dictates of humanity and enforces the plain obligation or moral duty as to require the defendant to keep a constant lookout, and to exercise an unremitting diligence, which is no more than requiring him to exercise a degree of care in proportion to the danger to others, to the end that they may not be injured; and this duty especially arises in favor of children, the aged and infirm, and in general in favor of those who, by reason of physical or mental decrepitude, are incapable of caring for themselves. The subtitle of the section in which

Turnbull v. New Orleans & C. R. Co

the language just referred to is used is in these words: "Or When He Ought to Have Discovered Plaintiff's Negligence." Section 239.

In the case of *Inland & Seaboard Coasting Company v. Tolson*, 139 U. S. 558, 11 Sup. Ct. 655, 35 L. Ed. 270, the Circuit Court had instructed the jury as follows:

"There is another qualification of this rule of negligence, which it is proper I should mention. Although the rule is that, even if the defendant be shown to have been guilty of negligence, the plaintiff cannot recover if he himself be shown to have been guilty of contributory negligence which may have had something to do in causing the accident, yet the contributory negligence on his part would not exonerate the defendant, and disentitle the plaintiff from recovering, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of plaintiff's negligence."

Of this instruction MR. JUSTICE GRAY, as the organ of the court, said:

"The qualification of the general rule, as thus stated, is supported by decisions of high authority, and was applicable to the case on trial."

He cites numerous cases, naming first *Radley v. London & Northwestern Railway*, 1 App. Cas. 754.

In *Grand Trunk Railway Company v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485, Mr. Justice Lamar refers to the generally accepted definitions of contributory negligence as laid down by the courts and by text-writers, and, without going into a discussion of them, or even attempting to collate them, states:

"That the generally accepted and most reasonable rule of law applicable to actions in which the defense is contributory negligence may be thus stated: 'Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured; subject to this qualification, which has grown up in recent years (having been first enunciated in *Davies v. Mann*, 10 M. & W. 546): that the contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence.'"

The requested charge which we are discussing is almost identical in its language with the first headnote to the opinion in the case of *Thomas McGuire et al. v. The V. S. & P. R. R. Co.*, 46 La. Ann. 1543, 16 South. 457. In that case the qualification of the old rule is most strenuously applied. It is likewise given controlling application in the subsequent case of *Lampkin v. McCormick*, 105 La. 418, 29 South. 952,

Jones v. Charleston & W. C. Ry. Co

83 Am. St. Rep. 245. It is most elaborately discussed and approved and supported in a still more recent case decided by the Supreme Court of Louisiana. *McLanahan Tudor v. The V. S. & Pacific R. R. Co.*, 33 South. —.

After a careful examination of a number of recent decisions of the courts of highest authority and of the most approved text-writers, we conclude that the requested charge was not too broad, and was not misleading, and that the excerpt from the trial judge's general charge does not fully state the true rule, but omits to instruct the jury that, if the motoneer ought to have discovered the danger of the child in time to save it, he could recover, notwithstanding his own contributory negligence. It is always true, and cannot be too strongly impressed on the minds of trial judges, that instructions to juries should avoid abstractions, and get as close as may be to the particular issues and evidence in the case on trial. Those issues and that evidence are always more clearly in the view of the trial judge than they can be brought by any record to the attention of a court of errors, and therefore we refrain from propounding a charge which, in our view, would have stated the true rule to the jury on the trial of this case. For the reasons that we have suggested, rather than elaborated, we conclude that the assignment of error which we are discussing was well taken, and requires us to reverse the judgment of the Circuit Court.

It is therefore ordered that the judgment of the Circuit Court be and is hereby reversed, and this case is remanded to that court, with instructions to award the plaintiff therein a new trial.

JONES v. CHARLESTON & W. C. RY. CO.

(*Supreme Court of South Carolina, Feb. 27, 1903.*)

[43 S. E. Rep. 884.]

Accident on Track—Evidence—Use of Track by Pedestrians.

In an action for injuries to a person on a railroad track, evidence of the use of such track by pedestrians is admissible where such use is alleged in the complaint.

Same—Speed—Evidence—Ordinance.

Where a complaint alleges that a train was run in violation of a city ordinance, the ordinance was admissible in evidence.

Same—Licensees.*

Where there is reason to presume that a railroad company had notice that persons were accustomed to walk on its track at a certain place, though no permission so to use it be shown, a person walking on such track is a licensee, to whom the railroad company owes more duty than to a trespasser.

Law of the Case.

Where the Supreme Court has laid down a principle of law in a case, it is the law of the case, though the doctrine be modified in

*See generally, foot-note appended to *Denver & R. G. R. Co. v. Buffehr* (Colo.), 4 R. R. R. 762, 27 Am. & Eng. R. Cas., N. S., 762.

Jones v. Charleston & W. C. Ry. Co

other cases decided subsequently, but before the determination of such case.

Negligence—Speed in Violation of Ordinance.†

In deciding whether a railroad company was negligent in running its trains at a point not a street crossing, failure to observe the requirements of an ordinance regulating the speed of trains across streets may be considered.

Exceptions.

Exceptions based on questions of fact cannot be considered.

Appeal from Common Pleas Circuit Court of Anderson County; Watts, Judge.

Action by James L. Jones against the Charleston & Western Carolina Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

This is an action by the plaintiff against the defendant for damages alleged to have been sustained through the negligent, willful, and careless operation of its train of cars, resulting in the death of his intestate. The jury rendered a verdict in favor of the plaintiff for \$1,400. The defendant appeals upon the following exceptions:

“(1) Because the presiding judge erred in allowing the introduction of testimony of James L. Jones, P. K. McCully, W. T. McGill, J. L. Farmer, J. M. Patterson, M. Kennedy, E. D. Kay, W. L. Brissey, John A. Hays, and Sam. O. Jackson, tending to show that they had seen persons walking up and down the tracks of the defendant company, when, as it is respectfully submitted, the testimony was incompetent, and should not have been introduced for the following reasons: (a) Such testimony was not admissible, and had no relevancy to the case then on trial, unless it had previously been shown that such use of the defendant's track was with the knowledge and consent of the railroad company. (b) Because such evidence would not even then be competent unless it was first shown that any officer or agent of defendant consenting to such use of defendant's tracks had authority to give such consent.

“(2) Because the presiding judge erred in allowing to be introduced in evidence an ordinance of the city of Anderson regulating the speed of trains within the city limits; the error of such ruling being: (a) Because the accident did not occur at a street or railway crossing, but occurred upon a trestle one hundred to one hundred and fifty yards away; and therefore its introduction had no relevancy to the case on trial, and was prejudicial to the defendant. (b) Because the ordinance in question is a penal ordinance, providing for the punishment of agents of railway companies who fail to observe its requirements, and not directed against the railroad company, and that it had no relation whatever to the issues in

†As to whether the violation of an ordinance limiting speed of trains is negligence, see foot-note appended to *Edwards v. Chicago & A. Ry. Co.* (Mo. App.), 2 R. R. R. 333, 25 Am. & Eng. R. Cas., N. S., 333.

Jones v. Charleston & W. C. Ry. Co

this case, and its introduction was, therefore, improper, and prejudicial to the defendant. (c) First. Because there was no evidence of the rate of speed at which defendant's train crossed the street [Reed street] about 100 yards from the place where the accident occurred, and its introduction was, therefore, improper, and prejudicial to the defendant. Second. Because the rate of speed prescribed in said ordinance is an unreasonable one, which the defendant had a right to disregard.

“(3) Because the presiding judge erred in charging the jury as follows: ‘If you believe from the evidence that the deceased was at the time of the accident walking along the track of the defendant company at a place where the said track had long been used by the public as a walkway with the knowledge and acquiescence of the railway company, then the deceased was not upon the track as a trespasser, but as a licensee;’ and again in these words: ‘The jury must be satisfied to make out a licensee that that place had for a long time been used as a walkway with the knowledge and acquiescence of the railway company, and, if she was on that track under such circumstances, then she would be a licensee, and not a trespasser,’—the error being that the presiding judge instructed the jury, in effect, that mere knowledge and acquiescence or failure to object to such use of the defendant's tracks was sufficient to make persons using such tracks licensees, when we submit under the law that they would be and are trespassers, unless they have the positive consent of some officer of the railway company authorized to give the same to so use such tracks.

“(4) Because the presiding judge erred in charging the jury, as requested by plaintiff's counsel in their third request to charge, as follows: ‘If the jury believe from the evidence that the deceased was at the time of the accident walking along the track of the defendant company at a place where the said track had long been used by the public as a walkway with the knowledge and acquiescence of the railway company, then the deceased was not upon the track as a trespasser, but as a licensee’—the error being in instructing the jury, in effect, that mere knowledge and acquiescence by the railway company in such use of its tracks would constitute persons so using the defendant's tracks licensees, when we submit that such person would be and are trespassers thereon.

“(5) Because the presiding judge erred in charging the jury, as requested by plaintiff's counsel in their eighth request to charge, as follows: ‘That if the jury should find from the evidence that the defendant ran its train at a greater speed than the ordinance of the city of Anderson permitted, or that it failed to ring its bell as required by said ordinance, and if the injury complained of resulted from such violation, then they may consider such acts as circumstances from which they may infer negligence on the part of the defendant’—the

Jones v. Charleston & W. C. Ry. Co

error being that the ordinance in question had no relation to, and could not properly affect the question of, defendant's negligence in this case, as the admitted testimony was that the injury did not occur at any street crossing in the city of Anderson.

"(6) Because his honor erred in refusing the motion for a new trial, made upon the following ground: 'Because the uncontradicted evidence shows that the deceased, Mrs. Susan V. Jones, was a trespasser when injured, and therefore the defendant company only owed her the duty not to do her wanton or willful injury, and, there being no evidence of any such wantonness or willfulness, the verdict should have been for the defendant'—such refusal on this ground being, under the facts and circumstances of this case, error of law.

"(7) Because his honor erred in refusing the motion for a new trial made upon the following grounds: 'Because the uncontradicted evidence shows that the deceased, Mrs. Jones, was guilty of negligence, which was one of the proximate causes of her injury; and, if the defendant was also negligent, still the deceased was guilty of contributory negligence, and therefore the verdict should have been for the defendant'—said refusal on this ground being, under the facts and circumstances of this case, error of law.

"(8) Because his honor erred in refusing the motion for a new trial made upon the following ground: 'Because the great weight of the evidence shows that the defendant was not guilty of any negligence which proximately caused the injury of the deceased, and therefore the verdict should have been for the defendant'—such refusal on this ground being, under the facts and circumstances of this case, error of law."

S. J. Simpson, Breazeale & Rucker, and B. F. Whitner, for appellant.

Bonham & Watkins and Quattlebaum & Cochrane, for respondent.

GARY, A. J. The exceptions will be considered in their regular order.

First Exception. When the testimony mentioned in this exception was offered, the defendant's attorney objected "on the ground that the sole purpose of this testimony can be to prove (if they can prove it) that people who walked over this track are licensees, and, before they can be licensees, permission must have been given by somebody, and, if such permission was given by any person, then it should be brought home to such person." It will be observed that the questions presented by the exception are not identical with those ruled upon by his honor the presiding judge when the objection was interposed to the admissibility of the testimony. The testimony was admissible, inasmuch as it was responsive to the allegations of the complaint. *Hicks v. R. R.*, 63 S. C. 570, 41 S. E. 753, 4 R. R. 540, 27 Am. & Eng. R.

Jones v. Charleston & W. C. Ry. Co

Cas., N. S., 540. Furthermore, the ruling of the circuit judge was in accordance with the principles announced by this court on the former appeal in this case. 61 S. C. 556, 39 S. E. 758.

Second Exception. The defendant's attorney objected to the introduction of the ordinance in evidence on the following grounds: "(1) Because the accident did not occur at a street or railroad crossing, but occurred upon a trestle 100 or 150 yards away; and (2) because the ordinance is not directed against the railroad company, but against the engineer and the men in charge of the train; and (3) as to the rate of speed." The testimony was competent, because it was responsive to the allegations of the complaint.

Third and Fourth Exceptions. These exceptions will be considered together. On the former hearing this court laid down certain rules for the guidance of the circuit court, relative to the questions under consideration, when it used the following language: "Even though the use of the track by the public as a walkway was not for such length of time nor of such character as to give a legal right to so use the track, and even though the evidence fell short of showing any positive consent of such use by the company, yet, if there was evidence tending to show knowledge of or acquiescence in such use without protest, such evidence would tend to show that the railroad company had much reason to expect the presence of persons upon the track, who were there not as bald trespassers, but using it with the knowledge and acquiescence of the company. Under such circumstances it would be the duty of the railroad company to keep a reasonable lookout, or to give warning of the approach of the train, or generally to observe ordinary care under the circumstances to avoid injury." Again, it said: "The fifth exception complains of error in failing and refusing to charge defendant's second request, which is as follows: 'If the jury find from the evidence that the said Susan V. Jones was injured by the train on the railway track other than at the public crossing, or a crossing which the public was accustomed to use to cross the track, she was a mere trespasser, and the plaintiff would not be entitled to recover in this action, unless the jury further find from the evidence that the injury was the result of wanton and willful misconduct of the defendant in the running of its train at the time. Except at crossings, the railroad company has a right to the exclusive use of its track, and is entitled to assume that it is clear. It is not bound to anticipate that persons will be upon it, or make provision for the safety of such persons.' Responding to the request, the court said: 'Well, defendant has submitted an abstract proposition of law that is in one sense correct, because the right of way, the track of the railroad company, being the property of the railroad company, and maintained for its use, it is the property of the railroad company, and it is not bound to anticipate

that, as a rule, a person is to obstruct that track by getting upon that track; and the railroad company has a right to assume that its legal right will be respected by the people, and it is not its duty to anticipate that people will be upon that track.' The defendant was not entitled to have the court charge the request without qualification, for it assumed that the plaintiff was a trespasser if the injury happened at any other than a public crossing, and that, therefore, the defendant was not liable unless the injury was the result of defendant's wanton and willful misconduct; whereas plaintiff's complaint and evidence in support thereof was directed to show that plaintiff was not such a trespasser, but rather a licensee, using the track with the knowledge and acquiescence of the defendant, and in a populous part of the city of Anderson, where people were accustomed to travel, which circumstance would call for greater care on the part of the defendant than in the case of a bald trespasser. In view of what has been said, the sixth exception must also be overruled, since it complains that the court erred in charging the jury that if they believe from the evidence that the deceased was at the time of the accident walking along the track of the defendant company at a place where the track had been in use by the public as a walkway with the knowledge and acquiescence of the railroad company, then the deceased was not upon the tracks as a trespasser, but as a licensee." The charge of the presiding judge was in harmony with the principles announced by the Supreme Court in this case.

The appellant, however, contends that the more recent decisions in *Haltiwanger v. R. R.*, 64 S. C. 7, 41 S. E. 810, 3 R. R. R. 883, 26 Am. & Eng. R. Cas., N. S., 883, *Elkins v. R. R.*, 64 S. C. 553, 43 S. E. 1, and *Ringstaff v. R. R.*, 64 S. C. 546, 43 S. E. 22, establish a contrary rule. Even if this is true, the principles announced in these later cases cannot affect the judgment of the Supreme Court upon questions raised by the exceptions in the former appeal. Section 8, art. 5, of the Constitution, is as follows: "When a judgment or decree is reversed or affirmed by the Supreme Court, every point made and distinctly stated in the cause and fairly arising upon the record of the case, shall be considered and decided, and the reasons thereof shall be concisely and briefly stated in writing, and preserved with the record of the case." When such questions are decided, they become *res judicata*, and when the remittitur has been sent down the Supreme Court loses jurisdiction, and cannot render a different decision upon the question decided (even if it should be convinced that there was error), so as to affect the particular case in which the decision was rendered. *Carpenter v. Lewis*, 65 S. C. —, 43 S. E. 881; *Ex parte Knox*, 17 S. C. 217; *Brooks v. Brooks*, 16 S. C. 621; *Ex parte Dunnovant*, *Id.* 300; *Sullivan v. Speights*, 14 S. C. 360; *Ex parte Dial*, *Id.* 585; *Kibler v. R. R.*, 65 S. C. 242, 41 S. E. 977; *Wil-*

Jones v. Charleston & W. C. Ry. Co

loughby v. R. R., 52 S. C. 166, 29 S. E. 629; *Jennings v. Parr*, 54 S. C. 109, 32 S. E. 73; *Mfg. Co. v. Price*, 6 S. C. 278; *Warren v. Raymond*, 17 S. C. 163; *Frost v. Frost*, 21 S. C. 501. When this case was last heard by this court it was composed of only three members. Even if it should be of opinion that the decision on the former appeal was erroneous, the court is without jurisdiction to grant relief from that judgment, and a decision upon the question whether the principles announced upon the former hearing have been shaken by more recent decisions could only affect other persons not parties to this action. We have, therefore, deemed it advisable to postpone the consideration of that question until it arises in a case that can be heard by the court when composed of all its members.

Fifth Exception. The plaintiff's intestate had the right to assume that the defendant would regulate the speed of its train in compliance with the requirements of law, and we see no good reason why the jury should not take into consideration the defendant's violation of the law along with the other circumstances of the case in determining the question of negligence. *Kirby v. R. R.*, 36, S. C. 494, 41 S. E. 765.

Sixth and Seventh Exceptions. Without undertaking to detail the evidence, we are satisfied that both those grounds were properly overruled.

Eighth Exception. This exception involves merely a question of fact, and cannot be considered by this court.

It is the judgment of this court that the judgment of the circuit court be affirmed.

On Rehearing.
(March 25, 1903.)

PER CURIAM. In this case the appellant has filed a petition for a rehearing on two grounds, the first of which is as follows: "Because, as it is respectfully submitted, the court, in its decision in this case, in holding that certain conclusions announced on the former appeal were *res judicata*, and required the circuit judge on the new trial to charge the jury in accordance therewith, whether right or wrong, he overlooked the fact that the principle governing this case is not *res adjudicata*; but, if the former decision controls, it must be on the principle of *stare decisis*, and, for such decision has been weakened or overruled, then the latest decision must control." While this court is satisfied that the authorities cited in the opinion amply sustain the ruling of this court, nevertheless, out of deference to the earnest argument of appellant's counsel, we will refer to others, some of which are from our own state. In the case of *Sanders v. Bagwell*, 37 S. C., at page 150, 15 S. E. 714, 16 S. E. 770, Mr. (now Chief) Justice Pope uses this language: "The effect of the judgment of this court, simply reversing the first judgment in the circuit court, placed the parties litigant in the same plight and condition they had been in before any trial of the action,

Chattanooga Electric Ry. Co. v. Cooper

with this restriction: that they could not again litigate the same matters that had been passed upon by this court, as evidenced by the opinion of the court, accompanying its judgment. It may be as well to state in this connection, in answer to so much of respondent's position 'that the judgment of the Supreme Court on the first appeal was neither pleaded nor put in evidence,' that it was not necessary to either plead or put such judgment in evidence. All parties were bound at their peril to give such judgment in the identical action between the same parties, with the same attorneys, instant and continued recognition and obedience." See, also, *Cunningham v. Cauthen*, 44 S. C. 106, 21 S. E. 800; *Mfg. Co. v. Price*, 6 S. C. 278; *Kibler v. Bridges*, 5 S. C. 335. The two last-mentioned cases are cited in the voluminous notes to *Hastings v. Foxworthy* (Neb.) 34 L. R. A. 321, which discuss the question under consideration, and show that the ruling of this court is sustained by the weight of authorities.

The second ground for a rehearing is as follows: "It is respectfully submitted that, even if we are wrong in what we have above said, the former case and this case are not identical, as the facts were to some extent different on the two trials, and this fact was overlooked by the court. On the former trial there was no evidence tending to show notices had been posted forbidding the use of the track as a walkway. On the new trial there was such testimony." It makes no difference whether the testimony was the same or not. The material question is whether the same principle of law is involved.

It is, therefore, ordered that the petition be dismissed, and that the order staying the remittitur heretofore granted be revoked.

CHATTANOOGA ELECTRIC RY. CO. v. COOPER.

(*Supreme Court of Tennessee, Oct. 23, 1902.*)

[70 S. W. Rep. 72.]

Accident on Track—Contributory Negligence—Sudden Peril from Another Cause.

Where plaintiff's decedent was killed by the negligence of the motorman of a street car while he was attempting to escape from an approaching automobile, he was not disbarred from claiming immunity from contributory negligence on the ground that he was placed in a sudden peril, and, losing his self-possession, made a mistake of judgment, by reason of the fact that the peril producing the confusion of judgment and the consequent false effort to escape was not the negligent act of defendant.

Same—Same—Same.

Where, in an action for death, it was claimed that deceased was not guilty of contributory negligence by reason of his being placed in a sudden peril, it was error to refuse to charge that, to entitle deceased to immunity from the charge of contributory negligence under such rule, he must have been without fault in putting himself in the place of peril or danger.

Chattanooga Electric Ry. Co. v. Cooper

Appeal from circuit court, Hamilton county; Floyd Estill, Judge.

Action by John L. Cooper, as administrator, etc., against the Chattanooga Electric Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Brown & Spurlock, for appellant.

Head & Anderson, for appellee.

BEARD, C. J. The evidence in this case tended to prove that the intestate of the defendant in error, a very old man, in crossing one of the streets of Chattanooga, over which the plaintiff in error operated its cars by electric power, suddenly found himself in a position of apparent peril from a rapidly approaching automobile, and in attempting to escape, in a moment of alarm and excitement, inadvertently ran upon one of the tracks of the plaintiff in error, and was killed by one of its passing cars. This car was moving in a direction opposite to that of the automobile, and the evidence also tended to show that the motorman, instead of watching his car and the track in front, so as to avoid accident, had his eyes on the automobile, and was looking down the side of the car at the automobile as it passed down the street; and that, but for this, the death of Mr. Cooper would not have occurred. In this state of the evidence it was insisted by the railway company that the deceased could have pursued another direction, whereby he would have escaped the peril that apparently threatened him, and at the same time have avoided contact with its car; and that, failing to do so, his own negligence, proximately contributing to his death, would bar a recovery, even though the motorman was also guilty of negligence. This view was pressed on the trial judge, and he was requested, but declined, to give it in charge to the jury. On the contrary, he said to the jury: "It is true, as insisted by counsel for the plaintiff in this case, that if a man is in a place of danger, and he is excited by the danger to such an extent that he cannot act with sound judgment and discretion,—in other words, if the automobile was upon him (the deceased), and he was excited by the situation, and did the wrong thing under the circumstances,—the law would not hold him accountable, would not charge him with contributory negligence." This is assigned for error by the railway company, the defendant below, and the plaintiff in error in this court. It is said in the brief and argument submitted by its counsel that this rule would properly have been applied if the plaintiff in error had placed the deceased in the position of danger with the result to him set forth in this paragraph, "but that a different rule applies when the danger is brought about by a third person, or an independent agency." It is well settled by all the authorities that a plaintiff put in a place of sudden peril by the negligent act of a defendant, who, losing self-possession, takes the wrong step, and is injured, will not have such step

Chattanooga Electric Ry. Co. v. Cooper

imputed to him as contributory negligence. This rule has been recognized by this court in *Railroad Co. v. Gurley*, 12 Lea, 46, and *Marble Co. v. Black*, 89 Tenn. 124, 14 S. W. 479. But it is a mistake to assume, as is done by the plaintiff in error, that the application of this rule is restricted to cases where the peril producing the confusion of judgment, and the consequent false effort to escape, is the negligent act of the party creating the peril. Judge Elliott, in section 1173, vol. 3, of his work on Railroads, says: "The rule goes further than to exonerate the traveler where the peril is caused by the railroad company; for if, without fault himself, the traveler is placed in a position of sudden peril by a third person, or by some accident,—as, for instance, by horses running away,—he may be absolved from exercising that degree of care required of one in ordinary circumstances." So, in section 89, vol. 1, of *Sherman & Redfield on the Law of Negligence*, the authors say that: "In judging of the care exercised by the plaintiff, reasonable allowance is always made for the circumstances of the case; and, if the plaintiff is suddenly put into peril without having sufficient time to consider all the circumstances, he is excusable for omitting some precautions, or making an unwise choice, although, if his mind had been clear, he ought to have done otherwise." Judge Thompson, in his *Commentaries on the Law of Negligence*, in volume 1, § 195, thus states the rule: "One who is placed in the apparent situation of sudden and imminent danger, without his own fault, is not, as matter of law, guilty of contributory negligence, because he acts upon appearances of danger which had not in fact existed, or fails to make the most judicious choice between the expedients which the situation presents for seeking his safety, or because he might have escaped injury had he acted differently. The obligation resting upon him to exercise ordinary care does not extend so far as to require him to act with all the care and caution which might be reasonably required of him under ordinary circumstances." To the same effect is *Wharton on the Law of Negligence* (section 304). The text of each of these authors is supported by the opinions of courts of the most eminent respectability, as well as, we think, by sound reason; for to require that one in the midst of peril, or in the presence of impending danger, should act with the prudence of an ordinarily careful man under ordinary circumstances, would be to put a strain on human nature which all experience shows it would not be able to bear. But, to get the benefit of this extension of the rule, the party injured must be without fault in putting himself in the place of peril or danger; that is, he must not recklessly or improvidently have incurred it. But, while the plaintiff in error is wrong in this contention, yet his assignment of error is well taken, in that the trial judge failed to qualify the clause in controversy in the manner indicated in

Dilas' Adm'r v. Chesapeake & O. Ry. Co

the last paragraph above of this opinion. Whether the deceased was without fault in getting into danger was a question which should have been submitted to the jury, as it was essential in determining the main question; that is, was contributory negligence to be imputed to him, so as to bar a recovery?

DILAS' ADM'R v. CHESAPEAKE & O. RY. CO.

(*Court of Appeals of Kentucky, Jan. 20, 1903.*)

[71 S. W. Rep. 492.]

Killing Trespasser on Track—Contributory Negligence.

A trespasser, who, before daylight, and in a dense fog, was killed while riding on a railroad tricycle in a collision with a passenger train running at usual speed and on regular time, was guilty of contributory negligence precluding recovery.

Same—Authority of Road Superintendent to Permit Use of Track for Travel.

Plaintiff's intestate was killed by collision with a passenger train while riding on the track on a railroad tricycle at the invitation of a shop employee. The tricycle belonged to defendant's road superintendent, and in an action to recover damages for such killing evidence offered that such superintendent told deceased's companion that he might use the tricycle, and that defendant had permitted persons to use the track for travel at the place of the accident, was excluded. The petition did not allege that such superintendent had authority to permit such use of the track, or license to so use it: *held*, that the exclusion of such evidence was not error.

Same—Absence of Light during Dense Fog.

The engineer of a passenger train was not guilty of negligence in failing to have the headlight of his engine burning at the time of a collision, where it appeared that there was a dense fog, so that it would have done no good.

Appeal from circuit court, Greenup county.

"Not to be officially reported."

Action by L. T. Mowry, as administrator of the estate of Crit. Dilas, deceased, against the Chesapeake & Ohio Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

W. T. Cole, Cole & Son, and J. B. Bennett, for appellant.
W. H. Wadsworth, for appellee.

SETTLE, J. The appellant, L. T. Mowry, as administrator of the estate of Crit. Dilas, deceased, instituted this action in the Greenup circuit court against appellee, Chesapeake & Ohio Railway Company, to recover damages for the alleged negligent and wrongful killing of his intestate October 28, 1897, by a passenger train in charge of its servants. The answer traverses the allegations of the petition, and avers negligence on the part of the decedent. Upon the trial in the lower court, and at the conclusion of appellant's evidence, the jury found for appellee upon a peremptory instruction from the court, and appellant, having been refused a new trial, prosecutes this appeal.

Dilas' Adm'r v. Chesapeake & O. Ry. Co

It appears from the record that the intestate, at the invitation of one Ad Jacobs, was riding with him upon a railroad tricycle from the latter's house into the village of Russell, where he (Jacobs) was employed in the shops, presumably of appellee, when, but a short distance from Jacobs' house, and within three miles of Russell, the tricycle was struck by the passenger train, and both Jacobs and Dilas were killed. The accident occurred between 6 and 7 o'clock in the morning. A dense fog prevailed at the time, which doubtless obstructed the view of the two men on the tricycle, as well as that of the engineer and fireman on the train. It appears that the collision took place at a point about 400 yards from a private crossing known as "Powell's Crossing," and that between that crossing and Russell were two other crossings, both of which were public crossings,—one, Pond Run, or Chinn's crossing, being a quarter of a mile to a half mile from Powell's crossing; and the other, Clancy's crossing, being about the same distance from Chinn's crossing. While the evidence is somewhat conflicting, it fairly establishes the following facts: That the train was running on time, and not at an unusual rate of speed; that it gave no signal, either by the ringing of its bell or the blowing of its whistle, for the Powell crossing, but it did give the usual whistle signal for the Chinn public crossing, which, as stated, was a quarter or half mile from the Powell crossing. And one or more witnesses testify that the train whistled for the Clancy crossing. In view of the foregoing facts we are unable to see why appellee should be held accountable for the death of appellant's intestate, for, as he and Jacob were mere trespassers in thus making use of appellee's track, the latter's servants in charge of the train were under no duty to keep a lookout for them. Nor does the evidence show any negligence on the part of those in charge of the train in failing to use all reasonable means to avoid the injury after discovering Dilas and Jacobs on the track. It is contended, however, that, as there is evidence tending to show that the tricycle on which the parties were riding was owned by one Stout, appellee's road superintendent, and that Jacobs, with his permission, had used it for nearly two years on appellee's track in going to and from his house to Russell, his use of the track was thereby known to and acquiesced in by appellee, for which reason he and Dilas were not trespassers in thus using the track. It must be borne in mind that Jacobs, if in the employment of appellee at all, was employed to work in its shops at Russell. He had nothing to do with the track or roadbed; nor did his duties, so far as this record discloses, require him to travel over appellee's track with, or without, a tricycle; and certainly he was without authority, either express or implied, to take Dilas on the tricycle with him. In *Railroad Co. v. Gastineau's Adm'r*, 83 Ky. 119, it was held by this court that, even where one undertakes to assist an employee of a railroad company at the

Dilas' Adm'r v. Chesapeake & O. Ry. Co

request of such employee, "it [the railroad company] is not required to use care to anticipate and discover the peril to such a person, but only to do so after the discovery of the danger. Until then no legal duty is imposed upon it, because no one by a wrongful act can impose a duty upon another." The doctrine announced in the case *supra* was followed and reaffirmed in *Railway Co. v. Powell* (Ky.) 33 S. W. 629, in which case the injuries sued for were inflicted in a collision between a train and hand car, the latter having been furnished by the station agent of the railroad company for the use of himself and others. In discussing in this case the want of authority on the part of the station agent to run or allow the use of hand cars on the railroad track, the court said: "There was an entire absence of proof showing Irwin had any authority to use, or to authorize any one else to use, defendant's road in the manner stated. Besides, the presumption might be indulged that the officers of a railroad would not permit a subordinate like Irwin to go upon its track, or allow others to do so, with a hand car, at will, when special trains were being frequently run over the road. If he had no authority to so use the track, he could not vest any one else with such authority." We are of opinion, therefore, that the lower court did not err in refusing to allow appellant's counsel to prove a conversation between the road superintendent, Stout, and Ad Jacobs, in which the former said he "did not care" if the tricycle was used by Jacobs. We are also of the opinion that the court properly excluded the evidence offered by appellant to the effect that persons had been permitted by appellee to use its track for travel at the place of the accident and from there to Russell. It was not shown by the avowal of what the witness would state by whom and to what extent the track had been used, and, besides, as said by this court in *Brown's Adm'r v. Railroad Co.* (Ky.) 30 S. W. 639, "the mere acquiescence on the part of the railroad company in the use of the track by the public does not confer any authority or right, or amount to a license, to use the same."

Appellant has failed to plead the alleged consent of appellee's road superintendent to the use of the tricycle by Jacobs and Dilas, or that he had authority from appellee to give such consent, nor does he plead the alleged license from appellee to the public to the use of its track as a walkway. In *Embry v. Railroad Co.* (Ky.) 36 S. W. 1123, it was held, in an action against a railroad company to recover for injuries resulting from its negligence, that "the petition is fatally defective in failing to show that plaintiff had any right to be on the track, or that defendant owed him any duty, and therefore a peremptory instruction to find for the defendant was proper." The law is well settled in this state by numerous decisions of this court that, as to persons who are trespassers upon its track, a railroad company can only be held liable in damages for injuries inflicted by its trains where it is shown that the

Indiana, D. & W. R. Co. v. Fowler

danger to the injured party was discovered in time for the injury to have been avoided by the exercise of reasonable or ordinary care on the part of those in charge of the train. In addition to the cases above indicated, the following may be cited in support of the doctrine announced, viz.: Hoskins' Adm'x v. Railroad Co., 30 S. W. 643; Railroad Co. v. Wade, 36 S. W. 1125; and Railroad Co. v. Tinkham's Adm'x, 44 S. W. 439.

It is contended for appellant that appellee's engineer was guilty of negligence in failing to have the headlight of the engine burning at the time of the collision, but we are unable to see that any good could have resulted from the use of the headlight in such a fog as that which enveloped the railroad track and contiguous territory, and the engineer, whose statements are uncontradicted, testified that the headlight was extinguished at Russell because of no further service in affording light. We do not believe that appellee's servants in charge of the train, under the existing conditions, could have anticipated that persons would be on the track with a tricycle, nor was it their duty to do so. The collision occurred where appellee's track ran through a field, and at a point 400 yards from the nearest crossing. The train, according to the evidence, was making a great noise at the time, and gave, as it approached, the usual signal at each of the public crossings, Clancy's and Chinn's. It was not required to whistle for the Powell private crossing, though it may at times have theretofore done so. It is manifest, therefore, that those in charge of the train did not discover the peril of Jacobs and Dilas in time to avoid the collision. Upon the other hand, it does appear that Jacobs and Dilas were familiar with the running of the trains on appellee's road, and it follows that in venturing to use appellee's track with the tricycle in the face of an approaching train they were guilty of the grossest negligence, but for which they would not have been killed.

Being of the opinion that the circuit judge did not err in giving the peremptory instruction asked by appellee, the judgment of the lower court is affirmed.

PAYNTER, J., not sitting, because he was a witness in the case.

INDIANA, D. & W. R. Co. v. FOWLER.

(*Supreme Court of Illinois, Feb. 18, 1903.*)

[66 N. E. Rep. 394.]

Damages—Release—Fraud.

The question whether a release of all claims for damages was procured by fraud was a question of fact, conclusively settled by the jury and the appellate court.

Same—Same—Same—Return of Consideration.

A party induced by fraud to execute a release of all claims for

Indiana, D. & W. R. Co. v. Fowler

damages is not required to return the amount paid him on the execution thereof, before bringing a suit for damages.

Same—Same—Same.

The questions whether a release of all claims for damages was fairly obtained by the party liable, and whether the party executing it knew and understood its contents, and knew he was releasing his right of action for damages, were for the jury.

Same—Same—Right of Illiterate to Rely on Representations of Railroad's Agent.*

An illiterate person, executing a release of all claims for damages, at a time when there were no others present than his wife, who was also illiterate, and the agents of the party liable for damages, had a right to rely on the representations of such agents.

Appeal from appellate court, Fourth district.

Action by Solomon Fowler against the Indiana, Decatur & Western Railroad Company. From a judgment of the appellate court (103 Ill. App. 565) affirming a judgment for plaintiff, defendant appeals. Affirmed.

Geo. W. Fithian (R. D. Marshall, of counsel), for appellant.
Shamhart & Williams, for appellee.

CARTER, J. This is an appeal from a judgment of the appellate court for the Fourth district affirming a judgment of the circuit court of Jasper county in favor of appellee for \$1,000 recovered for a personal injury. On July 16, 1900, the appellee, Solomon Fowler, was a passenger on the train of the appellant going from Willow Hill to Ste. Marie. During the journey a bridge gave way, wrecking the train, and appellee was injured. Nine days later, while appellee was still suffering on account of the injuries received, the superintendent and an attorney of the appellant, together with the physician attending appellee, called at his home, and secured his mark as a signature to a paper purporting to be a release of all claims for damages for the personal injuries received on account of the wreck, with a receipt for \$35 subjoined. Appellee claims that he did not know what he was signing, and that the release was secured by fraud and circumvention. He brought this suit for damages, and on the trial the appellant company admitted everything charged in the declaration, except as to the extent of his injuries, and relied on the release as a complete bar to a recovery. The case was tried twice, each time resulting in a verdict for appellee.

At the instance of appellant, the following special interrogatory was submitted to the jury: "Was the receipt offered in evidence by the defendant obtained by the defendant from the plaintiff by fraud and circumvention?" The jury answered, "Yes." The question whether the release was executed by appellee with full knowledge of its purport, and under circumstances that would bind him, was one of fact, and has been settled by the jury and the judgment of the appellate court adversely to appellant. *National Syrup Co. v. Carlson*, 155

*See *Great Northern Ry. Co. v. Kasischke* (C. C. A.), 19 Am. & Eng. R. Cas., N. S., 406, and note, 421.

Enright v. Pittsburg Junction R. Co

Ill. 210, 40 N. E. 492; Illinois Central Railroad Co. v. Welch, 52 Ill. 183, 4 Am. Rep. 593. The court properly refused the instruction asked to find for defendant, as there was sufficient evidence before the jury to sustain a verdict for the plaintiff.

Counsel for appellant contend that appellee should have offered to return the amount paid him by appellant before bringing this suit. In Chicago, Rock Island & Pacific Railway Co. v. Lewis, 109 Ill. 120, 19 Am. & Eng. R. Cas. 224, it was held that an instrument absolutely void need not be rescinded, to remove it out of the way of the assertion of a right. If the release was obtained by fraud, it was absolutely void. It never had any binding force, and there was nothing to rescind. Pawnee Coal Co. v. Royce, 184 Ill. 402, 56 N. E. 621.

Counsel offer some criticism on the instructions given for the appellee, but they are in accord with the law. Whether the release was fairly obtained, and whether appellee knew and understood the contents of the release when it was executed, and whether he knew and understood that he was releasing his right of action against appellant, were all proper questions for the jury; and the instructions given are like those approved in other cases. Pioneer Cooperage Co. v. Romanowicz, 186 Ill. 9, 57 N. E. 864.

Appellant complains of the refusal of the court to give an instruction telling the jury that, if they believed that it was on account of appellee's own negligence or lack of diligence that he did not understand the purport and effect of the release, he could not now be heard to complain that he signed it without understanding it. There was no evidence on which to base this instruction. Appellee and his wife were illiterate, and there were no other persons present than those in the interest of appellant, and he had to rely on their representations. The instruction was properly refused.

Finding no error, the judgment will be affirmed. Judgment affirmed.

ENRIGHT *et al.* v. PITTSBURG JUNCTION R. CO.

(*Supreme Court of Pennsylvania, Jan. 5, 1902.*)

[54 Atl. Rep. 317.]

Injury to Child—Negligence of Parent.

A father is not guilty of contributory negligence in allowing his son, 11 years old, to go on the street alone on Sunday, and to stroll along railroad tracks a block and a half from his home.

Trial—Influencing Witnesses.

Where the evidence in an action against a railroad company for personal injuries showed that an agent of the railway had paid certain moneys to boys, who were the only witnesses of the accident, and that counsel for plaintiff was prevented from speaking to the boys in court by defendant's agent, and the agent testified that the money was given to the boys for car fares and luncheons, the court properly left it to the jury to determine whether the payments were legitimate, or made for the purpose of affecting the evidence of the boys.

Witnesses.

Where a boy's testimony as to an accident in which he received

Enright v. Pittsburg Junction R. Co

the personal injuries sued for was different from his statements in the hospital at a time when one leg had been amputated, and the other was badly lacerated, and his head was cut open, it was not error to instruct that, if he was suffering such pain at the time of the statements as not to know what he was talking about, such fact should be considered by the jury in determining the question of his credibility.

Appeal from Court of Common Pleas, Allegheny County; Evans, Judge.

Action by Patrick Enright and Joseph Enright against the Pittsburg Junction Railroad Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

The plaintiff, a boy about 11 years old, was injured on the afternoon of Sunday, September 5, 1897, while on a moving freight car. The conflicting testimony as to the circumstances of the accident is stated in the charge as follows:

"The plaintiff, Joseph Enright, with two other boys, McCarthy and Reardon, on the day of this accident, boarded a train of the Baltimore & Ohio Railroad Company which was being transported across on the tracks of this defendant company, for the purpose of going over to Schenley Park; and, in getting off the train while it was in motion, this plaintiff was injured.

"The important question for you to determine, first, is the circumstances surrounding the injury—how he came to get off the train. If he got off the train of his own motion, then he is not entitled to recover. He alleges, however, that he did not intend to get off the train, but that a brakeman on the train flourished his brake stick and yelled at him to get off, and, through fear of the brakeman, he jumped off the train and was injured. Now, that will be the first question of fact which will present itself to you to determine; and it is for you to determine, under the evidence in this case, whether it was through fear of injury to him by the brakeman, or the railroad detective whom the brakeman had called, as he said, that caused the boy to jump off while the train was in motion, or whether he got off of his own accord. You have heard the testimony on that subject, and, so far as the direct evidence as to the fact is concerned, the boy's testimony is uncorroborated. He testifies to that state of facts himself, and he is not corroborated directly by any other witness. He is contradicted directly by the two boys that were on with him, who testify that they heard no brakeman, and saw no brakeman swing a stick. From the testimony of the plaintiff, it is hardly conceivable that this could have happened, and the other two boys not know it. If I understand his testimony correctly, the three were on the car when the brakeman commenced to hollo. He says, 'He holloed at us.' I infer from that that he means that the three were on the car when the brakeman commenced holloing; and if that be true, and he heard it when they were all sitting together, it is not conceivable that the others did not hear it or see it. Therefore

Enright v. Pittsburg Junction R. Co

there does not appear to be any way of reconciling the testimony of these three boys. Either this plaintiff is telling us what is not true, or the other two are telling what is not true. At least, that is the way it looks to the court; and it is for you to determine which of these two stories is the correct one, because, as I stated before, the plaintiff's case hinges on the fact of whether this brakeman called out to him, or not. It is for you to pass upon the credibility of these witnesses. The plaintiff Joseph Enright is an interested witness, of course, because upon his testimony will depend his recovery in this case. You pass upon the credibility of the other two witnesses, and, in doing so, you take into consideration the testimony which has been offered in evidence to affect their credibility. One of them—I think it is Reardon, the larger of the two boys—has been contradicted by three witnesses. Of course, those three witnesses are the plaintiff Joseph Enright and the father and mother of the plaintiff—in fact, both plaintiffs and the mother; all interested. They have contradicted him directly as to assertions which he made very soon after this accident—within, I suppose, two or three months after this accident happened—that the brakeman did frighten him off the car. You take that into consideration.

“Another matter has come into the case, which you have a right to consider, as affecting the credibility of these two boys, and that is the fact that an agent for the defendant company paid them money at different times pending the trial of this case. You have heard his explanation of that; and while ordinarily it is a highly improper matter to pay a witness money, it is not improper, under certain circumstances, if the services of the witness are wanted, to pay his ordinary expenses. To illustrate what I mean: The testimony of the agent of the defendant company was that the counsel of the defendant company wanted these two boys in his office to make an affidavit. They had a right, of course, to demand their expenses to and from the office, and it was legitimate for him to pay it. If that and similar purposes is all that this money was paid for, then that was a perfectly legitimate transaction. But that is for you to determine. You take the fact into consideration that these boys were paid money at different times pending the trial of this case; and, taking the evidence, you will determine whether it was a legitimate payment, or whether it was a payment for the purpose of influencing their testimony in this case. If it was for the latter, of course, it would affect their credibility. Of course, if you believe that they were telling the truth, then, no matter how improper the payment might have been, it should not affect the verdict in this case. You only consider that to affect their credibility—as to whether that was paid for the purpose of influencing them, and did influence them, in their testimony here.

“The plaintiff Joseph Enright is further contradicted by the

Enright v. Pittsburg Junction R. Co

testimony of Robinson as to an interview that he had with him a few days after the accident, and by Mr. Howells, the superintendent of the West Penn Hospital. Now, it is alleged that at that time (a few days after the accident) the boy was suffering pain; and you take that into consideration, not, as suggested by counsel for plaintiffs, because it was an outrage—a hard-hearted act on the part of the agent—because it does not matter how hard-hearted the agent might have been. That cannot affect the truth. But you take into consideration the time following the accident—as to whether the boy was in mental condition, or not, to tell it at that time. If he was, then, no matter how hard-hearted it might have been on the part of the defendant's agent, if he was in condition to tell the truth, and knew what he was saying, then the evidence of Robinson goes to affect his credibility. If he was suffering such pain at that time as to not know what he was talking about, or as to affect his knowledge of the subject, then you take that into consideration, as to whether this interview does affect his credibility, or not, and to what extent. All these things you consider, gentlemen, in determining the question as to which of these two stories you believe, because as I have said—and I am still of that opinion—you have to find that either this plaintiff, Joseph Enright, is telling the truth, and that the other two boys are willfully telling a falsehood, or else that he is telling a falsehood, and the other boys are telling the truth.

“When you come to consider the case of this father, you have one other matter to consider besides the question as to whether this accident was occasioned by the employees of this defendant company, and that is as to whether the parents of this child were negligent in permitting him to run into places of danger such as testified to in this case. If you believe that they did not take proper care of him, and allowed him to run as he pleased, and get into places of danger, then the father cannot recover. To illustrate what I mean: If this boy had been of mature years, he could not recover in this case, because it would be contributory negligence on his part to get upon a train such as this was, even if the train was standing still, and much more so if the train was moving. In his own case, it is only because he was a boy that he is entitled to recover. Now, it is the duty of the parents to take proper care of their children, and use all reasonable diligence to see that they do not get into places of danger. This boy had been, I think he said, two hours and a half, playing down near the tracks of this railroad. If you think that that was proper care for a parent to exercise over a child of this age, then, if you believe the accident happened as narrated by the boy, the father would be entitled to recover. If you believe that this was not proper care to exercise by a parent over a child, then he would be guilty of contributory negligence, and would not be entitled to recover.”

Enright v. Pittsburg Junction R. Co

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Johns McCleave, for appellant.

J. S. Ferguson, E. G. Ferguson, Horace J. Miller, and T. T. Donehoo, for appellees.

BROWN, J. When this case was here before (198 Pa. 166, 47 Atl. 938, 53 L. R. A. 330, 82 Am. St. Rep. 795), on appeal from the refusal to take off a compulsory nonsuit, we held, in reversing the court below, that under the facts proven the defendant company was negligent. On this appeal the right of Joseph Enright, the minor, to recover, is not questioned, if his testimony is to be believed; but we are asked to reverse the judgment in favor of the father on the ground of his contributory negligence, and to send the case back for another trial on the boy's claim for alleged errors in the charge of the trial judge.

The contributory negligence of the father, which appellant insists is a bar to his right to recover, is his carelessness in allowing his boy to be out on the street alone, and to stroll away from home, a square and a half, with young companions, down along the railroad tracks, where they jumped on a moving train, and the boy was hurt in getting off. He was 10 years and 6 or 8 months old on the day of the accident, which we judicially notice was Sunday. It was a day of rest, in the late summer or very early fall, when the temptation to be out of doors is great. With all ordinary business suspended, and the dangers incident to children on the street greatly diminished, the solicitude of the most anxious parents for the welfare of their little ones, longing to be out, would be naturally relaxed on the Sabbath, and what might be negligence by them on any other day of the week might not be on this. But without regard to the day, ought the court below to have declared the father guilty of contributory negligence, as a matter of law? The boy was not a little, prattling child, of so tender years that his very presence on the street, away from home, unattended by any one, was in itself evidence of the carelessness and neglect of his parents. He was nearly 11 years old—soon to reach the age of discretion. Many no older than he earn their own living, and help to support needy or helpless parents. In the healthful development of children, thousands of the age of this boy are daily seen on the streets of towns and cities, squares away from home and unattended, without a thought in the mind of the passerby that their parents are negligent; and even if, as here, they do stroll or wander into places of danger, and are hurt in their search for amusement, the law could not declare the parents careless without offending its own humanity. What was said under the facts in *Philadelphia & Reading Railroad Co. v. Long*, 75 Pa. 257, may be aptly repealed here: "The doctrine which imputes negligence to a parent in such a case is repulsive to our nat-

Enright v. Pittsburg Junction R. Co

ural instincts, and repugnant to the condition of that class of persons who have to maintain life by daily toil." In his charge to the jury, the learned trial judge said: "Now, it is the duty of parents to take proper care of their children, and use all reasonable diligence to see that they do not get into places of danger;" and he submitted it to them to determine whether, under the facts in the case, the father had been negligent. To more than this the appellant was not entitled.

The second assignment relates to what the court said in its charge about money that had been paid by an agent of the defendant company to the two boys who were on the car with Enright. McCarthy—one of them—testified that the agent had called to see him and given him money three or four times, and that it had been given to him voluntarily, as he had not asked for it. The other boy—Reardon—said the agent had given him money two or three times. In explanation, the agent testified: "I gave them fifty or sixty cents, and may be seventy-five cents or a dollar (I forgot the amounts), to come into town to see the attorney once, and attend the trial once, and to get them their dinners. Once they came in to make an affidavit to their two statements. I gave them money for their fare, and also gave them money for their dinners. I also paid their fare and paid for their dinners. This money was for that. They were poor, they said, and did not have anything. That is the reason the money was given." These two boys were subpoenaed by the plaintiff, as well as by the defendant, at the first trial. When they came into court they were in charge of Robinson, the agent who had paid them the money; and Reardon testified that, when the attorneys for the plaintiff tried to speak to them, they were ordered not to do so by the agent who had them in charge. Robinson admits this in his testimony. On the second trial, when counsel for the plaintiff attempted to speak to them in court, he was stopped by the railroad detective, and not allowed to have any communication with them. Counsel for the appellee admits that he commented on these matters in his address to the jury, and it was not improper for him to do so, for the jury could have fairly concluded that the payments were made for a purpose which was effected. In commenting upon this feature of the case, the court left it to them to determine whether the payments had been legitimately made, or for the purpose of influencing the testimony of the boys. The portion of the charge objected to is: "Another matter has come into the case, which you have a right to consider, as affecting the credibility of these two boys, and that is the fact that an agent for the defendant company paid them money at different times pending the trial of this case. You have heard his explanation of that; and, while ordinarily it is a highly improper matter to pay a witness money, it is not improper, under certain circumstances, if the services of the witness are wanted, to pay his ordinary expenses. To

Richmond Traction Co. v. Wilkinson

illustrate what I mean: The testimony of the agent of the defendant company was that the counsel of the defendant company wanted these two boys in his office to make an affidavit. They had a right, of course, to demand their expenses to and from the office, and it was legitimate for him to pay it. If that and similar purposes is all that this money was paid for, then that was a perfectly legitimate transaction. But that is for you to determine. You take the fact into consideration that these boys were paid money at different times pending the trial of this case; and, taking the evidence, you will determine whether it was a legitimate payment, or whether it was a payment for the purpose of influencing their testimony in this case. If it was for the latter, of course it would affect their credibility." In this there was no error.

The statement of the occurrence given by the injured boy, when in the hospital, to Robinson, the agent already referred to, differed very materially, according to that witness and Howell, the superintendent of the institution, from his testimony on the trial. When he was interviewed in the hospital, on the second day after the accident, as nearly as Robinson could fix the date, he was lying on a cot, covered up. One leg had been amputated, the other was badly lacerated, his head was cut open, and it is safe to assume he was in great suffering. Under these conditions, the representative of the company called upon this boy to learn from him his version of the accident. Older heads might not have been able to remember, and no just complaint can be made of that portion of the charge in which, after directing attention to the inconsistent statements alleged to have been made by the boy, the jury were told: "If he was suffering such pain at that time as to not know what he was talking about, or as to affect his knowledge of the subject, then you take that into consideration, as to whether this interview does affect his credibility, or not, and to what extent."

The assignments are dismissed and the judgments are affirmed.

 RICHMOND TRACTION CO. v. WILKINSON.

(Supreme Court of Appeals of Virginia, March 19, 1903.)

[43 S. E. Rep. 622.]

Trespassers—Ejection of Child—Instruction.

Plaintiff, 7 years of age, boarded a street car, and, after it had started, the conductor ordered plaintiff to jump off, and he jumped on a pile of sand and was thrown under the car. The court charged that if defendant's employees knew of plaintiff's dangerous position it was their duty to slow up to permit plaintiff to leave the car in safety, or not to start until plaintiff was in a place of safety, and that if plaintiff was riding on the car while it was in motion, to the knowledge of the defendant's servants who ordered him to get off, it was their duty to reduce the speed sufficiently to enable him to alight in safety, but that, in order for plaintiff to recover, the conductor must have given the order so as to

Richmond Traction Co. v. Wilkinson

frighten plaintiff and cause him to jump from the car while it was in motion: *held*, that such instructions were not objectionable as unsupported by the evidence.

Same—Same—Contributory Negligence—Instructions.

The instructions were not objectionable as assuming that it was dangerous for a boy of plaintiff's age to jump off a car in motion, or that the running board of a street car was a dangerous place for a boy of plaintiff's age to stand.

Same—Same—Moving Train—Instructions.

The instructions were not objectionable as forbidding the conductor to order a trespassing boy off his car when he was going slowly enough for the boy to alight in safety.

Same—Same—Same—Same.

Where a boy 7 years of age boarded a street car at the terminus of the line, and was injured while jumping from the car in obedience to the conductor's orders, after the car had started, whether the car was going slow enough to justify the conductor in ordering the boy to jump was a question for the jury.

Same—Same—Same—Same.

Where the conductor and motorman of a street car knew that the plaintiff had boarded the running board of the car, and the conductor ordered plaintiff to jump while the car was in motion, by which he sustained injuries, instructions that, if defendant's employees knew or could have known that plaintiff was in a dangerous situation, it was their duty to slow up sufficiently to permit plaintiff to leave the car in safety, were not objectionable as requiring defendant to keep a lookout for trespassers.

Same—Same—Instructions.

In an action for injuries to a child by being compelled to jump from a moving car on which he was a trespasser, where there was evidence as to the speed of the car at the time, an instruction that if plaintiff jumped from the car in consequence of defendant's orders, while it was in motion, by reason of the threats of the conductor, and was injured, etc., he was entitled to recover, was not objectionable for failure to include a reference to the speed of the car.

Same—Same—Instructions.

Requested instructions that, if a conductor's order to plaintiff to alight from a moving street car on which he was a trespasser was given more as a suggestion than a command, and plaintiff, not being intimidated, voluntarily jumped and was injured, or jumped as a boyish prank and was injured, the jury should find for defendant, were sufficiently covered by the charge that, unless the conductor ordered plaintiff off, while the car was moving, in such a threatening manner as to intimidate plaintiff, or if plaintiff jumped off because he knew he had no right on the car, or because he had been told to get off before the car started, and was thereby injured, he could not recover.

Same—Ejection from Moving Car—Instructions.

Where plaintiff, an infant, jumped from defendant's car on which he was a trespasser while it was in rapid motion because he was frightened by defendant's conductor calling to him to get off, and he landed on a pile of sand and was uninjured by jumping, but his injury was received by reason of the sand giving away and causing him to slide under the car, the proximate cause of the injury was the conductor's negligence in ordering him to alight, and not the falling of the sand.

Instructions.

Refusal of requested instructions covered by the general charge is not error.

Same—Ejection from Moving Car.*

Where plaintiff boarded a running board of street car while the car

*As to the duty of railroad companies to infant trespassers, see footnote appended to *Enright v. Pittsburg Junction R. Co.* (Pa.), 20 Am. & Eng. R. Cas., N. S., 564.

Richmond Traction Co. v. Wilkinson

was being switched from one track to the other, and was ordered by the conductor to jump from the car after it was in rapid motion, whereupon he jumped on to a pile of sand, which gave away and precipitated him under the car, by which he was injured, a verdict in favor of plaintiff was supported by the evidence.

Error to Circuit Court of City of Richmond.

Action by Holland R. Wilkinson against the Richmond Traction Company. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

Wm. L. Royall, for plaintiff in error.

Sands & Sands, for defendant in error.

HARRISON, J. Holland R. Wilkinson, an infant 7 years of age, by his next friend, instituted this action to recover damages for injuries alleged to have been sustained by him in consequence of the careless and negligent conduct of the plaintiff in error in operating and running one of its electric cars.

Viewed from the standpoint of a demurrer to the evidence, the record shows that the terminus of the Broad street line was at Chimborazo Park, on Church Hill, and that when car No. 31, had reached that point, and had come to a standstill, a number of little boys jumped on it and commenced turning the seats, while the conductor and motorman were preparing to switch the car over to the west-bound track for its immediate departure on the return trip; there being no delay at the terminus, the cars, under the prescribed schedule, leaving immediately upon their arrival. The employees running this car were a motorman, who was making extra time, and a conductor, who was making his first trip alone, with 8 or 10 days' previous training. Holland Wilkinson, the defendant in error, a small boy 7 years of age, who had only been in the city about two months, without experience about cars, stood on the step or running board along the side of the car, and from that position assisted in turning over the seats. While he was in this position the conductor gave the signal for the motorman to start, and the car moved off with young Wilkinson on the running board outside the car. He says he could not get off because the car had started up "real fast." While the car was moving, the conductor commanded him in a loud voice, two or three times, to get off the car, and, being frightened by the conductor, he jumped, and landed on a pile of sand thrown up by the side of the track, which gave way under him, and he was precipitated under the car and run over, with the result that both legs were cut off about the knee joints.

The following instructions were given for the plaintiff:

"(a) The court instructs the jury that the conduct of an infant is not of necessity to be judged by the same rules which govern that of an adult; that while it is the general rule in regard to an adult or grown person that, to entitle him or her to recover damages for an injury resulting from the fault or

Richmond Traction Co. v. Wilkinson

negligence of another, he or she must have been free from fault, such is not the rule in regard to an infant of tender years. The care and caution required of a child is according to its maturity and capacity wholly, and this is to be determined by the circumstances of the case and the evidence before the jury, and the law presumes that a child between the ages of 7 and 14 years cannot be guilty of contributory negligence, and, in order to establish that a child of such age is capable of contributory negligence, such presumption must be rebutted by evidence and circumstances establishing his maturity and capacity."

"(b) If the jury further believe from the evidence that the employees of defendant knew, or could have known by the exercise of reasonable care, the plaintiff was on said car, in a dangerous situation, considering his age and experience and understanding, that then it was their duty to slow up sufficiently to permit said plaintiff to leave said car in safety, if the same was in motion, and, if the said car had not been started, not to start same until said plaintiff had gotten to a place of safety; and, if the jury believe from the evidence that the injury resulted to the plaintiff from the failure of said employees in either one of these particulars, they must find for the plaintiff; provided they believe from the evidence that the plaintiff exercised such a degree of care and caution as under the circumstances might reasonably be expected from one of his age and intelligence."

"(c) If they believe from the evidence that the motorman or conductor knew, or could have known by the exercise of reasonable care, that when the car was about to start off on its return trip that the said plaintiff occupied a dangerous position for a child of tender years, that then it was the duty of the said conductor and motorman not to start the car while the plaintiff was so occupying said position; and, if they believe from the evidence that they did so, negligence may be imputed to the defendant, if the jury believe that the accident was occasioned by said negligence; provided the jury shall believe from the evidence that the plaintiff exercised such a degree of care and caution as under the circumstances might reasonably be expected from one of his age and intelligence."

"(d) The jury are further instructed by the court that if the plaintiff, Holland R. Wilkinson, at the time of the injury, was a child of tender age of 7 years, and was riding upon the defendant's car in the city of Richmond, whilst the same was in motion, and that the defendant's servants in charge of said car knew of his presence on the car and ordered him to get off, it was their duty to have reduced the speed of said car, before ordering the plaintiff to leave the same, to such a rate of speed as the plaintiff might depart from the car with safety, notwithstanding the jury may believe that the plaintiff was at the time a trespasser upon the defendant's car. But in

Richmond Traction Co. v. Wilkinson

order to find for the plaintiff the jury must believe that the order of the conductor was given in such a manner as to frighten or intimidate the plaintiff to such an extent as to cause him to jump from the car while it was in motion; taking into consideration the age and capacity of the plaintiff."

"(e) The court further instructs the jury that if they believe from the evidence that the plaintiff was injured by jumping from a moving electric car of the defendant, whilst being propelled through the streets of the city of Richmond, and that the plaintiff's act of jumping from the car was caused by the orders of the defendant's motorman or conductor in charge of the car, given while the car was in motion, then they must find for the plaintiff, provided the jury shall believe that the plaintiff, by reason of his age and want of judgment and discretion, was unable to exercise care and caution to resist the orders of the defendant's motorman or conductor. The jury must believe from the evidence that the conductor ordered the plaintiff to get off, while the car was moving, in such a threatening manner as to intimidate the plaintiff, considering his age and capacity, and thereby caused him to jump from said car."

"(f) The court instructs the jury that if they believe from the evidence that the plaintiff, Holland R. Wilkinson, at the time of the injury was a child of tender years, and had boarded a car of the defendant company whilst the same was standing at the eastern terminus of the defendant's road, and that the agents and employees of the defendant company knew, or could have known by the exercise of ordinary care, of his presence on said car, and that said child was standing on the step of said car, and that step was a place of danger for a child, that it was the duty of the agents or employees of said company to take notice of the danger of the plaintiff; and if they believe from the evidence that the conductor or motorman allowed the car to start while the plaintiff occupied such position, which action in permitting the said plaintiff to remain on the car resulted in the injury to said plaintiff, then they shall find for the plaintiff; provided the jury shall believe from the evidence that the plaintiff, by reason of his age and want of judgment and discretion, was not guilty of contributory negligence as heretofore defined in these instructions."

"(g) The jury are further instructed by the court that, if they believe from the evidence that the defendant company is liable in this action, then, in estimating said damages, they should take into consideration the bodily injury, if any, sustained by the plaintiff, the pain and suffering undergone, the effects on the health of the sufferer, according to its degree, and its probable duration as being temporary or permanent, and the pecuniary loss sustained by the plaintiff through his inability to attend to his business affairs after his arrival at the age of 21 years."

"(h) The court instructs the jury that, even if they may

Richmond Traction Co. v. Wilkinson

believe from the evidence that the plaintiff was guilty of contributory negligence, that they are instructed that still the plaintiff would be entitled to recover against the defendant, if they believe from the evidence that the servants and agents of the defendant company in charge of said car did not do all they could to avoid the injury after his danger was known, or might have been known by the exercise of ordinary care."

Instructions "b," "c," and "d" are objected to upon the ground that there is no evidence to support them; that they assume that it must be dangerous for a boy of 7 to jump off a car in motion; that they assume that the running board of a street car is a dangerous place for a boy of 7 years of age to stand; and, further, that these instructions would forbid the conductor to order a trespassing boy off of his car when the car was going slowly enough for him to do so with perfect safety to the boy. These objections are not well taken. The evidence was ample to sustain the instructions, and they do not assume that the running board of a car is a dangerous place for a boy 7 years of age to stand, or that it is dangerous for a boy of that age to jump from a moving car. Those questions were submitted to the jury upon the evidence, and they are charged, in reaching their conclusion, to consider whether the plaintiff exercised such a degree of care and caution as under the circumstances might reasonably be expected from one of his age and intelligence. Nor does it appear that these instructions are subject to the objection that they would forbid the conductor to order a trespassing boy off of his car when the car was going slowly enough for him to do so with safety to the boy. Whether the car was going slowly enough to justify the conductor in ordering a child 7 years of age to jump off was a question for the jury, and, under the instructions given in this case, the jury were charged with the duty of determining that question.

Instructions "b," "c," and "f" are objected to upon the ground that they tell the jury, if the employees of the defendant could have known by the exercise of reasonable care that the plaintiff was on the car in a dangerous situation, etc., thereby, it is contended, making it the duty of the defendant to keep a lookout for trespassers. Ordinarily, it is not the duty of a railroad company, operating its trains, to use reasonable care to discover and avoid injuring persons trespassing upon its tracks. *C. & O. R. Co. v. Rogers*, 100 Va. —, 41 S. E. 732. Whether or not this rule applies to street railways in a populous city, where children of tender years are constantly coming in dangerous proximity to street cars, we need not now consider, for the instructions under consideration, when applied to the facts of the case at bar, are free from objection. The employees of the defendant company knew that the children were on this car. The motorman admits that he saw the plaintiff, together with other children, on the running boards of the car just before it started, and

Richmond Traction Co. v. Wilkinson

that he moved off when the bell was rung, without looking back to see if they were off. The conductor admits that he saw as many as three boys on the car, and that they turned some of the seats. He says that he thought they were off, but admits that he did not see but two get off. If, therefore, it were improper for these instructions to use the expression, "or could have known by the exercise of reasonable care," it was harmless error, for the employees knew, at or about the time the car started, that the children were on the car, and the conductor ordered them off.

It is further insisted that instruction "f" is erroneous because it assumes, without evidence, that the step or running board along the side of the car was an unsafe place for a child 7 years of age. This objection is not well taken. The evidence clearly explained to the jury the position of the running board, and they were taken out to view the car itself. The instruction does not assume that the step or running board was a dangerous place, but submits that question to the jury.

Instruction "e" is objected to because it leaves out entirely all question of the speed at which the car was going. The evidence was before the jury as to the rate of speed the car was moving, and they were not restrained by instruction "e" in the right to determine whether the boy could jump from the car, moving at that rate, with safety. Instruction "e" told the jury that if they believed the plaintiff jumped from a moving car in consequence of the defendant's orders, while the car was in motion, etc. The instruction was intended to meet the proof as to the threats of the conductor which caused the child to jump from the car, and was not intended to deal with the rate of speed at which the car was going.

The defendant company asked for a number of instructions which were refused, and in lieu thereof the court gave the four following instructions:

"(i) The jury are instructed that if they believe from the evidence that the plaintiff, at the time of the starting of defendant's car, was on said car, not as a passenger or with the consent of the company, or that he remained thereafter instructed to get off by the conductor, but was there without the knowledge or consent of the company, or its employees, in the exercise of reasonable care upon their part, and that the plaintiff jumped from the defendant's car when it reached the pile of sand or dirt because he knew he had no right on said car, or because he had been told by the said conductor to get off the said car before it started, and was thereby injured, he cannot recover in this case."

"(j) The court instructs the jury that the fact that the plaintiff was injured by a car of the defendant company will not justify a verdict for the plaintiff, unless they further believe from the evidence that the injury was caused by the negligence of the defendant, and this negligence must be established by

Richmond Traction Co. v. Wilkinson

the preponderance of testimony, and, although they may believe that the defendant's conductor or motorman were negligent in the operation of the defendant's car, they must still find for the defendant if they believe from the evidence that the plaintiff, by lack of such care and caution as might reasonably be expected to one of his years, understanding, and intelligence, was guilty of negligence which contributed to his injury."

"(k) The court instructs the jury that if they believe from the evidence that the conductor, before starting the car, saw three boys on the same, and told them to get off, and if they further believe that, before starting the car, two of these boys did get off, and the conductor exercised reasonable care in looking to see if the boys had gotten off, and did not know or see the plaintiff on the car before the accident, the jury must find a verdict for the defendant company."

"(l) The court instructs the jury that if they believe from the evidence that before starting the car of the defendant company the defendant's conductor, in the exercise of reasonable care, believed that in response to his direction so to do the plaintiff and his companions had gotten off the defendant's car, and the plaintiff either got on again or remained there without the knowledge of the motorman or conductor on the defendant's car, and the plaintiff jumped from the said car and was injured, he cannot recover, and the jury must find for the defendant."

The action of the court in refusing to give instructions 3 and 4 asked for by the defendant company is assigned as error. These instructions deal with the subject of the conductor commanding the plaintiff to jump off the car. No. 3 tells the jury that if they believe the order was given more in the way of suggestion than peremptory command, and that plaintiff, not being intimidated by the call, voluntarily jumped and was injured, they should find for the defendant.

No. 4 tells the jury that if they believe plaintiff was not alarmed or intimidated by the call of the conductor to get off, and that he jumped on the pile of sand as a boyish prank or freak and was injured, they must find for the defendant.

The subject of these instructions had been already dealt with and fully covered by instructions "e" and "i" which the court had given. Instruction "e" expressly told the jury that they must believe from the evidence that the conductor ordered the plaintiff off, while the car was moving, in such a threatening manner as to intimidate the plaintiff and thereby cause him to jump; and instruction "i" tells the jury that if the plaintiff, when the car reached the pile of sand, jumped off because he knew he had no right on the car, or because he had been told to get off before the car started, and was thereby injured, he could not recover. There was no occasion to multiply instructions on the subject, and therefore Nos. 3 and 4 were properly refused.

Richmond Traction Co. v. Wilkinson

The action of the court in refusing instruction No. 5 is assigned as error. That instruction tells the jury that if they believe the plaintiff jumped from the defendant's car while it was in motion because he was frightened into doing so by defendant's conductor calling to him to get off, and that he landed on a pile of sand or dirt, and was uninjured by jumping on the pile of sand, and that his injury was received by reason of the sand giving way under him and causing him to slide down under the defendant's car, then they must find for the defendant. This instruction was properly refused. The proposition set forth therein that a conductor may frighten a little child 7 years of age into jumping from a moving car, and because, under the impulse of the peril confronting him, he lands in a dangerous place rather than a safe one, there can be no recovery, is certainly at war with the settled law of this state, whatever view of the subject may be taken elsewhere. This court has held, even in the case of adults, that if "A., through his negligence or fault, puts B. in a position of immediate danger, real or apparent, and B., through a sudden impulse of fear, makes a movement to escape the danger, and in so doing accidentally receives another and different injury from that threatened by the negligence of A., he may recover damages of A.; for A.'s negligence or fault is the proximate cause of the injury."

This principle, which, in view of the tender years of the plaintiff, is peculiarly applicable to the present case, has been recognized in the following cases, among others, by this court: *Richmond & D. R. R. Co. v. Morris*, 31 Grat. 200, 210; *Balt. & Ohio R. Co. v. McKenzie*, 81 Va. 71, 79, 24 Am. & Eng. R. Cas. 395; *N. & W. R. Co. v. Burge*, 84 Va. 63, 70, 4 S. E. 21, 32 Am. & Eng. R. Cas. 101; *So. W. Imp. Co. v. Smith's Adm'r*, 85 Va. 306, 7 S. E. 365, 17 Am. St. Rep. 59; *R. & D. R. Co. v. Brown*, 89 Va. 749, 753, 17 S. E. 132; *Dingee v. Unrue's Adm'x*, 98 Va. 251, 35 S. E. 794; *Richmond Rwy. & Elec. Co. v. Hudgins*, 100 Va. —, 41 S. E. 736.

The refusal of the court to give several other instructions asked for by the defendant is suggested as error in the petition, but not pressed in argument. It is, however, not necessary to further prolong this opinion for the purpose of commenting in detail upon these instructions. They have been carefully considered, and it is sufficient to say that so much of them as was proper had been fully covered by the 12 instructions which the court gave, so that the defendant company suffered no prejudice by the action of the court in refusing to give the instructions which were rejected.

The case was fairly submitted to the jury, and the evidence was sufficient to justify their verdict. This being so, there was no error in overruling the motion to set the verdict aside.

The judgment must therefore be affirmed.

WILLIAMS' ADM'R *v.* SOUTHERN RY. IN KENTUCKY.*(Court of Appeals of Kentucky, April 22, 1903.)*

[73 S. W. Rep. 779.]

Railroads—Injury to Trespasser—Malicious Act of Brakeman—Pushing Boy Off Car.*

A railroad was liable for the malicious act of its brakeman in pushing a boy off a moving freight car, if such act was done "in the line of his employment and while acting within the scope of his authority," though it was not done "in the interest and business" of the company.

Appeal from Circuit Court, Jefferson County, Law and Equity Division.

"To be officially reported."

Action by John H. Weller, as administrator of Robert Williams, deceased, against the Southern Railway in Kentucky. From a judgment for defendant, plaintiff appeals. Reversed.

Matt O'Doherty and A. Y. Bizot, for appellant.

Humphrey, Burnett & Humphrey, for appellee.

BURNAM, C. J. This suit was instituted by the appellant, John H. Weller, as administrator of Robert Williams, against the appellee, the Southern Railway in Kentucky, for damages for having caused the death of his decedent. The petition alleges in substance that plaintiff's intestate, a boy of about 15 years of age, was on top of one of defendant's freight cars, which was being hauled through the city of Louisville; that one of the defendant's agents in charge of the train wrongfully pushed or threw him from it to the ground below; and that the fall so bruised and injured him that he shortly thereafter died. The defendants in their answer, which is in two paragraphs, first traverse all of the affirmative averments of the petition, and deny that the boy was thrown from the car at all. The second is a plea of contributory negligence.

Upon the trial three witnesses were introduced, who claimed to have seen plaintiff's intestate on the car and to have witnessed his fall therefrom. Two of these, Mesdames Lofler and Kurtzinger, were introduced by the plaintiff. They testified, in substance, that on Saturday, the 17th of March, 1900, between 3 and 4 o'clock in the afternoon, they were walking on the railway track near Greenwood avenue, in the city of Louisville; that a freight train, composed exclusively of box cars, passed the place where they were, going north towards Broadway; that as the train approached them they stepped off the track; that, whilst the train was passing, they saw three boys running along the top of one of the cars which composed the train, and one of the defendant's employees in pursuit of

*See note appended to *Merrieles v. Wabash R. Co.* (Mo.), 22 Am. & Eng. R. Cas., N. S., 158.

Williams' Adm'r v. Southern Ry. in Kentucky

them; that the trainman overtook the last boy and knocked him off the train, saying, "You d—— son of a b——, I have been telling you I would kill you if you did not keep off this train"; that when he fell to the ground he lay perfectly still for a few moments, and finally got up, crying, and said he was hurt in the side; that he staggered down the track in the direction of his home, being joined in a short time by the other two boys; that they recognized this boy as Robert Williams; and that he died on the 23d day of March thereafter.

The defendant introduced as a witness James Robertson, who testified in substance that the deceased, Robert Williams, and himself boarded one of the defendant's freight trains near Weber's Bend, and rode over to Broadway on Sunday after St. Patrick's Day, which was the 18th of March; that he got on top of the car, but that Williams was standing on the side ladder near the front end of the car, holding on with one hand, and in some way he lost his hold, and fell to the ground, near Broadway; that he immediately jumped down from the top of the car and picked him up, and assisted him down to a distillery, from which point Williams went straight home; that none of the train employees knocked or threw him from the train, or were anywhere near him at the time of the fall, nor did anyone threaten or curse him. He also testified that he and Robert Williams had been in the habit of boarding defendant's freight trains and stealing rides in this manner. The physician who attended deceased testified that he died from "spinal meningitis," but that this disease could be produced by a blow or shock such as is alleged the deceased received in being thrown from the car. Numerous other witnesses were introduced with a view of impeaching the testimony of this witness, and the other two for plaintiff, but their testimony is not important in the determination of the questions of law raised by this appeal.

The trial resulted in a verdict for the defendant, and the plaintiff has appealed, relying for reversion upon errors in instructions Nos. 1 and 2 which were given to the jury, and which are as follows:

"(1) If the jury believe from the evidence that Robert Williams was riding upon one of the cars of the defendant, the Southern Railway Company in Kentucky, at the time complained of herein, and that while so riding he was thrown or pushed from said car by one of the servants or employees of the defendant in charge of said cars, and by reason thereof was injured to such an extent that death resulted therefrom, they should find for the plaintiff, unless they believe from the evidence that the act of such employee or servant was malicious, and not done in the interest and business of the defendant.

"(2) If the jury believe from the evidence that Robert Williams was not riding upon one of the cars of the defendant at the time complained of herein, or that while so riding he was

Williams' Adm'r v. Southern Ry. in Kentucky

not thrown or pushed from said car by one of the employees or servants of the defendant in charge of said cars, or that the act of such employee or servant in throwing or pushing said Williams from said car was malicious, and not done in the interest and business of the defendant, or that the death of Robert Williams was not caused by the injuries, if any, received by him by being thrown or pushed from said car, they should find for the defendant."

In both of these instructions the jury were told that if the act of the servant was malicious, and not in the interest and business of the defendant, no recovery could be had. And we are referred to *Smith v. L. & N. R. R. Co.*, 95 Ky. 16, 23 S. W. 652, 22 L. R. A. 72, and *Illinois Central R. R. Co. v. West (Ky.)* 60 S. W. 290, 21 Am. & Eng. R. Cas., N. S., 239, as authority for this qualification of defendant's liability for the malicious act of a servant committed in the course of his regular employment. The opinions in the cases referred to do not support this contention.

In the case of *Smith v. L. & N. R. R. Co.*, 95 Ky. 16, 23 S. W. 652, 22 L. R. A. 72, the plaintiff, a minor, charged that one of defendant's agents or servants kicked or threw him off of its train, thereby breaking his arm and causing other serious injuries. The defense in that case was that the brakeman charged with throwing plaintiff off the train had no authority in the premises, and the court instructed the jury that: "If the brakeman was not charged or required, as part of his duty under his employment as brakeman, to put persons off the train who had failed to pay their fare, they should find for the defendant." The jury found for the defendant, and upon appeal to this court the judgment was reversed, the court saying: "We are of the opinion that the only question under the pleadings and proof which should have been submitted to the jury was whether the brakeman kicked the plaintiff from the train." And quoted with express approval from the opinion in *Hoffman v. New York Central and Hudson River R. R. Co.*, 87 N. Y. 25, 41 Am. Rep. 337, 4 Am. & Eng. R. Cas. 537, as follows: "But, assuming authority in the conductor or brakeman to remove a trespasser in a lawful manner, the question remains whether, when a conductor or brakeman, without warning or notice of any kind, kicks a boy of 8 years from the platform of the car while the train is running at a speed of 10 miles an hour, he can be said to be acting within the scope of his employment so as to make the company liable for the act. Assuming the case made by the plaintiff, the act was flagrant, reckless, and illegal, but the point is, was the act within the scope of the employment and authority? In this case the authority to remove plaintiff from the car was vested in defendant's servants; the wrong consisted in the time and mode of exercising it. * * *

In all cases where unnecessary force is used, it may be said that the servant acted without authority, express or

Williams' Adm'r v. Southern Ry. in Kentucky

implied. It can be truthfully claimed in all cases and by all companies that the authority of their servants is limited to the exercise only of force sufficient to eject the passenger in a lawful manner. Nevertheless the company is liable if the servant, in the exercise of his authority within the general scope of his employment and in the line of his duty, use unnecessary force, or use it under circumstances or at a time when the consequences ordinarily would seriously injure the person ejected. * * * We are of opinion that the only issues to be submitted to the jury in this case are whether or not the brakeman kicked the plaintiff off, and whether he did so without malice or evil design as above indicated. Upon the determination of these issues depend the question of the company's responsibility for plaintiff's injury." And the judgment in favor of the defendant in that case was reversed.

In *Illinois Central R. R. Co. v. West*, appellee had recovered a judgment against the Illinois Central Railroad Company for personal injuries in being thrown or kicked from a moving train of appellant by one of the brakemen employed on it. The company appealed, and sought to escape liability on the ground that the brakeman's act was malicious, and not done in the master's interest and business, and for this reason the company was not liable. Their contention was denied, and the judgment of the lower court affirmed, the court holding that the act of the servant was within the general scope of his employment and authority and in the line of his duty.

In *Thurman v. L. & N. R. R. Co. (Ky.)* 34 S. W. 893, 3 Am. & Eng. R. Cas., N. S., 652, a negro boy 13 years of age, with two companions, crawled under a freight car of appellee, and got on a truss rod, and, while thus riding, they were discovered by one of the defendant's brakemen, who pushed him off while the car was in motion, and he lost an arm and a leg as a result thereof. A trial before a jury resulted in a verdict for the defendant. Upon appeal, this court said: "The boy was a trespasser; nevertheless the trainman might not eject him from the train when to do so would probably endanger his life or even cause him to be injured. If the trainman pushed the boy off the train or caused his fall therefrom, as charged, the law permits a recovery, and if they did not the law is for the defendant. There was nothing else to go to the jury, as it is well settled in numerous cases that, in spite of his wrongful conduct, the trespasser does not forfeit his life or subject himself to loss of limbs without redress."

In the case of the *Lexington Railway Company v. Cozine (Ky.)* 64 S. W. 848, 23 Am. & Eng. R. Cas., N. S., 624, the question was whether the railway company was liable in exemplary damages for the willful, malicious, oppressive, or insulting act of one of its conductors, although it had not previously authorized or subsequently ratified it. After a careful review of the authorities the court reached the conclusion that, while the question was not free from difficulty,

Corbett v. Oregon Short Line R. Co

the great weight of authority held the master liable for malicious action of his servant when acting in the line of his duty within the scope of his authority.

Appellee's trainman was acting within the scope of his authority and in the line of his duty in requiring decedent to get off the train, and, if his conduct in the discharge of this duty was brutal and reckless, this fact does not relieve the company from liability for his acts committed in the course of his employment. We are therefore of the opinion that the instructions were erroneous and misleading in the use of the words, "not done in the interest and business of the defendant," instead of words, "not done in the line of his employment and while acting within the scope of his authority."

For reasons indicated, the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

CORBETT v. OREGON SHORT LINE R. CO.

• (*Supreme Court of Utah, April 1, 1903.*)

[71 Pac. Rep: 1065.]

Contributory Negligence—Burden of Proof.

The burden of proving contributory negligence rests on defendant, unless plaintiff's own testimony tends to prove such negligence.

Duty to Trespassers on Track.*

Where an unfenced railroad track, bordered by habitations on each side, is quite generally used as a highway by the public, those in charge of passing engines are bound to use reasonable diligence to prevent injury to persons on the track.

Care Required of Parents.

A parent is only required to exercise ordinary care to prevent injury to his child.

Negligence of Parent—Sufficiency of Existence.

Evidence in an action against a railroad company for the negligent death of a child examined, and *held* not to show any negligence imputable to the child's father.

Death of Child—Damages—Instructions.*

While an instruction on the measure of damages, in an action by a father for the negligent death of his child, to the effect that the jury should take into consideration the probability of the child's living to attain its majority, and the probable aid, assistance, society, and comfort it would have been able to give the father in the future, is open to criticism as assuming that the child would have done all it could, had it lived, yet where the court restricted the recovery to a "just compensation" for the injury sustained, and pecuniary compensation to the father for the loss he "may" have sustained, any error was harmless.

Same—Same—Same.*

In an action by a parent for the negligent death of his child, it was proper to authorize a recovery for the loss of services of the child, and its society and comfort; the court expressly excluding any recovery for sorrow, grief, or anguish to the parents, or pain and suffering to the child.

Appeal—Review—Damages.*

A judgment for damages for negligent death, supported by some

*See foot-note appended to *Haltiwanger v. Columbia, N. & L. R. Co. (S. Car.)*, 3 R. R. R. 883, 26 Am. & Eng. R. Cas., N. S., 883.

Corbett v. Oregon Short Line R. Co

legitimate and competent proof, will not be disturbed on appeal merely because it is excessive, as, under the Constitution, the determination of the amount of a verdict rests entirely with the trial court and jury.

Appeal from District Court, Juab County; T. Marioneaux, Judge.

Action by Walter S. Corbett against the Oregon Short Line Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Plaintiff brought this action to recover for the negligent killing of his infant daughter on the 21st of March, 1901, at Mammoth or Robinson, in Juab county. On that day the defendant was operating backwards, at the rate of from 12 to 25 miles per hour, what is known as a "Shay engine," which could have been stopped in a shorter distance than a common engine. It was an almost straight track, and there was an unobstructed view of the child on the track from the station near which the engine and tender started to the point of the killing, a distance of from 1,000 to 1,500 feet. There were three men and one woman upon the engine at the time; the men all standing in the gangway, and no one on the lookout on top of the tender. No signal was given after starting, although a street crossing intervened a distance of from 50 to 75 feet from the place where the child was struck. From the station to the place of injury, houses are thickly built on each side of the track, which is unfenced, and quite commonly used as a highway by people and children in walking up and down. Plaintiff resided between Silver City and Mammoth, and on said day came into the latter town on some little business, bringing his wife and three children; one being four years old, the deceased two years and three months old, and a baby three months old. The three children were left in charge of a Mrs. Harris, sister-in-law to plaintiff, at her house, which was 450 to 550 feet from the place of the accident. The three months old baby was sleeping when the plaintiff and his wife left the home of Mrs. Harris to transact their business, and 20 or 30 minutes thereafter the injury and death occurred. There is no evidence as to what care or attention Mrs. Harris paid to the children, nor how the deceased, with two or three other small children, came to be upon the track. It was a clear day, and between 4 and 5 o'clock p. m., when the child was run over. Upon the trial the jury returned a verdict of \$15,100, which upon a motion for new trial was reduced by the court to \$6,100, which reduction was acquiesced in by plaintiff in preference to submitting to a new trial. Defendant offered no evidence upon the trial, and conceded in its argument to the jury that the men in charge of the engine were negligent.

P. L. Williams, Geo. H. Smith, and J. W. N. Whitecotton, for appellant.

Powers, Straup & Lippman, for respondent.

Corbett v. Oregon Short Line R. Co

After stating the facts, HART, District Judge, rendered the opinion of the court.

Defendant excepts to the refusal of the court to give its request to instruct as follows: "I charge you that in this case, even though you find from the evidence that the defendant was negligent in the operation of the engine which caused the injury, and you further find that the parents, or either of them, of the deceased child, were also guilty of negligence in permitting it to go unattended upon the railroad track, and that such negligence on the part of the parents, or either of them, contributed to bringing about the injury complained of, the plaintiff cannot recover, and your verdict should be for the defendant, unless you further find from the evidence that notwithstanding such negligence of the parents, or either of them, the defendant's servants, by exercise of ordinary care, might have avoided the accident after in fact discovering the child's peril." It was not error to refuse this request for the reasons: (1) There was no evidence of contributory negligence of the parents, or either of them, and in this state the burden does not rest upon the plaintiff to show his freedom from negligence, but upon defendant to prove contributory negligence, unless the plaintiff's testimony tends to so prove it. (2) That it does not correctly state the law as applied to the facts of this case, in that it assumes that the defendant was under no obligation to anticipate persons being upon the track at this point. With an unfenced track bordered by habitations on each side, and used quiet generally as a highway for both grown people and children, surely some diligence was required by defendant, other than "after in fact discovering the child's peril." In the case of *Young v. Clark*, 16 Utah, 42, 50 Pac. 832, this court held: "Where the public in considerable numbers become accustomed for a considerable length of time to use a bridge or railroad track as a footpath in populous cities or thickly settled communities, without molestation or objection from the company, and by reason of such general custom the presence of people upon the track or bridge is probable, or might reasonably be expected, those in control of passing trains are bound to use reasonable diligence and precaution to prevent injury to those who might be thereon, even though they are trespassers." The instruction asked by the defendant ignored entirely the question whether the use of the track for foot passengers was not such as to render it probable, or reasonably to be expected, that people would be upon the track at this point. In addition to the authorities cited in the above-mentioned case, the following may be referred to: *Gunn v. Ohio River R.*, 42 W. Va. 676, 26 S. E. 546, 6 Am. & Eng. R. Cas., N. S., 275, 36 L. R. A. 575; *Felton v. Aubrey*, 20 C. C. A. 436, 74 Fed. 350; *Garner v. Trumbull*, 36 C. C. A. 361, 94 Fed. 321.

Appellant also complains of the refusal of the court to give

Corbett v. Oregon Short Line R. Co

its request to charge as follows: "It is the duty of a parent to take such care of his young child as will shield and protect it from danger, and keep it from dangerous places and out of harm's way. The care and diligence to be employed in the performance of this duty increase according to the circumstances, and with reference to the perils the child may become exposed to, and the means employed to protect the child must be in proportion to dangers. More care is required of a parent in protecting a child of tender years than is necessary in reference to a child of such age and experience as to be able to take care of itself. And the court further charges you that if a parent trusts the care of his child to some other person, and such person fails to exercise the proper degree of care to protect the child from danger, and as a result of such carelessness the child is injured, the parent cannot recover, as the negligence of the custodian of the child would be imputed to the parent." This request was also rightly refused. It makes the parent the insurer of the safety of his child, although the law requires only the exercise of ordinary care to prevent injury. Again, there is no evidence showing or tending to show how the child came upon the track, nor what care was bestowed upon the child by the person with whom it was intrusted. "The burden of showing contributory negligence is upon the defendant, unless the testimony of the plaintiff shows it." *Riley v. Rapid Transit Co.*, 10 Utah, 437, 37 Pac. 681, citing *Reddon v. Railway Co.*, 5 Utah, 344, 15 Pac. 262. See, also, *Decker v. McSorley* (Wis.) 86 N. W. 554. •

Reaching the view that there is no evidence in the record of contributory negligence to be imputed to the plaintiff, appellant's exception to the last part of paragraph 5 of the court's charge, which ignores the question of negligence by the plaintiff, is likewise disposed of.

Another question is whether the court erred in giving the following part of its charge on the measure of damages: "In determining the value of said services, you are to take into consideration all the circumstances of the case, such as the age of the child, and its physical and mental state, the probability that it would have lived to reach its majority, and the probable aid, assistance, society, and comfort it would have been able to give to the father in future years." Complaint is made that this language "assumes, as a settled fact, that the child would have done all it might have been able to do, had it lived." While this part of the instruction is, to some extent, open to criticism, yet, when read in connection with other parts of this same instruction, we do not think it probable that the jury was misled. For instance, the court restricted the recovery to a "just compensation" for the pecuniary loss thereby sustained, and "pecuniary compensation to the father for the loss which he may have sustained." Neither was it error to authorize a recovery for the pecuniary

Chesapeake & N. Ry. Co. v. Ogles

loss sustained for the loss of services of the child, including society and comfort; the instruction expressly excluding any recovery for sorrow, grief, or anguish the parents, or either of them, may have sustained, or any pain or suffering that may have resulted to the child. *Pool v. Ry. Co.*, 7 Utah, 303, 26 Pac. 654; *Hyde v. Ry. Co.*, 7 Utah, 356, 26 Pac. 979; *Wells v. Ry. Co.*, 7 Utah, 482, 27 Pac. 688; *Chilton v. Ry. Co.*, 8 Utah, 48, 29 Pac. 963; *Munro v. Pac. Coast Dredging & R. Co.*, 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248; *Lange v. Schoettler*, 115 Cal. 391, 47 Pac. 139; *Green v. Ry. Co. (Cal.)* 67 Pac. 4; *Denver Consol. Tramway Co. v. Riley (Colo. App.)* 59 Pac. 476; *Florida Cent. & P. R. Co. v. Foxworth (Fla.)* 25 South. 338, 79 Am. St. Rep. 149, 13 Am. & Eng. R. Cas., N. S., 469.

The only remaining question is whether the verdict, as reduced by the trial court, is excessive. Under the Constitution of this state, according to the established construction of this court, the amount of a verdict is a matter entirely with the trial court and jury, where the same is supported by some legitimate and competent proof. *Murray v. Salt Lake City Ry. Co.*, 16 Utah, 356, 52 Pac. 596; *Braegger v. O. S. L. R. Co.*, 24 Utah, 391, 68 Pac. 140, and cases there cited.

The decision of the trial court is affirmed, with costs.

BASKIN, C. J., and BARTCH, J., concur.

CHESAPEAKE & N. RY. CO. v. OGLES.

(*Court of Appeals of Kentucky, April 16, 1903.*)

[73 S. W. Rep. 751.]

Signals—Frightening Horses—Trestles.

Where a railroad trestle crosses a highway, it is the duty of those in charge of a train approaching the trestle to give warning of its approach for the protection of those who may be riding or driving on the highway.

Same—Same—Same—Question for Jury.

The question as to whether or not the failure to give a warning at an overhead railroad crossing is negligence is for the jury.

Directing Verdict.

If there is any evidence conducing to show a right of recovery in plaintiff, it is improper to give a peremptory instruction for the defendant.

Contributory Negligence—Erroneous Conduct in Avoiding Danger.*

A horse drawing a buggy in which plaintiff was riding became frightened at a train on an overhead crossing. There was a high bluff a little further along the road, and, fearing the horse might jump over it, plaintiff leaped from the buggy, and injured herself: *held*, in action against the railroad for negligence in failing to give warning of the approach of the train, that the plaintiff's act in jumping from the buggy

*See *Reed v. Missouri, K. & T. Ry. Co. (Mo. App.)*, 3 R. R. R. 262, 26 Am. & Eng. R. Cas., N. S., 262; *Nosler v. Coos Bay, etc., R. & Nav. Co. (Ore.)*, 22 Am. & Eng. R. Cas., N. S., 719; *Louisville & N. R. Co. v. Stewart (Ala.)*, 21 Am. & Eng. R. Cas., N. S., 34.

Chesapeake & N. Ry. Co. v. Ogles

was not contributory negligence, since one suddenly placed in imminent danger by failure of duty on the part of another is not guilty of contributory negligence because he does not adopt the best means of escape.

Appeal from Circuit Court, Allen County.

“Not to be officially reported.”

Action by Lula Ogles against the Chesapeake and Mobile Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. C. Goad, for appellant.

B. W. Bradburn, for appellee.

BURNAM, C. J. The track of the Chesapeake & Nashville Railway Company crosses the Scottsville and Gallitan turnpike road upon a high trestle near the point where Tramill creek is spanned by a large inclosed bridge. On the 8th day of July, 1901, the appellee, Lula Ogles, and her husband and brother-in-law, were traveling over the turnpike road from Scottsville to their home near the village of Petroleum, in Allen county, and in doing so necessarily passed under the railroad crossing. The testimony shows that neither appellant's track nor trains thereon could be seen from any point south of this crossing, both because it was much higher than the turnpike road, and for the reason that the approach to the crossing was at the end of a high bluff, which obstructed the view. When appellee and her husband had arrived at within about 60 yards of the crossing, they stopped their horse, which was a young and inexperienced animal, and listened for a signal, or any noise that would indicate the approach of a train. But, hearing none, they sent their brother-in-law, who was riding with them, forward to the crossing, to see if he could discover any evidence of the approach of a train. He informed them that the way was clear. They then proceeded on their way, and while passing under the crossing appellant's train of cars came suddenly from the south, running rapidly over the crossing, making a loud noise, which so frightened their horse that he began to tremble, jump, and make efforts to escape. Realizing that further along on the turnpike road there was a high and unfenced bluff, and fearing that her husband would not be able to control the horse, and that it would succeed in running away, and in all likelihood throwing her over the bluff, she jumped from the wagon, and in so doing dislocated her ankle, and suffered other serious injuries, which confined her to her bed for many weeks; and this suit was instituted to recover damages for the injuries so received, which she alleges was due to the negligence of the defendant in failing to give notice of the approach of its train to the turnpike crossing by ringing its bell or blowing its whistle. The trial before a jury resulted in a verdict and judgment for appellee for \$600.

The only ground upon which a reversal is asked is that the

Chesapeake & N. Ry. Co. v. Ogles

trial court failed at the conclusion of appellee's testimony to direct the jury to find a verdict for the defendant. It is insisted for the appellant that, as the railway track does not cross the turnpike road upon the same level, the company were under no obligation to give the signals of its approach required by section 786 of the Kentucky Statutes. But they also insist that as a matter of fact these signals were given, and that appellee, who lived in the immediate vicinity of Petroleum, knew, at the time she attempted to make the crossing, that it was the regular schedule time for the passage of one of their regular trains, and that she was, therefore, guilty of contributory negligence in attempting to drive an unbroken horse under the track. Five witnesses testify positively that no signal was given by appellant of the approach of their train, and the engineer in charge thereof, while expressing the opinion that a signal was given, testified that previous to the accident he had no instruction from the railway company to blow the whistle for the Big Tramel Crossing, but that he received such instruction shortly after the accident. It was decided in *Rupard v. Chesapeake & Ohio R. R. Co.*, 88 Ky. 280, 11 S. W. 70, 7 L. R. A. 316, that, where a railroad track crossed a public highway on a trestle, it was the duty of those in charge of the train approaching the crossing to give some warning of its approach for the protection of those who might be riding or driving on the highway, that they might secure themselves against injury by reason of the frightening of their horses, and that the question as to whether or not the failure to give such warning was negligence should be left to the decision of the jury. This is undoubtedly the common-law rule upon the subject, and the instructions in this case are carefully drawn with the view of leaving to the jury to determine whether appellant actually gave the signals of its approach to the crossing, and also whether a failure to do so under the facts of the case was negligence, and the proximate cause of plaintiff's injury. In fact, no complaint is made of the instructions on this point. And it is a well-established rule in this state that, if there is any evidence conducing to show a right of recovery in the plaintiff, it is improper for the court to give a peremptory instruction for the defendant, even though the court may be of the opinion that the verdict should be for the defendant. This is a question of fact, which must be left to the determination of the jury. So far as we are able to discover, the conduct of this case by the trial court is in accordance with well-settled rules of law. Nor was appellee guilty of contributory negligence in jumping from the spring wagon at the time and under the circumstances. The right of a person to damages for a personal injury due to the negligence of another is not affected by his having contributed thereto, unless he was in fault in so doing, as the rule is well settled that one suddenly and unexpectedly placed in a position of imminent

Pinder v. Brooklyn Heights R. Co

danger by the failure of duty on the part of others will not be held guilty of contributory negligence because he did not adopt the best means of escape, or made an error in judgment as to the best course to pursue. See *Middlesborough R. R. Co. v. Stallard's Adm'r* (Ky.) 72 S. W. 17, and authorities there cited.

Judgment affirmed.

PINDER v. BROOKLYN HEIGHTS R. CO.

(*Court of Appeals of New York, Feb. 17, 1903.*)

[66 N. E. Rep. 405.]

Street Railroads—Injury to Traveler—Assault by Motorman.*

A boy 14 years old, riding on the front platform of an electric car, was thrown or kicked from the car by the motorman. He walked back a short distance somewhat lamely, and while in the act of crossing the further track was struck by a car, and died from the injuries received. The place was well lighted by electric lights, and the car was well lighted, and about 125 feet distant, when he attempted to cross the tracks. There was no evidence that he looked or listened, or that he was so injured as to be unable to use his powers of sight and hearing: *held*, that the railroad company was not liable for his death.

Bartlett, J., dissenting.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by James M. Pinder, administrator of Arthur Pinder, deceased, against the Brooklyn Heights Railroad Company. From an order of the Appellate Division (72 N. Y. Supp. 1082) reversing a judgment in favor of defendant and granting a new trial, defendant appeals. Reversed.

I. R. Oeland and George D. Yeomans, for appellant.

Robert Stewart, for respondent.

GRAY, J. The action was brought to recover damages for the death of the plaintiff's intestate, which the complaint alleged to have been caused by the negligence of the defendant in the operation of one of its cars upon the Nostrand avenue route, in Brooklyn. The deceased was, concededly, a bright lad of 14 years of age, with no physical defect, save that of being slightly tongue-tied, and the accident occurred at about 11 o'clock in the evening, as he was upon his way from Rockaway Beach to Bergen Beach—a trip which he had been more or less accustomed to make alone. The plaintiff's complaint was dismissed at the close of his evidence upon the ground that he had failed to show that the deceased was free from contributory negligence, or that the circumstances were such as to furnish inferences in that respect. The Appellate Division reversed the judgment of nonsuit, and ordered a new trial of the action (72 N. Y. Supp. 1082), from which order the defendant appeals to this court.

*See generally, note appended to *Merrielee v. Wabash R. Co.* (Mo.), 22 Am. & Eng. R. Cas., N. S., 158.

Pinder v. Brooklyn Heights R. Co

While the plaintiff is entitled to have the most favorable view taken of the evidence which he adduced in support of his cause of action, the evidence should show facts from which reasonable inferences are directly deducible that the deceased did not contribute, by his own negligence, to the result; and the difficulty in this case is that, unless inferences were permissible to the jurors, based upon other inferences, their verdict for the plaintiff could have had no basis. Adopting the most favorable view of the facts which the plaintiff could claim, the boy, while riding upon the front platform of a car, propelled by electric power, upon a part of the Nostrand avenue which was unimproved by buildings, was thrown or kicked from the car by the motorman. He picked himself up, and, walking slowly, crossed the track, upon which his car had been running, and, while in the act of crossing the second, or further, track, was struck by a car returning from Bergen Beach, run over by it, and, from the injuries received, subsequently died. The cause of action set up in the complaint was the negligence of the defendant's servants in so injuring him. The witness of the accident whose evidence is depended upon, and which, alone, could support a finding of the jury adverse to the defendant, was a woman, who at the time was about crossing the defendant's tracks from the direction in which the deceased was proceeding. In substance, she testified that her attention was attracted by the boy's screaming upon the platform, as though endeavoring to have the motorman stop the car; that thereupon the latter kicked the boy off, and the car continued on its way; that the boy, who had fallen upon a path or sidewalk alongside the track, picking himself up slowly, walked, lamely, back a short distance, and proceeded to cross over the tracks, and that the car from the beach, coming at a high rate of speed, struck him, threw him up in the air, and, as he fell upon the track, went over him. There was no crossing at this place, which was more or less lighted by clusters of electric light, and the car, itself well lighted up, was about 125 feet distant at the time the deceased attempted to cross. To what extent he was injured by being thrown or kicked from the car did not appear, further than that the witness testified to his walking slowly and lamely. We may assume that he was injured by the fall, but the action was not brought for that injury. It was brought because of his being subsequently run over, and thereby injured to the extent of causing his death. It does not appear that he either looked or listened when undertaking to cross the road, and the evidence discloses nothing of his condition or of his actions beyond what has been mentioned. The court is not enlightened by one fact proving or tending to prove that the deceased was vigilant to that degree which, under the circumstances, it was incumbent upon him to be, in attempting to cross a railroad track, and without which, notwithstanding the possible negligence of the defend-

Pinder v. Brooklyn Heights R. Co

ant in running over him, he could not himself have maintained an action for the injury received.

The respondent, however, argues, and that was the theory of the reversal by the Appellate Division, that the boy's fall from the moving car upon the pavement "may have rendered him for the moment unable to exercise his faculties with normal acuteness," and that, therefore, he could "neither appreciate nor avoid the impending danger." Perhaps that may have been his condition, and perhaps not. That it was such is purely a matter of conjecture. No one can say so, and no fact testifies to it, unless we may predicate of a slow and limping walk an impairment of the senses of sight and hearing. To have permitted the jurors to pass upon the case would have been very clearly to permit them to indulge in mental speculations as to whether a person violently thrown from a moving car, and afterwards walking lamely, was so affected mentally, or in his capacity to see and to hear, as to be incapable of appreciating the danger of crossing a railroad track. As a purely mental speculation, or guesswork, sympathy would inevitably have cast its weight in the scales against the defendant. What would a verdict for the plaintiff have rested upon? Certainly, it could not rest upon facts established by the evidence, or upon inferences from facts. It would have rested upon inferences, which, in turn would have rested upon other inferences. That is to say, first inferring from his slow and lame movements that the deceased had been injured by his fall from the car, and then that the injury was in the head, the jurors would have had to infer further that it was such as incapacitated him to make use of his powers of sight and of hearing, or to judge of the peril of a situation. Would the verdict for the plaintiff have withstood the test of a motion to set it aside? I think not, and I think that the rule, settled by repeated decisions of the court, in such cases, would be violated by permitting such a case to be submitted to a jury. I think that the evidence pointed as much in the direction of the negligence of the deceased as to his freedom from negligence. If he had looked and listened, as he was bound to do, there was nothing to show that he could not have seen the approaching car, and, as I have already said, that he was unable to take those usual and necessary precautions was a matter of pure guesswork, and not of a reasonable inference from proven facts.

In my opinion, the nonsuit at the trial term was proper, and therefore I advise the reversal of the order appealed from, and that the judgment entered at the trial term should be affirmed, with costs in all courts.

PARKER, C. J., and HAIGHT, CULLEN, and WERNER, JJ., concur. BARTLETT, J., dissents. O'BRIEN, J., absent.

Order reversed, etc.

MISSOURI, K. & T. RY. CO. *v.* GARRISON.*(Supreme Court of Kansas, April 11, 1903.)*

[72 Pac. Rep. 225.]

Railroads—Damage by Fire—Pleading.

In an action against a railway company for damages occasioned by the negligent setting out of a fire, as against a motion to make more definite and certain, an allegation that the defendant, by and through its agents and employees in the use of the engine from which fire escaped and destroyed plaintiff's property, was careless and negligent in the operation of its railway, is not sufficient to support a finding of negligence in the use of a defective spark arrester. And in view of such finding the overruling of such motion is material error.

Johnston, C. J., and Cunningham, J., dissenting.

(Syllabus by the Court.)

In Banc. Error from District Court, Anderson County;
C. A. Smart, Judge.

Action by J. W. Garrison against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

T. N. Sedgwick, for plaintiff in error.

Clarence Davis, for defendant in error.

MASON, J. J. W. Garrison brought an action against the Missouri, Kansas & Texas Railway Company to recover damages for property destroyed by fire started by sparks from an engine of defendant, and recovered a judgment, which the railway company now seeks to have reversed. The only assignment of error it will be necessary to examine grows out of the overruling of a motion to make the petition more definite and certain. The only allegation of negligence in the petition was as follows, the same language being used in each of the two counts: "The defendant, by and through its agents and employees in the use of said engine from which fire escaped and destroyed the property as aforesaid of this plaintiff, was careless and negligent in the operation of its railway." The defendant filed a motion asking that the plaintiff be required to make his petition more definite and certain, by setting out specifically whether the negligence of the defendant consisted in using an engine defectively equipped with appliances to prevent the escape of sparks and coals of fire, or whether it was negligent in the management and handling of the engine at the time the fire was communicated. The motion also asked, in effect, that the plaintiff be required to state whether he relied upon negligence through failure to keep the right of way clear of combustible material. The court overruled this motion. The jury found specially that the negligence of the defendant consisted in the use of a defective spark arrester.

The defendant in error, in support of the ruling of the trial court, argues that in such cases as this negligence need only be pleaded in general terms, and cites authorities to that effect. We shall assume this contention to be correct. In-

deed, it is said in *Railway Co. v. Snaveley*, 47 Kan. 637, 28 Pac. 615, that in such a case negligence need not be pleaded at all; it being sufficient to merely allege that the fire was caused by the operation of the railroad, because under the statute that is all that need be proved. But when the pleader attempts to set out the specific negligence relied upon, the ordinary rules of pleading obtain. If he alleges negligence of one kind, he cannot recover by showing negligence of a different sort. In *Railway Co. v. Fudge*, 39 Kan. 543, 18 Pac. 720, it was held that an allegation that the employees of a railway company, "in operating and running its engine, * * * negligently and carelessly permitted said engine to cast out sparks," would not justify a finding of negligence based upon a defective engine. It is true, it was intimated in *Railway Co. v. Tubbs*, 47 Kan. 630, 28 Pac. 612, that when the opinion in the *Fudge* Case was written the court had in mind that the statute of 1885, making proof that a fire was caused by the operation of a railroad prima facie evidence of negligence, did not apply, or the ruling might have been different. But in *Railway Co. v. Ayers*, 56 Kan. 176, 42 Pac. 722, it is expressly held that, even under this statute, if the plaintiff sets out the specific negligence relied upon, he will be confined to it. And since in such case the allegations of negligence are not surplusage, but substantial parts of the pleading, to which the defendant has a right to look as defining the issues to be tried, they are subject to the same rules of construction as other material averments. In the present case a motion to make the petition more definite and certain was proper, not because it was necessary in the first instance for plaintiff to set out the particular form of negligence relied upon, nor because, having been more definite in his charge than was necessary, he may on that account be required to be yet more specific, but because, having elected to define the character of the negligence alleged, he was under an obligation to use plain and unambiguous language for the purpose. The motion was not a demand that plaintiff should be required to add any new statements to his petition, but that he should be required to disclose just what was meant by those he had already voluntarily made. Either the part of the petition above quoted does not include a charge of negligence through the use of defective appliances at all, or it includes it, but only by a forced and unnatural construction. Under the former view the motion was properly overruled, but the petition, as so construed, could not sustain the judgment, as it was based upon a finding of that kind of negligence. As defendant in error is seeking to uphold the verdict based on such finding, the latter view is the more favorable for him, and the one he must be considered as adopting. In that view of the case, the language used was so obscure that it should have been changed when attention was called to the obscurity by motion. Even in volunteer allegations the pleader may not seem to say

one thing, and recover on the theory that he meant another. He may not have the benefit of a hidden meaning which he has refused to reveal upon invitation.

It was not error for the district court to overrule the motion to make definite and certain so far as related to the matter of negligence through permitting the accumulation of inflammable material along or near the right of way, for the reason that the petition, as it stood, could by no possible construction be held to refer to that feature of the case, and would not support evidence in that line. But we hold that, in view of the subsequent proceedings, it was material error to overrule the motion on the other ground—that already discussed.

The judgment is reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

SMITH, GREENE, POLLOCK, and BURCH, JJ., concurring.

JOHNSTON, C. J. (dissenting). Under the statute, all that the plaintiff was required to allege or prove, in order to recover, was that the fire was caused by the operation of the defendant's railroad, and the amount of his damages. Gen. St. 1901, § 5923. A presumption of negligence arises from the fact that the fire was set out by the company in the operation of its road, and therefore neither averment nor proof of negligence was essential. The petition measured up to the requirement of the statute, as it alleged in detail that the fire was set out by the defendant in the careless and negligent operation of its railroad. It was not necessary to state that the fire escaped from the engine, nor that the company was negligent in setting out the fire, but the fact that more was pleaded than was necessary is not a good ground for overthrowing a judgment. The fullness of the pleading may limit a plaintiff in his proof, and also as to the negligence for which a recovery may be had, but the fact that he pleaded too much does not require that he plead still more. This case, as will be observed, does not turn on a variance between the pleading and the proof, nor because a recovery was allowed on one kind of negligence, when another was pleaded, but because the petition was more specific than the law requires. The fact that it was more specific was a benefit to the defendant, and this benefit ought not to be used as a club against its opponent. Under the rulings in this and other states, a redundancy in allegations in fire cases is not a fatal defect. *Railway Co. v. Tubbs*, 47 Kan. 630, 28 Pac. 612; *Railway Co. v. Snaveley*, 47 Kan. 637, 28 Pac. 615; *Rose v. Chicago & Northwestern Ry. Co.*, 72 Iowa, 625, 34 N. W. 450; *Engle v. Railway Co.*, 77 Iowa, 661, 37 N. W. 6, 42 N. W. 512; *Campbell v. Railway Co.*, 121 Mo. 340, 25 S. W. 936, 25 L. R. A. 175, 42 Am. St. Rep. 530. The company was not, and, of course, could not have been, hampered or embarrassed by the fact that the petition was more specific than was nec-

Northern Pac. Ry. Co. v. Spike

essary. It had full opportunity to meet the charge of negligence which was alleged, and it appears to have introduced a great deal of testimony tending to show that the engine was not defective, and that the employees of the company were not negligent in operating it. The negligence which caused the injury was found to be in the engine from which the fire escaped, and not on account of combustible material on the right of way. It appears, too, that the fire was communicated from the engine directly to the plaintiff's premises, and hence the scope of the inquiry was limited to the condition and use of the engine. The company offered to allow judgment to be taken against it for a certain amount, and I find nothing in the record which tends to show that it suffered any prejudice by the lack of a detailed statement of the negligence. It was not necessary for the plaintiff to prove negligence in general or in detail, and it is never necessary for a party to plead that which he need not prove.

CUNNINGHAM, J., concurs in the dissent.

NORTHERN PAC. RY. CO. v. SPIKE.

(Circuit Court of Appeals, Eighth Circuit, February 19, 1903.)

[120 Fed. Rep. 44.]

Railroads—Crossing Accident—Contributory Negligence.

Plaintiff's intestate was riding home alone after dark, in a lumber wagon, when he was killed by a collision at a crossing. The highway and railroad ran parallel for some distance, till within 75 feet of the crossing the highway turned down a declivity to the crossing. At the time of the accident the train was 12 hours late, and running at a speed of 30 miles an hour, in the same direction deceased was driving. It gave no signals upon approaching the crossing, and the wind was in the opposite direction. The view of the track was more or less obstructed from the highway, and from the turn to the crossing neither the train nor its headlight could be seen until one was on or near the track. Defendant attempted to show by photographs taken some time after the accident, and in the daytime, that at various points before reaching the crossing decedent could have seen the headlight on the locomotive, had he looked, but no photograph was shown of any point between the turn and the crossing: *held*, that decedent was not shown to have been guilty of contributory negligence, as a matter of law.

Same—Crossing—Statutory Signals.

Where the view of a railroad track, running almost parallel with a highway, is obstructed by trees, fences, etc., so that a train can be seen only at intervals, and at a distance of 75 feet from a crossing such view is entirely cut off by an embankment till the traveler is on or near the track, it is imperatively necessary for the safety of travelers that trains give the statutory signals on approaching the crossing.

Same—Contributory Negligence—Presumption.*

The presumption that a traveler killed at a railroad crossing was at the time in the exercise of due care is sufficient to warrant a recovery in the absence of countervailing testimony.

*See note appended to Northern Pac. Ry. Co. v. Spike (C. C. A.), 121 Fed. Rep. 44.

Northern Pac. Ry. Co. v. Spike

In Error to the Circuit Court of the United States for the District of Minnesota.

L. T. Chamberlain (C. W. Bunn, on the brief), for plaintiff in error.

Halvor Steenerson (Charles Loring, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. On the 31st day of December, 1900, about 8:25 p. m., William I. Spike, a man of intelligence, 31 years old, in the full possession of all his senses, was traveling along the public highway, with which he was familiar, leading from Detroit, Minn., to his home; driving a span of mules, hitched to an ordinary lumber wagon. For some distance the highway runs east and west, and nearly parallel to the railroad, but at varying distances from it, until the highway approaches within about 75 feet of the point at which it crosses the railroad track, when it turns south, and, going down a declivity, crosses the railroad at grade. At this crossing a locomotive pulling one of defendant's passenger trains came in collision with the team driven by Mr. Spike, killing him instantly, and this action is brought by his administratrix, under the Minnesota statute, to recover damages for his death, upon the ground that the accident resulted solely from the culpable negligence of the defendant railway company. In this court it is not contended that the evidence did not warrant the jury's finding that the railway company was guilty of negligence. The contention is that the deceased was guilty of contributory negligence and that this court should so declare, as matter of law. The burden is on the defendant to establish this defense of contributory negligence by clear and satisfactory testimony. A brief summary of some of the leading facts will show very clearly that it has not discharged this burden.

The accident occurred after night. The deceased and the train were going in the same general direction until the highway turned sharp to the south to cross the railroad track. The train was running at the speed of 30 miles an hour. As it approached the highway it gave no signal by whistle or bell, as required by the law of the state. The wind was blowing in the opposite direction to that which the deceased and the train were moving. The train was 12 hours behind its schedule time. The country along and over which the highway ran was somewhat broken, and owing to this fact, and the presence of brush, trees, telegraph poles, fences, and the like, the train or its headlight could only have been seen at intervals by one looking back for that purpose; and, owing to a railroad cut and the topography of the country, neither the train nor its headlight could be seen from the point where the

Northern Pac. Ry. Co. v. Spike

highway turned to the south to cross the railroad track until one was on or near the track.

The defendant's evidence consists chiefly of photographs taken under the supervision of its claim agent, which, it is claimed, show that at various points before the deceased reached the crossing he might have seen the headlight of the approaching train if he had turned and looked. But it is obvious enough that these photographs were taken only at the points from which the train could be seen, and not at any of the points along the road from which the train could not be seen, and particularly was no photograph taken from the point in the highway where it descends to and crosses the railroad track. The photographs were taken some time after the accident, and in daylight, and from points of view chosen by the defendant. Having been taken under such widely varying conditions from those surrounding the deceased at the time of the accident, they fall far short of furnishing the clear and satisfactory evidence essential to establish the defense of contributory negligence. Courts have had frequent occasion to consider this character of evidence, and comment on its inconclusive and unsatisfactory character, in this class of cases. *Miller v. Truesdale*, 56 Minn. 274, 57 N. W. 661; *Hutchinson v. St. Paul Ry. Co.*, 32 Minn. 401, 21 N. W. 212, 19 Am. & Eng. R. Cas. 280; *Kellogg v. N. Y. C. & H. R. R. Co.*, 79 N. Y. 77; *Massoth v. Delaware & Hudson Canal Co.*, 64 N. Y. 524.

The rules governing the rights and duties of travelers and railway trains at grade crossings are clearly defined by the Supreme Court of the United States in *Continental Improvement Co. v. Stead*, 95 U. S. 161, 24 L. Ed. 403, and *Texas & Pacific Ry. Co. v. Gentry*, 163 U. S. 353, 16 Sup. Ct. 1104, 41 L. Ed. 186, 4 Am. & Eng. R. Cas., N. S., 559, and by this court in *St. Louis & S. F. Ry. Co. v. Barker*, 23 C. C. A. 475, 77 Fed. 810. In the first of these cases the Supreme Court, speaking by Mr. Justice Bradley, says:

"The train has the preference and right of way. But it is bound to give due warning of its approach, so that the wagon may stop and allow it to pass, and to use every exertion to stop if the wagon is inevitably in the way. Such warning must be reasonable and timely. * * * On the other hand, those who are crossing a railroad track are bound to exercise ordinary care and diligence to ascertain whether a train is approaching. They have, indeed, the greatest incentives to caution, for their lives are in imminent danger if collision happen; and hence it will not be presumed, without evidence, that they do not exercise proper care in a particular case."

And it is further said in the same case:

"Conceding that the railway train has the right of precedence of crossing, the parties are still on equal terms as to the exercise of care and diligence in regard to their relative duties. The right of precedence referred to does not impose

Northern Pac. Ry. Co. v. Spike

upon the wagon the whole duty of avoiding a collision. It is accompanied with and conditioned upon the duty of the train to give due and timely warning of approach. The duty of the wagon to yield precedence is based upon this condition."

And in *Texas & Pacific Ry. Co. v. Gentry*, supra, the court, speaking by Mr. Justice Harlan, says:

"Whether he [the deceased] did or did not stop and look and listen for approaching trains the jury could not tell from the evidence. The presumption is that he did; and, if the court had given the special instructions asked, it would have been necessary to accompany it with the statement that there was no evidence upon the point, and that the law presumed that the deceased did look and listen for coming trains before crossing the track."

No one was with the deceased or witnessed his movements, and the presumption prevails that he exercised ordinary care in approaching this crossing, and that he would not have been killed but for the culpable negligence of the defendant in neglecting to give the required timely warning of the train's approach. The condition prevailing at this crossing at the time of the accident were such as to make it imperatively necessary for the safety of travelers for the railway train to give the statutory signals of its approach.

The rule is well settled that where the accident results in instant death, as it did in this case, "the law, out of regard to the instinct of self-preservation, presumes the deceased was at the time in the exercise of due care, and this presumption is not overthrown by the mere fact of injury. The burden rests upon the defendant to rebut this presumption." *Flynn v. Railroad Co.*, 78 Mo. 195, 212, 47 Am. Rep. 99.

The presumption arising from this natural instinct of self-preservation stands in the place of positive evidence, and is sufficient to warrant a recovery, in the absence of countervailing testimony. *Johnson v. Railroad Co.*, 20 N. Y. 65, 69, 75 Am. Dec. 375; *Oldfield v. N. Y. & Harlem R. Co.*, 14 N. Y. 310; *Adams v. Iron Cliffs Co. (Mich.)* 44 N. W. 270, 18 Am. St. Rep. 441; *Railway Co. v. State*, 29 Md. 420, 438, 96 Am. Rep. 545; *Railroad Co. v. Nowicki*, 46 Ill. App. 566; *The City of Naples*, 32 U. S. App. 613, 16 C. C. A. 421, 69 Fed. 794; *Allen v. Willard*, 57 Pa. 374; *Schum v. Railroad Co.*, 107 Pa. 8, 52 Am. Rep. 468; *Cox v. R. Co. (N. C.)* 31 S. E. 848, 12 Am. & Eng. R. Cas., N. S., 390; *Cameron v. Railway Co. (N. D.)* 77 N. W. 1016. Nor is this presumption applied only when no one witnesses the accident. It has its application in all cases, and may be strong enough to overcome the testimony of an eyewitness. In the case of *McGhee v. Kennedy's Adm'r*, 66 Fed. 502, 13 C. C. A. 608, 31 U. S. App. 366, a witness testified that the deceased saw the train, and attempted to get over before it, and whipped up his horses to do so. The Circuit Court of Appeals states that, "if that were true, it would have been the duty of the court below to charge the

St. Louis, etc., R. Co. v. Karns

jury to return a verdict for the receivers." But the court said:

"It is very improbable that, if Kennedy had seen the train coming, he would have attempted to cross when so far from the track that he could not reach it with his wagon wheels before the coming of the train. The presumption of fact, and of law, too, would be against the existence of such wanton and reckless negligence, and the plaintiff was entitled to have the jury weigh the credibility of Miss Caldwell's evidence in the light of the circumstances."

This principle has been repeatedly affirmed and applied by the Supreme Court of the United States. *Railroad Co. v. Gladmon*, 15 Wall. 401, 21 L. Ed. 114; *Railway Co. Griffith*, 159 U. S. 603, 610, 16 Sup. Ct. 105, 40 L. Ed. 274; *Texas & Pacific Ry. Co. v. Gentry*, 163 U. S. 353, 16 Sup. Ct. 1104, 41 L. Ed. 186, 4 Am. & Eng. R. Cas., N. S., 559.

The court said to the jury:

"Mr. Spike had the highest motives to do just that—to look and to listen, to be on the alert and diligent to discover the presence of an approaching train, for his life depended upon that kind of caution; and you may take that fact into consideration in determining whether or not he did look and listen—the motive which he had to look and listen. That is one element that you may consider."

The defendant excepted to this part of the charge, and assigns the same for error; but, from the authorities already cited, it will be seen the charge of the court was not as strong in favor of the plaintiff in this regard as it might well have been.

¶ The judgment of the Circuit Court is affirmed.

ST. LOUIS & S. F. R. CO. v. KARNs.

(*Supreme Court of Kansas, April 11, 1903.*)

[72 Pac. Rep. 234.]

Railroads—Negligence—Walking on Track—Special Findings.*

Plaintiff's son, 19 years of age, while walking on a side track was run over by defendant's train and killed. The jury found that he was familiar with the location of the tracks; that his sight and hearing were good; that the train was moving west, and he was walking east; that defendant was switching cars on the tracks at the time he went on them; that there was nothing to prevent his seeing the cars approaching, had he looked. They also found that no sufficient signal of the approach of the cars was given, and that defendant was guilty of negligence by not giving such signals, and rendered a verdict for plaintiff: *held* that, on the special findings, defendant was entitled to judgment.

In Banc. In Error from District Court, Labette County; Thos. J. Flannelly, Judge.

*See generally, foot-note appended to *Chicago, I. & L. Ry. Co. v. Reed* (Ind.), 3 R. R. R. 627, 26 Am. & Eng. R. Cas., N. S., 627.

St. Louis, etc., R. Co. v. Karns

Action by Mrs. M. A. Karns against the St. Louis & San Francisco Railroad Company. From a judgment in favor of plaintiff, defendant brings error. Reversed.

Pratt, Dana & Black, for plaintiff in error.

M. E. Williams, for defendant in error.

PER CURIAM. The defendant in error, Mrs. M. A. Karns, recovered judgment against the St. Louis & San Francisco Railroad Company for damages occasioned her by the death of her son Merton L. Karns on the 1st day of July, 1899, when he was run over by one of the freight trains of the company. Young Karns was about 19 years of age, and in full possession of all his faculties, and was employed in a mill which was on the north side of the tracks in the city of Oswego. At the place of the accident there are three tracks—a main-line and two switch tracks. The young man, desiring to go to the business part of the city, passed east from his place of employment along one of the switch tracks. In so doing, he was run down by a freight train backing in from the east. It was about 10 o'clock a. m., and the day was clear. There was nothing to prevent his seeing the train as it was bearing down upon him, had he looked. The particular acts of negligence charged to the company by the petition of the plaintiff were as follows: "The failure, negligence, and omission of said defendant and its employees to have a brakeman on the front end of said car farthest west, and being then and there propelled, backed, or driven by said engine westward, so as to be on the watch and to guard as much as possible against accidents. The failure and neglect of said engineer and other employees to give notice and warning to deceased of the moving and approaching of said engine and cars, the same then and there being a violation and reckless disregard by said agents and employees of defendant of their duties." The railroad company, in addition to other defenses, pleaded contributory negligence on the part of the deceased. Upon the trial the company introduced no evidence, and the jury returned a general verdict in favor of the plaintiff, and also answered special questions submitted by both parties. In part, the special findings were as follows:

"(3) Was Merton L. Karns familiar with the lay of the land at and about the place where the accident occurred? Answer. He was.

"(4) Was Merton L. Karns familiar with the location of defendant's tracks at and about the place where the accident occurred? Answer. Yes.

"(5) Were Merton L. Karns' senses of sight and hearing good at the time of the accident? Answer. Yes."

"(9) In what direction was the train moving at the time of the accident? Answer. West."

"(14) At the time Merton L. Karns was injured, was he

walking east upon the tracks of defendant's road at Oswego? Answer. Yes."

"(20) At the point where Merton L. Karns was injured, were the tracks frequently used by defendant for switching purposes in placing cars at the mill where he was employed? Answer. Yes."

"(22) Prior to the accident had Merton L. Karns frequently seen defendant use the tracks at the point of the accident for switching purposes? Answer. Yes.

"(23) Was defendant switching cars over and upon its tracks at and prior to the time Merton L. Karns went upon them? Answer. Yes.

"(24) Was there anything to prevent Merton L. Karns from seeing defendant's cars approaching from the east, had he looked? Answer. No."

"(26) If Merton L. Karns had looked east while he was walking upon defendant's tracks, would he not have seen the cars approaching in time to have stepped off the tracks? Answer. Yes; had he looked in time."

The jury also specially found that no sufficient signal or warning of the approaching car was given, and that the company was guilty of negligence which caused the death of young Karns, by not giving such signals. The court overruled the motion of the company for judgment in its favor upon the special findings, and rendered judgment for plaintiff upon the general verdict, which judgment is sought to be reversed by this proceeding.

These facts involve the old, well-recognized, oft-repeated and oft-disregarded rule that, when one goes upon the track of a railroad, he must look and listen for the approach of danger. If this rule is obligatory upon one when he approaches a railroad track for the purpose of crossing it, much more is it obligatory when one assumes to walk upon and along such track. In this case the special findings disclose—what the evidence abundantly sustains—that the deceased, in full possession of his faculties, in broad daylight, walked along a switch track, where the surroundings were well known to him, and well knowing that the company was in the habit of using such track for switching purposes, with nothing to prevent his seeing the train bearing down upon him, had he looked, with time to have avoided the danger, had he given heed, yet suffered himself to be run upon by the train approaching from the direction in which he was going. It is simply the old story of proper want of care for one's safety in the presence of danger. That the said result might have been averted, had there been a man upon the approaching car to give warning and signals, makes no difference. It would also have been averted, had the injured man observed the most ordinary precautions for his safety. One may not contribute to his injury by an omission of ordinary care for

Selensky v. Chicago Great Western Ry. Co

his own safety, and then recover damages for injuries suffered from the neglect of another. For the purpose of emphasizing the old rule, rather than with the hope of preventing like fatalities in the future, we quote from *Railroad Company v. Houston*, 95 U. S. 697, at page 702, 24 L. Ed. 542: “* * * The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company’s employees in these particulars was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant.” See, also, *A., T. & S. F. R. Co. v. Priest*, 50 Kan. 16, 31 Pac. 674; *Railroad Company v. Holland*, 60 Kan. 209, 56 Pac. 6; *Bush v. Railroad Company*, 62 Kan. 709, 64 Pac. 624; *Railroad Company v. Judah*, 65 Kan. —, 70 Pac. 346; *Railroad Company v. Bussey* (Kan. Sup.) 71 Pac. 261.

It is contended by the plaintiff in error that the deceased was a trespasser upon the tracks where he was killed, and that therefore it owed him no duty, except not to willfully or wantonly injure him. We have decided the case, however, as though he was rightfully traveling along the tracks.

The findings of the jury, being such as to show contributory negligence on the part of the deceased, show that plaintiff below had no right to recover. We must therefore reverse the judgment of the court below, and direct that judgment be entered upon the special findings for plaintiff in error.

SELENSKY v. CHICAGO GREAT WESTERN RY. CO.

(*Supreme Court of Iowa, April 10, 1903.*)

[94 N. W. Rep. 272.]

Accident at Crossing—Signals—Positive and Negative Testimony.

The testimony of witnesses that they were listening, but failed to hear a locomotive give the statutory signals on approaching a crossing, and of another witness that he heard a signal two miles away and then the danger signal, creates a conflict of evidence, even as against the affirmative testimony of witnesses that they heard the statutory signals.

Selensky v. Chicago Great Western Ry. Co**Same—Same—Comparative Weight of Positive and Negative Testimony.***

A railroad company is not entitled to an instruction that the testimony of witnesses, who were listening, that no statutory signals were given by a locomotive on nearing a crossing, has not, as negative evidence, as much weight as the testimony of other witnesses that they heard the signals.

Same—Stop, Look, and Listen—Question for Jury.

Plaintiff approached a railroad crossing at a slow trot without stopping to look and listen. She testified, however, that she did listen, and, had the statutory signals been given by an approaching locomotive, could have avoided the ensuing accident. The evidence as to whether she could have seen the train, had she looked, was conflicting: *held*, that the question of contributory negligence was for the jury.

Same—Same—Obstructed View—Evidence.

Instructions assuming that plaintiff, injured at a railroad crossing, knew the view of the track to be completely obstructed, so that it was her duty to stop to look and listen, are properly refused where the evidence as to obstruction of view is conflicting.

Same—Contributory Negligence—Instructions.

A special instruction requested in a railroad crossing accident case, based on plaintiff's admission after the accident that she heard the train, but thought she could get across, is sufficiently covered by the general instruction that, if she saw or heard the train in time to avoid the collision, she could not recover.

Same—Signals—Admissions of Trainmen.

In a railroad crossing accident case, it is not error to admit evidence that the trainmen, including the conductor, remained silent when accused by the witness, immediately after the accident, of failing to whistle for the crossing; the court instructing that the evidence was admitted only to contradict the conductor in case he testified that the signal was given, as he afterwards did.

Appeal from District Court, Bremer County; Clifford P. Smith, Judge.

Action to recover damages for personal injuries received at a highway crossing as the result of a collision with defendant's train. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

Long, Hagerman & Farwell, and Miller & Williams, for appellant.

Sager & Sweet, for appellee.

McCLAIN, J. The collision occurred at a grade crossing. Plaintiff relied on evidence that the defendant's employees were negligent in the operation of the train, in that they failed to give the crossing signals as required by statute. For defendant it was contended that the crossing signals were given, and that plaintiff was not free from contributory negligence; having driven upon the crossing without taking proper precautions to ascertain whether a train was approaching.

The employees of defendant in charge of the train at the

*In regard to the comparative weight of positive and negative testimony as to whether crossing signals were given, see foot-note appended to *Jones v. Lehigh & N. E. R. Co. (Pa.)*, 2 R. R. R. 26, 25 Am. & Eng. R. Cas., N. S., 26.

Selensky v. Chicago Great Western Ry. Co

time of the accident, and other witnesses, testified to hearing the signals, while plaintiff and her husband, who was not with her in the conveyance, but was not far away from the crossing, and other witnesses who were in the neighborhood of the crossing at the time of the accident, testified that the crossing signal was not given, and that the first signal was the danger signal, when the engineer saw the plaintiff about to drive across the track. Counsel for appellant invoke a rule which has received countenance in some cases in this state and elsewhere, to the effect that, as between positive evidence on the part of witnesses who are in a position to hear that a signal is given, and negative evidence on the part of other witnesses, similarly situated, that they have heard no such signal, there is not a conflict in the evidence; the so-called negative evidence having no weight as against the positive evidence of those who testified that they actually heard the signal. But it appears in this case that the plaintiff was looking out for signals, realizing that the crossing was a dangerous one, and knowing that a train was due about that time; that her husband knew that plaintiff would reach the crossing about that time, and was also on the lookout for any indications of an approaching train; that another witness heard the signal of the train about two miles away, and then the danger signal, but did not hear any signal at the whistling post. Under the circumstances, we think that the testimony of witnesses who were thus in a situation to hear, and likely to have heard, a crossing signal, if one had been given, that they did not hear any such signal, cannot be entirely ignored and treated as of no weight because opposed to the testimony of witnesses who say that a signal was actually given, or that they heard such a signal given. *Annaker v. Chicago, R. I. & P. R. Co.*, 81 Iowa, 267, 47 N. W. 68; *Lee v. Chicago, R. I. & P. R. Co.*, 80 Iowa, 172, 45 N. W. 739, 45 Am. & Eng. R. Cas. 157; *McMarshall v. Chicago, R. I. & P. R. Co.*, 80 Iowa, 757, 45 N. W. 1065, 20 Am. St. Rep. 445; *Reed v. Chicago, St. P., M. & O. R. Co.*, 74 Iowa, 188, 37 N. W. 149. In the case of *Payne v. Chicago & N. W. R. Co.*, 108 Iowa, 188, 78 N. W. 813, it is said the fact that plaintiff and others did not hear the crossing whistle sound did not even create a conflict with positive evidence that the signals were given; but the facts in that case were different, for it appeared that the witnesses for plaintiff who testified they did not hear the crossing signal were not in a situation to hear, or were not noticing for the purpose of hearing such a signal. We cannot say in this case that there was no evidence as to defendant's negligence. Nor can we say that the question was not properly submitted to the jury.

The court was asked, in behalf of defendant, to instruct the jury that the testimony of witnesses that they did not hear the signals, or that such signals were not given, was negative evidence, entitled to less weight than the affirmative evidence of

Selensky v. Chicago Great Western Ry. Co

witnesses who testified that the signals were given or that they heard them. This instruction was properly refused. As between two witnesses listening at the same time for a signal, the testimony of one that no signal was given is just as much affirmative evidence as the testimony of the other that it was given. As already indicated, the rule has no application as between witnesses having equal means and opportunity of observation, and giving the matter equal attention.

It is contended that plaintiff was, under the evidence, as matter of law, conclusively shown to be guilty of contributory negligence in going upon the track at a place of danger. It does appear that at one place, as she approached the railway crossing, she could have seen the train, and that at no place did she stop to look or listen, and that before she had become aware of the approach of the train she had driven on a slow trot towards the crossing, until she was too near to avoid the danger by stopping her horse. But it is not, as matter of law, negligent in one approaching a highway crossing to fail to stop, unless there are circumstances which would indicate that stopping was essential in ascertaining whether there was danger. *Moore v. Chicago, St. P. & K. C. R. Co.*, 102 Iowa, 595, 71 N. W. 569. It is true that, if the view of the track had been unobstructed, the testimony of the plaintiff that she looked and listened would be so manifestly inconsistent with and overcome by the evidence that she drove into a place that was dangerous, on account of the approach of a train which she could not have failed to see and hear, had she used her senses, the court would disregard it. But on the other hand, if the plaintiff knew the view to be obstructed, it would be her duty to look out for an approaching train by exercising reasonable care, in view of the obstruction; and, under such circumstances, it might be necessary to show that she stopped for the purpose of looking and listening. *Crawford v. Chicago G. W. R. Co.*, 109 Iowa, 433, 80 N. W. 519, 16 Am. & Eng. R. Cas., N. S., 628; *Houghton v. Chicago & G. T. R. Co.*, 99 Mich. 308, 58 N. W. 314. Plaintiff testifies, however, that she did listen, and could have heard the crossing signal, had it been given, and could, with such warning, have escaped the danger. There is also testimony that she ought to have seen the train approaching, while, on the other hand, there is evidence tending to show that at that time the bank along the railroad track was so grown up with weeds that it was impracticable for her to see the train. The conflict in the testimony as to this fact made the case one proper for submission to the jury. When, by reason of obstructions or circumstances calculated to divert the mind of one approaching the track, it is not manifestly clear to every reasonable person that the plaintiff was negligent (that is, if the question is one as to which reasonable men may honestly differ), then the case is one for the jury; and we think it clear that, in

Selensky v. Chicago Great Western Ry. Co

view of the partial obstruction of the track, raising a doubt as to whether plaintiff could or could not, in the exercise of reasonable care, have seen the approaching train, and whether she was exercising reasonable care in driving along the highway towards the crossing, in the expectation of hearing the crossing signal if the train should be near, it was not error to submit the question of the plaintiff's contributory negligence to the jury. *Artz v. Chicago, R. I. & P. R. Co.*, 34 Iowa, 153; *Laverenz v. Chicago, R. I. & P. R. Co.*, 56 Iowa, 689, 10 N. W. 268, 6 Am. & Eng. R. Cas. 274; *Funston v. Chicago, R. I. & P. R. Co.*, 61 Iowa, 452, 16 N. W. 518, 14 Am. & Eng. R. Cas. 640; *Lorenz v. Burlington, C. R. & N. R. Co.*, 115 Iowa, 377, 88 N. W. 835, 56 L. R. A. 752.

The considerations which have just been suggested also dispose of objections to the refusal of the court to give instructions asked. Those instructions were predicated on the assumption that plaintiff knew the view of the track to be so obstructed that she could not see an approaching train, and that it was therefore her duty to stop for the purpose of looking and listening. But as we have seen, it was an open question whether she could see an approaching train. The testimony for defendant tended to show that she could have seen the train if she had looked. If this testimony was to be believed, then the negligence was not in failing to stop, but in failing to look. There is no necessity of stopping where the view is unobstructed, and by simply looking, without stopping, it can be determined whether a train is approaching. Whether plaintiff was negligent in assuming that she could see and hear a train, if it was approaching, without stopping, in view of the nature of the obstruction, or partial obstruction, of her sight by the weeds on the embankment, was clearly a question for the jury. A special instruction was asked in view of testimony tending to show an admission by plaintiff, immediately after the accident, that she heard the train approaching, but thought that she could get across the track in safety. But this point is sufficiently covered by the general instruction that, if plaintiff saw or heard the train approaching in time to stop or turn and avoid the collision, she could not recover. Certainly the common sense of the jury would enable them to apply such an instruction to the evidence relied on, if they believed it to be true.

A witness who was allowed to testify for the plaintiff stated that immediately after the accident he spoke to the trainmen, including the conductor, and charged them with not having whistled for the crossing, and that no response was made by the conductor or any one else to this accusation. The court explained to the jury that the witness was allowed to testify as to this statement to the conductor only as tending to contradict him if it should turn out that, as a matter of fact, he did testify that the signal by the whistle was given for the crossing; and the jury were told that they could only con-

Monahan v. Chicago, etc., Ry. Co

sider the statement of the witness if they found that the conductor heard what the witness said, and knew that it was addressed to him, and acquiesced in it. We think there was no error in this ruling. The court carefully guarded against the failure of the conductor to respond being taken as an admission of anything by the defendant, and the conductor did subsequently testify that the signal was given.

Other errors are assigned, but they seem not to be of sufficient importance to justify separate consideration. The case was properly presented to the jury by the court, and the judgment is affirmed.

MONAHAN v. CHICAGO, M. & ST. P. RY. CO.

(*Supreme Court of Minnesota, Jan. 16, 1903.*)

[92 N. W. Rep. 1115.]

Injury to One Who Had Been a Trespasser.

A trespasser in a railroad yard, intending to pass over a highway crossing the same and continue on the right of way, may cease to retain the illegal character of a trespasser, if, when entering upon the highway, he changes his purpose, and uses the street as an exit from the railway grounds.

Questions for Jury.

Evidence in this case considered, and *held* that it was a question of fact whether a minor was injured by being thrown down by a railroad car, or by falling therefrom while he was stealing a ride; also that it was an issue of fact whether such minor was guilty of contributory negligence when run over by a freight car at a railway crossing.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Frank C. Brooks, Judge.

Action by James Monahan against the Chicago, Milwaukee & St. Paul Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

F. W. Root, for appellant.

F. D. Larrabee, for respondent.

LOVELY, J. A father brings this action for injuries to his minor son. He recovered a verdict. Defendant moved to set it aside and for judgment in its favor, which was denied. Judgment was entered for plaintiff, from which defendant appeals.

The verdict requires us to adopt the following conclusions: Plaintiff's son, a lad about 12 years of age, had the toes of his left foot crushed by the wheels of a moving freight car upon one of defendant's tracks crossing Garfield avenue, in Minneapolis. At the time of the accident the boy lived with his parents on Lake street, some distance south of the place of the injury. He was attending a school situated several blocks north of the tracks, and east of Garfield avenue. There were several other streets running north and south, parallel to Garfield

Monahan v. Chicago, etc., Ry. Co

avenue, over this place, where trains were made up and switching done, so that there was no necessity for the boy to use the defendant's right of way in going to and from school. But he and other lads were in the habit of doing so, though such a course was known to be dangerous. In the latter part of October of last year, plaintiff's son was returning from school with a companion. He entered upon defendant's right of way east of Garfield avenue, and walked along the south side of the north track until he was quite near that thoroughfare; it being his intention to cross the street and continue on the right of way for several blocks, when he proposed to pass therefrom to his home. Several switchmen were moving cars on the north track. They had been previously troubled by boys jumping upon the cars, and as the two lads passed, going north, one of them, probably fearing that these lads would do likewise, called out, "Get away from there, or I'll kick your pants," and started forward several steps, as if to follow them. The boys, instead of continuing north over Garfield avenue, then turned and ran south on that street, apparently to leave the right of way. At the same time a bunch of three cars, which had been detached and kicked easterly from a locomotive operating further west, were moving by the momentum thus acquired; coming upon the avenue at a very slow rate of speed, over a spur track, at the instant the boys were crossing the same. These cars were not under the control of a brakeman or any person having them in charge. The plaintiff's son claims that he did not notice these cars until he was halfway across the spur track. He excuses his failure to discover danger by the fact that the cars were not attached to a locomotive; also that he was running, while the cars were moving very slowly, when at the moment he was leaving the track he was struck by the nearest approaching car and thrown upon the south rail; the car wheel passing over a portion of his left foot, whereby he received the injuries complained of.

It is insisted on behalf of defendant that the evidence conclusively demonstrates that plaintiff's son was stealing a ride on the car and fell under the car at the time he received his injury. This is urged upon the appearance of the boy's left shoe, produced at the trial, and brought here, which shows the marks of a pronounced indentation on its sole. From this, in connection with the statement of plaintiff's son, counsel argue that such an indentation must have been made by the wheel, which view is consistent only with the theory that the sole of the shoe was turned upward, instead of downward, as stated by the boy himself, which would apparently have been his position if he fell from the car, instead of being thrown down by it. Defendant's theorizing based upon these premises is futile to change the result reached by the verdict. It does not absolutely follow that the boy knew

exactly what occurred at the time, or the exact position of his foot when he fell, or while it was being crushed beneath the wheels of the car. And we cannot draw inferences based upon separate or incidental portions of the evidence, in the exercise of an *ex post factum* judgment, to usurp functions that do not belong to us. There was sufficient evidence to justify the finding of the jury that the statement by the boy that he was struck by the car and pushed under the wheels was correct, and their verdict must settle that issue.

It is further urged for defendant that the plaintiff's son had no right on Garfield avenue at the time he was injured; that having intended to cross from one portion of the railroad yard to the other upon this street, to pursue his journey to his home, he continued to be a trespasser all the time. Defendant relies upon the authority of *Kelly v. Railway Co.*, 65 Mich. 186, 31 N. W. 904, 8 Am. St. Rep. 876, to support this view. In that case it was held that the intention of the injured party was not changed while passing from one side of the right of way to the other, and that he was not using the street as a passageway, in the ordinary course of travel, and was a trespasser. Conceding this to be the law,—which we do not decide,—yet the jury were justified in finding in this case that, notwithstanding the boy's intention to cross from one part of the right of way to the other, as soon as he was ordered to "get away" by the switchman he turned and started south over the highway, to leave the precincts of the railway yard, and seek his home from another direction than first intended; and we have no hesitation in saying that, whatever his original intention may have been, he had a right to change it in order to use the highway for its legitimate purposes, when he ceased to be a trespasser.

It is further urged that plaintiff's son was guilty of contributory negligence, and this is the only serious question in the case. The claim for defendant is that the car moving on Garfield avenue was plainly apparent to the observation of the injured boy, and that he must have seen it, and in failing to avoid it he was wanting in the exercise of ordinary care, which contributed to his injury. We think that the moving of these cars, although slowly, upon the spur over the street, without control, would sustain the finding of the jury that defendant was negligent. *Klotz v. Railroad Co.*, 68 Minn. 341, 71 N. W. 257. And while there is force to the claim that the plaintiff's son should have known that the car was moving towards him, although he was running, the car was moving very slowly, which may have led to the belief on his part that it was not moving at all. It is also a fact not unworthy of an inference in his behalf that he may have been trying to avoid the switchman, who had previously told him to get away, and acted as if he would drive him from the yard, which circumstance may have had some effect upon his

Brown v. Southern Ry

actions. These facts, in connection with the immature age of the boy, have led us to the conclusion that it was not conclusive, as a matter of law, that he failed to exercise the care which a youth of his age, under the same circumstances, would have displayed, and the verdict in this respect must be sustained.

Judgment affirmed.

BROWN v. SOUTHERN RY.

(Supreme Court of South Carolina, Feb. 25, 1903.)

[43 S. E. Rep. 794.]

Death by Wrongful Act—Mitigation of Damages—Evidence.

In an action for wrongful death, evidence of declarations of deceased that his children were trying to get his property from him are incompetent in mitigation of damages.

Same—Elements of Damages.*

In an action for wrongful death, an instruction that the jury should give damages to the heirs for loss resulting from grief or mental suffering is not erroneous.

Crossings—Signals—Statutes.

Civ. Code, § 2132, provides that the bell of an engine shall be rung or the whistle sounded at the distance of 500 yards from any public crossing, and be kept ringing until the engine has crossed, and, if the cars be at a standstill, such bell shall be rung for at least 30 seconds before the engine shall be moved, and shall be kept ringing until it shall have crossed the highway: *held* to apply to a train of cars standing across a highway, the engine of which has already crossed, not to return, and to require the signals to be given for 30 seconds before such train is moved.

Same—Public or Private—Instructions.

In an action for injuries at an alleged public crossing, where the nature of the crossing was a question in the case, and the charge nowhere assumed that it was a public crossing, that the judge did refer to the engine and cars, which was necessary to render the charge intelligent, was not an assumption, as a matter of fact, that they were at or near a public highway.

Appeal from Common Pleas Circuit Court of Union County;
R. C. Watts, Judge.

Action by Joyce Brown, administrator, against the Southern Railway. Judgment for plaintiff. Defendant appeals. Affirmed.

The following are defendant's exceptions:

"His honor erred:

"(1) In not permitting the witness S. T. Clowney to testify to the statements of Martin Brown as to the efforts Brown's children had been making in trying to get his property from him. The error being that, this being a statement of one through whom the children were claiming as beneficiaries, it was competent and relevant to prove this statement on the question of the amount of damages, and in mitigation thereof.

*See notes appended to *Texarkana, etc., Ry. Co. v. Anderson* (Ark.), 18 Am. & Eng. R. Cas., N. S., 37; *Stucky v. Atlantic Coast R. Co.* (S. Car.), 20 Am. & Eng. R. Cas., N. S., 771.

Brown v. Southern Ry

“(2) In charging the jury that they could ‘award damages to the family of the deceased for any wounded feelings or mental suffering, or any shock to their affections, and anything of that sort, in addition to such pecuniary loss that the party has sustained.’ The error being that while, under the statute, the jury are allowed to give such damages ‘as they may think proportioned to the injuries resulting from such death,’ it is respectfully submitted: (a) That neither wounded feelings nor mental suffering nor shock to affections are the subject of damages, unless they cause some physical injury or sickness of some kind. (b) That mere wounded feelings or mental suffering or shock to affections, unaccompanied by any physical injury or sickness of some kind, are not the subject of damages, especially for injuries done to some one else besides the person who undergoes mental suffering or wounded feelings or shock to affections. (c) That his honor, by his charge, left it to the jury to give damages for the death of the deceased, for mental suffering, wounded feelings, and shock to affections, even though they may not have produced physical injuries or sickness of some kind. (d) Then by his charge his honor allowed the jury to award damages to the family of the deceased for wounded feelings or mental sufferings or shock to their affections, without proof or evidence of any kind that a large number of the members of this family had undergone any wounded feelings or mental suffering or shock to their affection. (e) That by his charge his honor failed to comply with section 26, art. 4, of the Constitution, in that he failed to declare the law applicable to the case at bar, in connection with this portion of his charge, in not instructing the jury that mental suffering, wounded feelings, or shock to the affections must cause or produce injury, before damages could be allowed.

“(3) Because, after reading the statute in reference to the ringing of the bell or sounding of the whistle, his honor charged as follows: ‘Now, I charge you, as a matter of law, that, if the engine or cars were at a standstill within the distance of a hundred rods of such crossing before they started that car, it was their duty to ring the bell or blow the whistle for at least thirty seconds before they moved the engine, and it was their duty to keep ringing or sounding it until the engine could have crossed such public highway or street or traveled place; and, if they failed to do that, then that was negligence on their part, per se, if it was within a hundred rods of the public crossing; and if they moved that engine or that train of cars without sounding that bell or blowing that whistle for at least thirty seconds before they moved it, and failed to keep ringing the bell or sounding the whistle until the engine crossed the public highway, street, or traveled place, then they were guilty of negligence per se. If you think they were guilty of negligence, and their negligence was the direct and proximate cause of plaintiff’s intestate’s

Brown v. Southern Ry

death, then you can award plaintiff in this case, administratrix of his estate, such damages as you think she has sustained, proportionate to the injury sustained.' The error being, as it is respectfully submitted: (a) That inasmuch as the engine was already across the alleged highway for the purpose of going on further, and not recrossing or again crossing such alleged highway, his honor left it in the power of the jury to give damages against the defendant for failure to continue to ring the bell until it could have again crossed such highway, although it was not the purpose or intention of those in charge of the engine and train to again cross said highway. and although the bell may have been ringing for more than thirty seconds before the engine moved from where it then was. (b) Because, under his honor's charge, the jury were empowered to give damages against the defendant company, even though the bell may have been ringing for thirty seconds before the engine moved from where it then was. (c) Because, under his honor's charge, he not only required the bell to be ringing or the whistle to be sounded for at least thirty seconds before the engine moved, and continue to ring until it crossed such highway, but he also required that the whistle should be kept sounding or the bell ringing until the engine could have crossed the alleged highway, although it was going away from said highway, and it was not the intention of those in charge of the engine and train to cross or recross such alleged highway. (d) Because by his honor's charge he instructed the jury that where an engine has already crossed a street or highway, and is at a standstill, that it must not only sound its whistle or ring its bell for thirty seconds before moving, but that it must continue to ring said bell or sound such whistle until such engine should have crossed such street or highway, but also that it must continue to ring the bell until it crossed such street or highway, even though it appear that it was going away from such street or highway, whereas, it is respectfully submitted that under such circumstances it 'is only required that the bell should be rung or whistle sounded for thirty seconds before moving the engine or train of cars. (e) Because it is respectfully submitted that where an engine attached to a train of cars is at a standstill, with part of the train on one side and part on the other side of any street or highway, the statute does not apply, nor was it the intention of the Legislature to require the engine to sound its whistle or ring its bell for thirty seconds before moving such engine, and to keep the same ringing until the engine could or should cross such street or highway, especially if, as under the facts in this case, it appears that it was not the purpose of those in charge of such engine and train to recross said street with such engine. (f) Because, in so charging, his honor charged upon the facts, and stated facts to the jury, contrary to the provisions of section 26, art. 4, of the Constitution of this

Brown v. Southern Ry

state, which provides that judges shall not charge juries in respect to matters of fact. (g) Because, in so charging, his honor assumed, as matter of fact, that there was a public highway at the place where the injury occurred. (h) Because, in so charging, his honor assumed, as matter of fact, that there was an engine and cars of the defendant company at or near a public highway where the alleged injury occurred.

“(4) Because his honor, in his charge, failed to instruct the jury in reference to the defense of contributory negligence, except in so far as the same applied to injuries received at a highway crossing by collision with an engine or train of cars. The error being, it is respectfully submitted, that by this failure he confined the jury to the consideration of the defense of contributory negligence of the deceased, solely to injuries received at an alleged highway crossing, by being injured while crossing between two cars of the defendant, on account of the alleged failure to ring the bell or sound the whistle, as required by statute, whereas it is respectfully submitted his honor should have charged the jury as to what constituted contributory negligence under the common law.

“(5) Because his honor, in charging the jury in reference to the defense of contributory negligence, confined the jury to that defense under the statute, instead of also instructing them as to what would constitute contributory negligence under the common law.”

C. P. Sanders, for appellant.

V. E. De Pass and Stanyarne Wilson, for appellee.

WOODS, J. This action to recover damages for the killing of Martin Brown, plaintiff's intestate, by the defendant on October 24, 1900, was tried in the court of common pleas for Union county before Honorable R. C. Watts. The jury found a verdict for the plaintiff for \$1,000, and defendant appeals. For the purposes of this discussion, it is only necessary to say of the pleadings that the complaint, in substance, alleged that defendant had obstructed a highway at Blairs with a train of cars for more than 15 minutes; that Martin Brown, desiring to cross the railroad on the highway, undertook to go over the bumpers between the cars, as others were doing within the observation of defendant's agents, when the agents of the defendant gave two quick sounds of the whistle, and simultaneously moved the car with great violence, throwing Brown to the ground between the cars, where he was crushed to death. The defendant denied the allegations of the complaint, and alleged contributory negligence of deceased.

The first ground of appeal alleges error by the presiding judge “in not permitting the witness S. T. Clowney to testify to the statements of Martin Brown as to the efforts Brown's children had been making in trying to get his property from him. The error being that, this being a statement of one through whom the children were claiming as beneficiaries, it was competent and relevant to prove this statement on the

Brown v. Southern Ry

question of the amount of damages, and in mitigation thereof." The fallacy of the position taken in this exception consists in assuming that those to be benefited by any recovery in this action were in any legal sense claiming through the deceased. This action under Lord Campbell's act is not a revival or continuance of any action the decedent would have had if his injuries had not been fatal. In re Estate of Mayo, 60 S. C. 401, 38 S. E. 634, 54 L. R. A. 660. Besides, the declaration which the defendant proposed to prove the deceased had made as to his children trying to get his property from him would not have been against his interest if he had survived and brought an action for injuries, and it would have been quite irrelevant to the issue in such action. This declaration, therefore, was not at any time against the interest of the person who may have made it, and certainly could not be proved in this case against a party suing on a cause of action which is not a revival of any cause of action the declarant might have had if he had survived.

The second exception assigns error in the charge to the jury, because, as appellant construes the language of the presiding judge, the jury were instructed they might find damages for mental suffering or shock to the affections, without proof of injury resulting from such suffering or shock. On this point the charge was in precise accordance with the law as stated in Nohrden v. R. R. Co., 59 S. C. 87, 37 S. E. 228, 13 Am. & Eng. R. Cas., N. S., 557, 82 Am. St. Rep. 826, and Stuckey v. R. R., 60 S. C. 253, 38 S. E. 416, 20 Am. & Eng. R. Cas., N. S., 771, 85 Am. St. Rep. 842. In the charge sustained in the latter case the jury were instructed they might find damages for "injury" produced by grief, and in this instance the word used was "loss," instead of "injury," which was practically an equivalent word in this connection. In addition to this, at the request of defendant the jury were instructed: "Even if the deceased was killed by the negligence of the defendant, still the verdict must not exceed the actual amount of the injury done the beneficiaries; and, if they have not been injured, then the verdict must be for the defendant." The appellant in this exception also insists the circuit judge should not have submitted to the jury the question of damages for mental suffering, because there was no evidence of such suffering. The family relations of the deceased were brought in issue, and a number of witnesses testified on the subject. The defendant undertook to show the life of the deceased lacked both pecuniary and sentimental value to those claiming damages for his death. The issue thus made was necessarily submitted to the jury. Strother v. R. R. Co., 47 S. C. 375, 25 S. E. 272, 5 Am. & Eng. R. Cas., N. S., 430.

As we understand, appellant makes three questions in the third exception. It is contended, first, that section 2132 of the Civil Code applies only where a railroad train is approach-

Brown v. Southern Ry

ing a public way of the character mentioned in the statute, or has come to a stop before the engine has reached the crossing, and not where it has come to a stop across such public way after the engine has passed it, without intention of those having it in charge that it should return. The following is the section under consideration: "A bell of at least thirty pounds weight and a steam whistle shall be placed on each locomotive engine, and such bell shall be rung, or such whistle sounded, by the engineer or fireman, at the distance of at least five hundred yards from the place where the railroad crosses any public highway or street or traveled place, and be kept ringing or whistling until the engine has crossed such highway or street or traveled place; and if such engine or cars shall be at a standstill within a less distance than one hundred rods of such crossing, such bell shall be rung or such whistle sounded for at least thirty seconds before such engine shall be moved, and shall be kept ringing or sounding until such engine shall have crossed such highway or street or traveled place." Civ. Code 1902, § 2132. It might be sufficient to say this question has been decided adversely to the view of the appellant in *Littlejohn v. R. R. Co.*, 45 S. C. 181, 22 S. E. 789, 9 Am. & Eng. R. Cas., N. S., 873; *Littlejohn v. R. R. Co.*, 49 S. C. 16, 22 S. E. 967; *Burns v. R. R. Co.*, 61 S. C. 409, 39 S. E. 567, 22 Am. & Eng. R. Cas., N. S., 624. But appellant asked and received permission to review those cases. The argument of appellant that the last clause of the statute, requiring the signals to be continued "until the engine shall have crossed such public highway or street or traveled place," coming just after the provision requiring that the bell shall be rung or the whistle sounded for at least thirty seconds when the engine or cars are at a standstill before it shall be moved, indicates that the statute applies only when the engine has not crossed the public way, is not without apparent force. It will be observed, however, that the clause of the statute relating to an engine or cars at a standstill is in itself perfectly clear and free from ambiguity. It plainly provides, if the engine or cars are at a standstill, or being at a less distance than 100 rods of such crossing, then the signals must be given at least 30 seconds before the engine shall be moved. To hold that this provision of the statute has no application when the engine has already crossed the public way, because a succeeding clause, separated from it by a semicolon, provides for the continued ringing of the bell or sounding the whistle until the engine shall have crossed such public way, would be limiting the plain words of this portion of the statute by inference from words used in a succeeding clause not necessarily inconsistent. The last clause of the statute manifestly has no application when the engine has already crossed the public way, but it is not sufficient to limit the preceding clause, requiring the signal to be given for at least thirty seconds before the engine is moved, to cases where

Brown v. Southern Ry

the engine has not crossed the public way. To sustain this view, we do not think it necessary to depart from the strict construction of the statute.

The appellant in this exception further insists that the presiding judge was in error in submitting the last clause of the statute to the consideration of the jury, because, the engine having already crossed the alleged highway, the provision requiring the signals to be continued until the engine should cross had no application. It will be observed the presiding judge did not state this portion of the statute had any application to the facts of the case. He did not even take for granted the engine had passed, but left all the facts to the jury. It is true, he recited the whole section, and charged the entire law which it enacted; but this certainly could not prejudice either party, because the jury could not have based their verdict on any failure of defendant to give signals before crossing the alleged public highway, when there was no testimony whatsoever that there was any violation of the law in this regard, and there was no issue of this kind made either in the pleadings or the evidence.

The third objection to the charge made by appellant in this exception is that the presiding judge "assumed, as a matter of fact, that there was an engine and cars of the defendant company at or near a public highway when the alleged injury occurred." The nature of the crossing was one of the questions in the case, and we are unable to find in the charge any assumption that it was a public highway. The presiding judge did refer to the engine and cars, but it is manifest no intelligent charge in this case could have been made without doing so. The constitutional provision on this subject does not require the circuit judge to deal in abstractions. He may not state the facts, but it was not intended that he should be forbidden to vitalize the case in the minds of the jury by reference to objects around which the evidence clusters.

The appellant insists in his fourth exception that the charge was defective in not containing a statement of the doctrine of contributory negligence at common law. Examination of the charge does not sustain this exception. In the body of the charge it was said: "I charge you, as a matter of law, they had a right to stop on the highway, if it was a highway, for a reasonable length of time; but, if they stopped there an unreasonable time, then the plaintiff has a right to cross that train, provided he observed due care and caution to not contribute to any injury that may be brought to himself by crossing that train." The appellant's thirteenth, fourteenth, and fifteenth requests to charge, which were all allowed, were intended, also, to cover the common law of contributory negligence applicable to the case. The appellant does not allege, either in his exceptions or argument, that the circuit judge was in error in anything that he charged on this subject, but that he failed to charge on the subject at all. It seems to the

Union Pac. Ry. Co. v. Cappier

court the appellant had fallen into an erroneous impression as to the fact, for the views of the circuit judge on this subject were given to the jury in his charge, and they were by no means unfavorable to appellant.

It is the judgment of this court that the judgment of the circuit court be affirmed.

UNION PAC. RY. CO. v. CAPPIER.

(*Supreme Court of Kansas, April 11, 1903.*)

[72 Pac. Rep. 281.]

Duty to Take Charge of Injured Trespasser.

A trespasser on a railway track was struck by a moving car, to which an engine was attached, and injured without fault on the part of the servants of the company: *held*, that the failure of the railway employees operating the car and engine to take charge of the wounded man and give him care and attention was not the violation of a legal duty for which the company was liable.

Same.

The case at bar distinguished from those where the servants of the railway company were at fault, and also from those where the injury was occasioned without fault, and the negligent acts or omissions occurred after the company had taken the injured person in charge.

(Syllabus by the Court.)

In Banc. Error from District Court, Wyandotte County; E. L. Fischer, Judge.

Action by Adeline Cappier against the Union Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

N. H. Loomis, R. W. Blair, and H. A. Scandrett, for plaintiff in error.

C. W. Trickett, for defendant in error.

SMITH, J. This was an action brought by Adeline Cappier, the mother of Irvin Ezelle, to recover damages resulting to her by reason of the loss of her son, who was run over by a car of plaintiff in error, and died from the injuries received. The trial court, at the close of the evidence introduced to support a recovery by plaintiff below, held that no careless act of the railway company's servants in the operation of the car was shown, and refused to permit the case to be considered by the jury on the allegations and attempted proof of such negligence. The petition, however, contained an averment that the injured person had one leg and an arm cut off by the car wheels, and that the servants of the railway company failed to call a surgeon, or to render him any assistance after the accident, but permitted him to remain by the side of the tracks and bleed to death. Under this charge of negligence a recovery was had.

While attempting to cross the railway tracks, Ezelle was struck by a moving freight car pushed by an engine. A yard-master in charge of the switching operations was riding on

Union Pac. Ry. Co. v. Cappier

the end of the car nearest to the deceased, and gave warning by shouting to him. The warning was either too late, or no heed was given to it. The engine was stopped. After the injured man was clear of the track, the yardmaster signaled the engineer to move ahead, fearing, as he testified, that a passenger train then about due would come upon them. The locomotive and car went forward over a bridge, where the general yardmaster was informed of the accident, and an ambulance was telephoned for. The yardmaster then went back where the injured man was lying, and found three Union Pacific switchmen binding up the wounded limbs and doing what they could to stop the flow of blood. The ambulance arrived about 30 minutes later, and Ezelle was taken to a hospital, where he died a few hours afterwards.

In answer to particular questions of fact, the jury found that the accident occurred at 5:35 p. m.; that immediately one of the railway employees telephoned to police headquarters for help for the injured man; that the ambulance started at 6:05 p. m., and reached the nearest hospital with Ezelle at 6:20 p. m., where he received proper medical and surgical treatment. Judgment against the railway company was based on the following question and answer: "Q. Did not defendant's employees bind up Ezelle's wounds, and try to stop the flow of blood, as soon as they could after the accident happened? A. No." The lack of diligence in the respect stated was intended, no doubt, to apply to the yardmaster, engineer, and fireman in charge of the car and engine. These facts bring us to a consideration of their legal duty toward the injured man after his condition became known. Counsel for defendant in error quote the language found in Beach on Contributory Negligence (3d Ed.) § 215, as follows: "Under certain circumstances, the railroad may owe a duty to a trespasser after the injury. When a trespasser has been run down, it is the plain duty of the railway company to render whatever service is possible to mitigate the severity of the injury. The train that has occasioned the harm must be stopped, and the injured person looked after, and, when it seems necessary, removed to a place of safety, and carefully nursed, until other relief can be brought to the disabled person." The principal authority cited in support of this doctrine is Northern Central Railway Co. v. State, 29 Md. 420, 96 Am. Dec. 545. The court in that case first held that there was evidence enough to justify the jury in finding that the operatives of the train were negligent in running it too fast over a road crossing without sounding the whistle, and that the number of brakemen was insufficient to check its speed. Such negligence was held sufficient to uphold the verdict, and would seem to be all that was necessary to be said. The court, however, proceeded to state that, from whatever cause the collision occurred, it was the duty of the servants of the company, when the man was found on the pilot of the engine in a helpless and insensible

Union Pac. Ry. Co. v. Cappier

condition, to remove him, and to do it with proper regard to his safety and the laws of humanity. In that case the injured person was taken in charge by the servants of the railway company, and, being apparently dead, without notice to his family, or sending for a physician to ascertain his condition, he was moved to defendant's warehouse, laid on a plank, and locked up for the night. The next morning, when the warehouse was opened, it was found that during the night the man had revived from his stunned condition, and moved some paces from the spot where he had been laid, and was found in a stooping posture, dead, but still warm, having died from hemorrhage of the arteries of one leg which was crushed at and above the knee. It had been proposed to place him in the defendant's station house, which was a comfortable building, but the telegraph operator objected, and directed him to be taken into the warehouse, a place used for the deposit of old barrels and other rubbish. The Maryland case does not support what is so broadly stated in Beach on Contributory Negligence. It is cited by Judge Cooley, in his work on Torts, in a note to a chapter devoted to the negligence of bailees (chapter 20), indicating that the learned author understood the reasoning of the decision to apply where the duty began after the railway employees had taken charge of the injured person. After the trespasser on the track of a railway company has been injured in collision with a train, and the servants of the company have assumed to take charge of him, the duty, no doubt, arises to exercise such care in his treatment as the circumstances will allow. We are unable, however, to approve the doctrine that when the acts of a trespasser himself result in his injury, where his own negligent conduct is alone the cause, those in charge of the instrument which inflicted the hurt, being innocent of wrongdoing, are nevertheless blamable in law if they neglect to administer to the sufferings of him whose wounds we might say were self-imposed.

With the humane side of the question courts are not concerned. It is the omission or negligent discharge of legal duties only which come within the sphere of judicial cognizance. For withholding relief from the suffering, for failure to respond to the calls of worthy charity, or for faltering in the bestowment of brotherly love on the unfortunate, penalties are found not in the laws of men, but in that higher law, the violation of which is condemned by the voice of conscience, whose sentence of punishment for the recreant act is swift and sure. In the law of contracts it is now well understood that a promise founded on a moral obligation will not be enforced in the courts. Bishop states that some of the older authorities recognize a moral obligation as valid, and says: "Such a doctrine, carried to its legitimate results, would release the tribunals from the duty to administer the law of the land, and put in the place of law the varying ideas of morals which the changing incumbents of the bench might

Tucker v. Erie Ry. Co

from time to time entertain." Bishop on Contracts, § 44. Ezelle's injuries were inflicted, as the court below held, without the fault of the yardmaster, engineer, or fireman in charge of the car and locomotive. The railway company was no more responsible than it would have been had the deceased been run down by the cars of another railroad company on a track parallel with that of plaintiff in error. If no duty was imposed on the servants of defendant below to take charge of and care for the wounded man in such a case, how could a duty arise under the circumstances of the case at bar? In Barrows on Negligence, p. 4, it is said: "The duty must be owing from the defendant to the plaintiff, otherwise there can be no negligence, so far as the plaintiff is concerned. * * * And the duty must be owing to plaintiff in an individual capacity, and not merely as one of the general public. This excludes from actionable negligence all failures to observe the obligations imposed by charity, gratitude, generosity, and the kindred virtues. The moral law would obligate an attempt to rescue a person in a perilous position—as a drowning child—but the law of the land does not require it, no matter how little personal risk it might involve, provided that the person who declines to act is not responsible for the peril." See Kenney v. The Hannibal & St. Joseph Railroad Company, 70 Mo. 252-257. In the several cases cited in the brief of counsel for defendant in error to sustain the judgment of the trial court it will be found that the negligence on which recoveries were based occurred after the time when the person injured was in the custody and care of those who were at fault in failing to give him proper treatment.

The judgment of the court below will be reversed, with directions to enter judgment on the findings of the jury in favor of the railway company. All the Justices concurring.

TUCKER v. ERIE RY. CO.

GEIL v. SAME.

(*Supreme Court of New Jersey, March 18, 1903.*)

[54 Atl. Rep. 557.]

Malicious Prosecution—Arrest by Railway Policeman—Liability of Company.*

Act Respecting Railroads and Canals (Gen. St. p. 2671) § 22, empowers the Governor, on application of a railroad corporation, to commission such persons as the company may designate to act as policemen for it. Section 23 gives persons so appointed the powers, in the counties through which the railroad may run, of policemen and constables. Section 25 requires the compensation of such policemen to be paid by the company. Section 27 provides that, when the company

*As to whether corporations can be held liable for malicious prosecution, see note appended to *Lezinsky v. Metropolitan St. R. Co.* (C. C. A.), 12 Am. & Eng. R. Cas., N. S., 55.

Tucker v. Erie Ry. Co

no longer requires their services, it shall file notice with the Secretary of State, whereupon the power of such policeman shall cease: *held*, that the railroad company was not liable for a false arrest and malicious prosecution made and instituted by its policemen on their own responsibility.

Actions by Patrick Tucker and Jacob Geil against the Erie Railway Company. On rules to show cause. Rules absolute.

Argued November term, 1902, before GUMMERE, C. J., and VAN SYCKEL, FORT, and PITNEY, JJ.

John J. Fallon, for plaintiffs.

Corbin & Corbin, for defendant.

GUMMERE, C. J. Tucker and Geil, the plaintiffs in these cases, were arrested while at the "oil switch" of the Erie Railroad Company, in the village of Garfield, on the evening of the 8th day of November last, by one Dwyer, without a warrant, upon a charge of stealing the brass journals from some freight cars which were standing on the company's tracks at that point. They were first taken by Dwyer to the office of the Standard Oil Company, which was near at hand. While they were there, two other men (Flynn and Delurey) came to the office; and, shortly after their arrival, Dwyer, with their assistance, took the plaintiffs before a magistrate whose office was in the building, where a complaint was made against them by Dwyer, charging them with the larceny of the journals. On this complaint the plaintiffs were committed to the county jail by the magistrate, and Flynn and Delurey took them to Hackensack, where the county jail was located, and there delivered them into the custody of the jailer. They were subsequently indicted for the offense charged against them in Dwyer's complaint. The trial of the indictment resulted in an acquittal. The plaintiffs then—each of them—instituted a suit against the defendant company for false arrest and malicious prosecution. Their suits were tried together by consent, and resulted in verdicts in their favor.

The responsibility of the defendant company is rested upon the doctrine of respondeat superior; and the primary question presented by these rules to show cause is whether the three men, Dwyer, Flynn, and Delurey, in causing the arrest and imprisonment of the plaintiffs, were acting as the agents or servants of the defendant company. The evidence shows that they were "railway policemen," appointed and commissioned as such, on the application of the defendant company, by the Governor of the state, in pursuance of the authority conferred upon him by the act respecting railroads and canals (Gen. St. p. 2671). By the provision of section 22 of that act, the Governor, upon the application of any railroad corporation made to him to commission such persons as the corporation may designate, to act as policemen for such corporation, "may appoint such persons, or so many of them as he may deem proper, to

Tucker v. Erie Ry. Co

be such policemen, and shall issue to such person or persons so appointed a commission to act as such policemen, a copy of which commission shall be filed in the office of the Secretary of State." The twenty-third section of the act declares "that every person so appointed shall, in the counties through which such railroad may run, possess all the powers of policemen and of constables, in criminal cases, of the several cities, wards of cities, and townships in such counties." By the twenty-fifth section of the act the compensation of such policeman is required to be paid by the company upon whose application they are appointed; and, by the twenty-seventh section, whenever the company shall no longer require the services of such policemen it shall file a notice to that effect in the office of the Secretary of State, and thereupon the power of such policemen shall cease and determine. It is plain, from a reading of the provisions of this statute, that although these men were appointed on the application of the defendant company, received their compensation from it, and were subject to be divested of their powers by its act, they were nevertheless state officers, charged with the performance of public duties. They were, in law, police officers, constables, authorized to arrest persons guilty of criminal offenses or breaches of the peace, not only in cases where the property of the company was involved, but in every case where the crime was committed or the peace broken within the boundaries of any of the counties through which the company's railroad ran. For the proper discharge of their official duties, as well as for the proper exercise of their official powers, they were responsible, not to the defendant company, but to the state. *Healey v. Lothrop*, 171 Mass. 263, 50 N. E. 540; *Tolchester Beach Imp. Co. v. Steinmaier*, 72 Md. 313, 20 Atl. 188, 8 L. R. A. 846. In order, therefore, to render the defendant company equally responsible for the unwarranted arrest made by them, and the subsequent criminal prosecution maliciously instituted by Dwyer, it was necessary to show that their action was instigated by the company, or by some of its officers or employees; that what they did was done by them as agents of the company, and not solely of their own volition, as peace officers. *Jardine v. Cornell*, 50 N. J. Law, 485, 14 Atl. 590. No such evidence was offered. On the contrary, the case made by the plaintiffs, and established as true by the verdict of the jury, under the charge of the court, was that their arrest was made by Dwyer on his own responsibility, without consultation with or instruction from any one, and without the existence of any facts to justify him in his action; that this was equally true of the action of Dwyer, Flynn, and Delurey in taking the plaintiffs before the magistrate; and that the subsequent prosecution was maliciously instituted by Dwyer, and was attempted to be supported by evidence manufactured by him, with the assistance of Flynn, for the pur-

Wolf v. City & Suburban Ry. Co

pose of making it appear that the plaintiffs were guilty of the charge which Dwyer had made against them. So far as the case shows, the indictment subsequently found against the plaintiffs was not procured by the defendant company, nor by any one acting in its behalf, and was prosecuted by the state without any suggestion by or assistance from it.

The rules to show cause should be made absolute.

WOLF v. CITY & SUBURBAN RY. CO.

(*Supreme Court of Oregon, May 1, 1903.*)

[72 Pac. Rep. 329.]

Crossings—Stop, Look, and Listen—Street Cars.*

One who fails to look and listen for a car before crossing a public street in daylight at a place where his view is unobstructed is guilty of contributory negligence.

Same—Same—Same.

Under such circumstances, there can be no recovery for injuries, notwithstanding the defendant may have been negligent in running the car at a dangerous rate of speed.

Same—Presumption That Person Seen near Track Will Avoid Danger.†

Where one approaching a street railway track stops near the track, the motorman in charge of an approaching car has a right to assume that he intends to wait until the car passes, and is not guilty of negligence in releasing his brakes at the time.

Appeal from Circuit Court, Multnomah County; J. B. Cleland, Judge.

Action by Mollie Wolf, as administratrix of the estate of Isaac Wolf, deceased, against the City & Suburban Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

On August 26, 1902, Isaac Wolf, while crossing First street at the intersection of Mill, in the city of Portland, was killed by one of defendant's cars. The plaintiff was appointed administratrix of his estate, and brought this action to recover damages for his death, on the ground that it was caused by the negligence of the defendant. The complaint alleges that there is a steep grade or incline from Montgomery to Mill street; that at the time of the accident one of defendant's cars was being run down this grade at a reckless, dangerous, and excessive rate of speed, and without any warning being given of its approach to the crossing; that by reason of such negligence, and without any fault on his part, Wolf was struck by the car and killed. The answer denies the negligence alleged, and avers that the defendant's agents and servants

*As to whether the stop, look, and listen rule is applicable to street railway crossings, see note appended to *Keenan v. Union Traction Co.* (Pa.), 2 R. R. R. 64, 25 Am. & Eng. R. Cas., N. S., 64.

†See foot-note appended to *Humphreys' Adm'x v. Valley R. Co.* (Va.), 5 R. R. R. 649, 28 Am. & Eng. R. Cas., N. S., 649.

Wolf v. City & Suburban Ry. Co

were in the exercise of due care and caution, and that the accident was due to the contributory negligence of Wolf. At the close of the testimony, the defendant requested the court to charge the jury to return a verdict in its favor. This motion was overruled, the jury found a verdict in favor of the plaintiff for \$500, and from the judgment entered thereon this appeal is taken.

John M. Gearin, for appellant.

D. Solis Cohen, for respondent.

BEAN, J. (after stating the facts). The sole question for our determination is whether the court erred in refusing defendant's request to direct a verdict in its favor. The defendant has two parallel tracks, about 6 feet apart, on First street, and the deceased was killed by one of its north-bound cars on the east track. The evidence for the plaintiff as to the circumstances of the accident consists of the testimony of Joseph Friedman, Joseph Ruvensky, Mrs. Walker, Mrs. Alter, and Mrs. Motts. Friedman, when the accident occurred, was standing on the west side of First street, about 40 or 50 feet north of Mill, and about 100 feet away. He first saw the car when it was near Montgomery street, but paid no particular attention to it afterward until he heard some one call out, when he looked up, and saw it strike Wolf. He testified that the car was running at a rapid rate of speed; that he heard no bell rung, or warning given of its approach to the crossing, and first saw the deceased on the track in front of the car just before it struck him. Mrs. Walker and Mrs. Motts were standing on the north side of Mill street, waiting to take the car to go down town. They both testified that they saw the car approaching, and that they heard no bell or gong sounded, and that they saw Wolf crossing the street, and did not see him stop, but, on cross-examination, said that the first they saw of him was just before he was struck by the car. Mrs. Alter, who was standing near the door of her place of business, on the east side of First street, about 20 feet south of its intersection with Mill, stated that she first saw the car about the middle of the block, coming from Montgomery toward Mill street; that she saw Wolf crossing First street on Mill, from west to east; that she heard no gong sounded, and the car was coming very fast; that she watched both Wolf and the car until the accident happened; and that Wolf walked straight across the street, without stopping. On cross-examination she testified that she was playing with a child at the time, and calling its attention to the approaching car; that she first saw Wolf coming from the west side of First street, and did not see him stop until he was run into by the car. Ruvensky was on the west side of First street, above Mill, going north. He testified that while he was going down the street the car passed him, and that he saw Wolf crossing Mill street, and he did not stop; that he did not see him when the car struck him because he (witness)

Wolf v. City & Suburban Ry. Co

was on the other side of the street; that the car was running fast; and that he did not hear the bell or gong sounded. On cross-examination he said that he first saw Wolf when he was on the "first track." The evidence for the defendant consists of the testimony of passengers aboard the car, and of its operators. C. Grohs was a passenger on the car at the time of the accident, standing on the front platform, at the right of the motorman. He testified that when the car was about the middle of the block between Montgomery and Mill streets he saw Wolf on Mill; that the motorman immediately rang his bell and slacked up the car; that when Wolf reached the west track he stopped in the middle of it, apparently to let the car go by; that the motorman then loosened up the brake, and the car started ahead, but when it was within seven or eight feet of the crossing Wolf suddenly attempted to pass in front of it, when the motorman again applied the brake, but was unable to stop the car in time to prevent the accident. J. R. Carswell, also a passenger on the car, was standing on the west side of the front platform. He testified that soon after the car passed Montgomery street he saw Wolf step from the sidewalk to the street, as though to cross to the east side; that the view was unobstructed, and there was nothing to prevent Wolf from seeing the car; that the motorman immediately rang his bell, slowed down the car, and ran within about 12 feet of the crossing, when Wolf stopped on the west track as if to let the car pass, and the motorman loosened the brake and started forward again; that about the same time Wolf started to cross in front of the car, and was struck by it, although the brakes were immediately applied. Joseph S. Bier was standing on the rear step on the west side of the car. He testified that he saw Wolf crossing the street; that the motorman rang his bell and slowed down, and, when the car came near Mill street, Wolf stopped and looked toward it; that the motorman then loosened the brake and let the car run down to the crossing, but the witness did not see the accident, his view being obscured by the car. Mrs. Gardner and Mrs. Parks were in the car, and both testified that they heard the bell ring, and that the car slowed down; one of them even testifying that it actually stopped before it reached the crossing. B. W. Rose said that he was riding in the car, and that his attention was attracted by the sound of the bell, as it was rung in a quick, sharp manner, and the car checked up suddenly, but that he did not see Wolf. Frank Keller was standing on the front platform of the car, but did not see Wolf at the time of the accident, because some one was standing in front of him. He testified that the gong was sounded several times, and the speed of the car slackened, before it reached Mill street, and when it got within about 10 feet of the street the motorman suddenly applied the brakes, and about the same time the witness heard some one call out, and then saw Wolf directly in front of the car. The motorman

Wolf v. City & Suburban Ry. Co

stated in his testimony that when about the middle of the block between Montgomery and Mill streets he saw Wolf going from the West to the east side of First; that witness immediately commenced ringing the bell and slowing the car down; that he continued to ring the bell and slacken the speed of the car until within about 25 or 30 feet of the crossing, when Wolf stopped in the middle of the west track, and the witness, supposing that he was intending to stand there until the car passed by, released the brake, and let the car roll down to the crossing at a speed of 3 or 4 miles an hour; that when within about 10 feet of the crossing, Wolf suddenly started to pass rapidly in front of the car, when the witness immediately applied the brakes as tight as he could, but was unable to stop the car in time to prevent its striking Wolf; that from the time the car was about 20 or 30 feet from the crossing until it reached a point about 8 or 10 feet from it Wolf was standing on the west track, and looking toward the car, there being nothing to obstruct his view; that in the middle of the block the car was running at a probable rate of 8 or 10 miles an hour, but before it reached the crossing it was slowed down to about 3 miles. The conductor did not see the accident, as he was inside the car, but he testified that he heard the gong, and that the car slowed down to three or four miles an hour, and that just before it reached the crossing he heard three or four sharp rings of the gong and felt the car give a jar or lurch, as if the brakes had been suddenly set.

From the testimony on behalf of the defendant the conclusion is irresistible that Wolf saw the approaching car, and first thought that he would stop, and wait for it to go by, but probably concluded that he could safely pass in front of it, and in attempting to do so was struck and killed. And it is practically uncontradicted. All of the witnesses for the plaintiff who testified on the subject, unless perhaps it was Mrs. Alter, stated that they did not see Wolf until about the time he was struck by the car. Mrs. Alter testified through an interpreter. It is possible to argue from her testimony, as contained in the record, that she intended to say that she saw Wolf all the time after he started across the street until the accident occurred, but the physical conditions were such that it was impossible for her to have had him in view during the entire time. She was on the street south of the crossing, standing between it and the approaching car. She was pointing out the car to the child with whom she was playing, so that her attention must have been more centered on it than on Wolf. It was impossible for her to see both the car and Wolf at the same time, since they were in opposite directions. Again, she was on the east side of the street, and the car must necessarily at some point have passed between her and Wolf, during which time her view was, of course, obstructed. It cannot be said, therefore, that her testimony materially contradicts the evidence for the defendant, or that it alone is

Goddard v. Chicago, etc., Ry. Co

sufficient to take the case to the jury, in view of the positive and overwhelming testimony to the contrary of persons whose attention was particularly attracted to the conditions at the time. Where there is a substantial conflict in the testimony, or even where it is undisputed, but different inferences may reasonably be drawn from it, the question of negligence is always for the jury, and the court should not direct a verdict for defendant. *Huber v. Miller*, 41 Or. 103, 68 Pac. 400; *Stager v. Troy Laundry Co.*, 41 Or. 141, 68 Pac. 405. But, where there is no substantial conflict, and only one inference can reasonably be deduced from the testimony, the question is one of law for the court, and, in our opinion, this is a case calling for its application. The deceased was crossing a public street, in broad daylight, at a place where his view was unobstructed. It was therefore his duty to look and listen for a car before crossing the track, and, if he did not, he was guilty of such contributory negligence as would preclude recovery (*Smith v. City Railway Co.*, 29 Or. 539, 46 Pac. 136, 46 Pac. 780, 5 Am. & Eng. R. Cas., N. S., 163; *McGee v. Consolidated St. Ry. Co.*, 102 Mich. 107, 60 N. W. 293, 26 L. R. A. 300, 47 Am. St. Rep. 507; *Ward v. Rochester E. R. Co.* [Sup.] 17 N. Y. Supp. 427; *Watkins v. Union Traction Co.*, 194 Pa. 564, 45 Atl. 321), notwithstanding the defendant may have been negligent in running the car at a dangerous rate of speed (*Sego v. Southern Pacific Co.*, 137 Cal. 405, 70 Pac. 279). In addition to this, the testimony shows that he saw the approaching car, and stopped when near the track, but afterwards concluded that he had time to pass safely in front of it. When he stopped, the motorman had a right to assume that he intended to wait until the car passed before crossing the track, and was not guilty of negligence in releasing his brakes at the time. *Sanders v. Southern Electric Ry. Co.*, 147 Mo. 411, 48 S. W. 855; *Gray v. Ft. Pitt. Traction Co.*, 198 Pa. 184, 47 Atl. 945.

Under the evidence adduced, therefore, we are of the opinion that the unfortunate accident was not due to the negligence of the defendant, and the judgment must be reversed, and the cause remanded for such further proceedings as may be deemed proper, not inconsistent with this opinion.

GODDARD *et al.* v. CHICAGO & N. W. Ry. Co.

(*Supreme Court of Illinois, April 24, 1903.*)

[66 N. E. Rep. 1066.]

Injunction—Dismissing Bill.

When the only relief sought by a bill was an injunction, an order dissolving the injunction for want of equity apparent on the face of the bill was, in effect, an order denying all relief, and was a final disposition of the case, and it was proper practice to dismiss the bill.

Street Railways—Right to Construct—Authority of County Board.

Act March 7, 1899 (Laws 1899, p. 331). § 1, provides that any company

Goddard v. Chicago, etc., Ry. Co

incorporated under the laws of the state for the purpose of constructing, maintaining, or operating any street railroad may locate and construct its road on and over any street, alley, road, or highway. Section 2 provides that no such company shall have the right to locate or construct its road on or along any road or highway without any incorporated city, town, or village, except on the consent of the county board: *held* not to authorize the board to make grants of such character to individuals. **Same—Same—Same—Power of Legislature.**

The Legislature has power to limit the authority of a county board to grant a license to occupy highways for street railway purposes to incorporated companies created under the general laws of the state for the purpose of constructing and operating street railways.

Same—Ordinary Avocations—Constitutional Law.

The operation of a street railway is not an ordinary avocation, within the constitutional provisions securing to every individual the right to choose his own occupation, and to pursue any ordinary calling or trade.

Appeal from Appellate Court, Second District.

Bill for an injunction by Alpheus P. Goddard and another against the Chicago & Northwestern Railway Company. From a decree of the Appellate Court (104 Ill. App. 526) affirming a decree dissolving the injunction and dismissing the bill, complainants appeal. **Affirmed.**

Oscar E. Heard, for appellants.

S. A. Lynde (A. W. Pulver and Lloyd W. Bowers, of counsel), for appellee.

CARTWRIGHT, J. The appellants, Alpheus P. Goddard and Alpheus J. Goddard, filed their bill in the circuit court of Stephenson county against the appellee, the Chicago & Northwestern Railway Company, alleging that complainants were engaged in constructing a street railway in the city of Freeport, and in public highways in said county outside of said city; that the board of supervisors of said county granted to them the right to construct, operate, and maintain lines of street railway upon certain highways not within any incorporated city, town, or village, among which was a highway called "Gund Avenue," in the town of Freeport, outside of said city; that said grant was duly accepted by complainants; that the railway of defendant crosses said highway with its tracks; that complainants located their street railway in said highway across said tracks, and commenced the construction thereof; and that defendant prevented them from crossing its railway with the tracks of their street railway, and from placing trolley wires over and across its said railway. The bill prayed for an injunction restraining defendant from hindering, delaying, or preventing complainants from constructing their street railway, and laying the tracks thereof across the right of way and railway tracks of the defendant, and from interfering with the operation of such street railway, and the running of cars on the same. On the filing of the bill, a temporary injunction was granted. Defendant filed its answer, setting up, among other things, that the board of supervisors of Stephenson county had no power to grant to appellants any right to construct and operate a street railway

Goddard v. Chicago, etc., Ry. Co

in or upon the public highway; and defendant then filed its motion to dissolve the temporary injunction. On the hearing of the motion the court dissolved the injunction, and afterward dismissed the bill for want of equity upon its face. The Appellate Court affirmed the decree.

The first complaint is that the court dismissed the bill, and did not retain it for a final hearing upon the merits. When an injunction is collateral to the main object of a bill, and other relief is sought which may be granted upon final hearing, the bill should not be dismissed on dissolution of the injunction, but should be retained and proceed to such final hearing. When the only relief sought by the bill is an injunction, an order dissolving the injunction for want of equity apparent on the face of the bill is, in effect, an order denying all relief, and is a final disposition of the case. In such a case it would be entirely useless to go through the form of making proof of the allegations of the bill. In this case the only relief prayed for was an injunction to restrain the defendant from interfering with or preventing the complainants from constructing, maintaining, or operating their street railway across the right of way and tracks of the defendant. The order dissolving the injunction disposed of the entire case, and it was proper practice to dismiss the bill. *Titus v. Mabee*, 25 Ill. 232; *Prout v. Lomer*, 79 Ill. 331. The decree dismissing the bill recited that the cause was heard upon the bill and answer, but it dismissed the bill "for want of equity appearing upon the face of the bill," and not upon a consideration of facts set up by the answer. To entitle complainants to the protection of a court of equity in laying their railway tracks and putting up their trolley poles and wires in the highway, it was necessary to show that they had a right to occupy the highway for that purpose. Their bill showed that they based their right to construct and operate the street railway in the highway upon a license granted to them by the board of supervisors of Stephenson county. The power of the board of supervisors to grant such a license is challenged, and the material question is whether the law conferred upon the board any authority to make such a grant. If the board had such power, it is to be found in an act in regard to street railroads, approved March 7, 1899 (Laws 1899, p. 331). Section 1 of that act provides "that any company which has been or shall be incorporated under the general laws of this state for the purpose of constructing, maintaining or operating any horse, dummy or street railroad or tramway, * * * may, subject to the provisions contained in this act, locate and construct its road upon and over any street, alley, road or highway, or across or over any waters in this state, in such manner as not to unnecessarily obstruct the public use of such street, alley, road or highway, or interrupt the navigation of such waters." Section 3 provides as follows: "No such company shall have the right to locate or construct its

Goddard v. Chicago, etc., Ry. Co

road upon or along any street or alley, or over any public ground in any incorporated city, town or village without the consent of the corporate authorities of such city, town or village, nor upon or along any road or highway, or upon any public ground without any incorporated city, town or village, except upon the consent of the county board. Such consent may be granted for any period not longer than twenty years, on the petition of the company, upon such terms and conditions not inconsistent with the provisions of this act, as such corporate authorities or county board, as the case may be, shall deem for the best interests of the public." Other provisions of the act authorize the exercise of the right of eminent domain when necessary for the construction, maintenance, or operation of such road, with the necessary sidings, side tracks, or appurtenances, and require that the consent of the public authorities shall be subject to the condition of payment of damages to the owners of property abutting upon the street, alley, road, highway, or public ground upon or over which the road is to be constructed, and also subject to the right of the proper authorities to control the use, improvement, and repair of the street, alley, road, highway, or public ground to the same extent as if no grant had been made, and to make all necessary police regulations concerning the operation and management of the railroad. The act, by its terms, only authorizes the board to make grants of the character in question to companies incorporated under the general laws of this state for the purpose of constructing, maintaining, or operating horse, dummy, street railways or tramways.

Counsel for complainants contends in argument that the statute should be so construed as to extend its terms beyond their natural and obvious meaning, so as to include individuals and partnerships, which would be contrary to the established rule in such cases. If the act should be extended beyond its terms, so as to embrace individuals, it would extend to them the right to exercise the sovereign power of eminent domain for the purposes of their street railways, and statutes conferring such powers are to be construed strictly. Unless both the letter and the spirit of the statute confer the power, it cannot be exercised; and, if the words of a public grant are doubtful, they are to be taken most strongly against the grantee. *City of East St. Louis v. St. John*, 47 Ill. 463; *Chicago & Eastern Illinois Railroad Co. v. Wilse*, 116 Ill. 449, 6 N. E. 492, 24 Am. & Eng. R. Cas. 261; *Harvey v. Aurora & Geneva Railway Co.*, 174 Ill. 295, 51 N. E. 163.

It is argued in favor of the construction contended for that there is no good reason why the Legislature should not give to individuals the right to construct and operate street railroads in public highways, or why they might not delegate to individuals the right to exercise the power of eminent domain for such purposes. Whether that is so, or not, is immaterial

Goddard v. Chicago, etc., Ry. Co

in this case, since the question here is not whether the Legislature might have granted such rights to individuals, or delegated authority to the board of supervisors to do so, but whether they have granted to the board of supervisors such authority. The question is not whether a natural person, if the law so provided, might acquire a right of way, exercise the right of eminent domain, and enjoy the franchise to operate a street railway, but whether the law does so provide; and, if it is clear that it does not, the complainants acquired no right by the action of the county board. The Legislature had power to limit the authority of the county board to grant a license to incorporated companies created under the general laws of the state for the purpose of constructing and operating street railways, and it is not material what reason existed for prescribing the limit. It was a case for the exercise of the legislative judgment, with which we are not concerned.

Counsel also invokes, in support of the construction contended for, the general rule No. 5 laid down by the Legislature for the construction of statutes, as follows: "Fifth. The word 'person' or 'persons,' as well as all words referring to or importing persons, may extend and be applied to bodies politic and corporate as well as individuals." Hurd's Rev. St. 1899, p. 1649. This provision is limited by the act to cases where such construction would not be inconsistent with the manifest intent of the Legislature, or repugnant to the context of the same statute; and it clearly would be in violation of that limitation to construe this act, embracing by its terms only incorporated companies, so as to include natural persons. "Person" is a generic word of comprehensive nature, embracing both natural and artificial persons, such as corporations; but to say that a description of the specific class of artificial persons known as "corporations" shall embrace all persons, both natural and artificial, would be to reverse both the rule, and the reasons upon which it is founded.

It is also urged that the use of the word "company" in the act authorizes a construction including persons and partnerships, because the word "company" is used to designate several persons or a partnership. "Company" and "corporation" are commonly used as interchangeable terms, and it is plain that they were so used in this case. The act, in using the words "such company," plainly refers to a company of the kind mentioned in section 1, which is a "company which has been or shall be incorporated under the general laws of this state." If there is no inherent reason why the Legislature should not have included individuals in the provisions of the act, it is clear that they did not see fit to do so.

Counsel relies with much confidence upon the decisions in *Chicago Dock Co. v. Garrity*, 115 Ill. 155, 3 N. E. 448, and *McGann v. People*, 194 Ill. 526, 62 N. E. 941, as holding that authority may be granted to individuals to lay tracks in the streets of a city. Neither of those cases involved in any way

Goddard v. Chicago, etc., Ry. Co

the right of an individual to operate a railway and carry passengers or freight for hire, or to enjoy a franchise of that character. In the first case an ordinance was passed authorizing partners to lay down a railway track in a street in Chicago to their warehouse, to give access to the tracks of a railway company. It had been held that there might be a grant to individuals of the right to lay tracks connecting their manufacturing establishments with railroad tracks previously laid, which became, in legal effect, the tracks of the railway company with which they were connected. *Truesdale v. Peoria Grape Sugar Co.*, 101 Ill. 561; *Mills v. Parlin*, 106 Ill. 60. In reference to the ordinance then involved, it was agreed on both sides that the city counsel had power to authorize the laying of the track, and the controversy was as to the limitations under which the power could be exercised. The question of limitation was decided, and it was also held that such tracks, if laid, would be open to the public use and under the public control in all respects as other railway tracks of the corporation with which they were connected. In the second case the question was again concerning the limitations imposed upon the power to grant a right to lay a switch track from a railroad to a warehouse. It was said that ordinances of that character had been held valid upon the ground that the track is only an extension of the track of the railroad company, and the grant is, in effect, a grant to the railroad company to lay its track in the public street, through the individual presenting the application. Neither of those cases is authority for the position assumed by counsel.

Another branch of the argument in support of the bill is that the statute must be construed to include individuals, because any other construction would be contrary to the Constitution of the state of Illinois and the Constitution of the United States. These fundamental laws secure to every individual the right to choose his own occupation, to pursue any ordinary calling or trade, and to acquire, hold, and sell property. Counsel says that this includes the right to follow the occupation of constructing and operating street railways; that the Legislature have no right to prohibit an individual from purchasing and operating a street railway; and that any law discriminating against the individual, and in favor of the corporation, in the right to follow such an avocation, would be unconstitutional. The obvious reply is that the operation of a street railway is not one of the ordinary avocations to which the constitutional provisions apply. It is a special privilege conferred by the government, which does not belong to citizens of the country generally, by common right. The right to operate a street railway and collect fares for carrying passengers, and the power to exercise the right of eminent domain, are franchises. No private person can establish a toll bridge, public ferry, or railroad, or enjoy the franchise connected therewith, without authority from the Legislature,

Indianapolis St. Ry. Co. v. Hockett

either directly granted, or by the exercise of legislative power through delegation to a municipality. 2 Smith's Law of Mun. Corp. § 1702. A franchise is a special privilege conferred by grant from the sovereign power, not belonging to the citizen of common right. It must be derived from the laws of the state, and emanate from the sovereign power, and it cannot be exercised by an individual on his own lands without the consent of the state. Trustees of Schools v. Tatman, 13 Ill. 27; Board of Trade v. People, 91 Ill. 80; Chicago & Western Indiana Railroad Co. v. Dunbar, 95 Ill. 571, 1 Am. & Eng. R. Cas. 214.

Complainants sought an injunction to restrain defendant from interfering with their alleged property right, and, on the face of their bill, showed that they had no right to do that which they asked the court to protect them in doing. The bill showed that they asserted a right which had no foundation in law, and the court was right in dissolving the injunction and dismissing the bill.

The judgment of the Appellate Court is affirmed. Judgment affirmed.

INDIANAPOLIS ST. RY. CO. v. HOCKETT.

(*Supreme Court of Indiana, April 22, 1903.*)

[67 N. E. Rep. 106.]

Injury to Newsboy Riding on Car—Ordering Him Off—General Verdict and Special Findings.

In an action against a street railway the complaint alleged that plaintiff, an infant, went upon the running board of one of defendant's open cars to sell a newspaper, when the conductor commanded him to jump off, and approached him threateningly, so that plaintiff slipped from the running board, and was injured; that the car was running at considerable speed at the time; and that it was a custom of the railway company to permit boys to go upon the cars to supply passengers with newspapers. There was a general verdict for plaintiff, but the jury found specially that the conductor had ordered plaintiff to get off the car before it started, and again just after it started: *held*, that such findings were not inconsistent with the general verdict, since they did not find that the boy heard or could have heard the command.

Same—Licensees.

Where, according to a general custom, newsboys are permitted to go on street railway cars to sell and deliver papers, a boy is not a trespasser while on a car selling a paper, unless his right to remain on the car has been terminated by reasonable notice.

Same—Same.

A command given by a conductor to a newsboy on the car to get off, which he did not hear, would not operate to terminate his right to be on the car.

Same—Ordering from Moving Car—Liabilities.

Where, after a car had started, the conductor ordered a boy to leave the car while it was running at a hazardous speed, and under the influence of fear, while attempting to comply with the order, the boy was injured without fault on his part, the railroad was liable.

Same—Same—Negligence—Question for Jury.

The question whether it was safe for a boy to alight from a car at the

Indianapolis St. Ry. Co. v. Hockett

command of the conductor while it was running at a speed of some four to five miles an hour was a question of fact for the jury.

Same—Same—Proximate Cause.

Where a conductor orders a boy to leave a moving street car, and, being frightened at the threatening manner of the conductor, he sustains injuries while attempting to alight, the expulsion from the car is the proximate cause of the injury.

Same—Same.

It appearing that the conductor did not intend to injure the boy, his conduct was negligent, but not wrongful.

Appeal from Superior Court, Marion County; Jas. M. Leathers, Judge.

Action by David O. Hockett, by his next friend, against the Indianapolis Street Railway Company. From a judgment for plaintiff, defendant appealed. Transferred from Appellate Court under specification 2, § 10, of Act March 13, 1901. Affirmed.

W. H. Latta and F. Winter, for appellant.

Cox, Cox & Remster, for appellee.

DOWLING, J. Action by David O. Hockett, a minor, by his next friend, for damages for a personal injury alleged to have been caused by the wrongful acts and negligence of the appellant, the Indianapolis Street Railway Company. From a judgment against it the railway company appealed. The only error assigned, and not waived by a failure to discuss it, is the refusal of the court to render judgment for the railway company upon the answers of the jury to questions of fact submitted to them, notwithstanding the general verdict.

The material facts set out in the third paragraph of the complaint, upon which the case was tried, were that the appellee, on July 28, 1899, was an infant aged 12 years, and that the appellant was a corporation organized under the laws of this state; that the appellant at said date, and for a long time before that, owned and operated a street railway in the city of Indianapolis for the transportation of passengers by means of cars propelled by electricity; that it was and had been the custom of said railway company to permit newsboys to supply its passengers with newspapers, and upon signals from such passengers to enter upon its said cars, wherever they might be, for that purpose, and that said custom was known to the appellee; that the appellee was on said day a newsboy and vender for newspapers, and was on Pennsylvania street, near Washington street, with newspapers to sell, when a passenger on one of appellant's said cars, which had stopped, signaled that he wanted a newspaper; that the appellee ran to supply said passenger; that said car was an open summer car, with a running board extending the whole length of one side, used both by passengers when entering or leaving said car and by the conductor thereof in collecting fares and for other purposes; that the appellee mounted said running board to supply said pas-

Indianapolis St. Ry. Co. v. Hockett

senger with a newspaper, and stood on the said running board, holding to the "handhold" with which said car was equipped, such position being a perfectly safe one, while he looked through said car for the passenger who had signaled to him for a paper; that before he had time to supply such passenger, or even to discover him, the conductor of said car, which was then proceeding northward to the next street crossing and stopping place, started toward the appellee, along said running board, and with threatening words and gestures commanded him to jump off said car, which was then running at considerable speed, although said conductor well knew that said car would stop at the next street crossing, then but a short distance away; that the appellee, frightened by the words and manner of the said conductor, prepared to leave said car, but before he had time to do so the said conductor continued toward him in a threatening manner, using menacing words and gestures, thereby greatly increasing appellee's fears, and, in his distraction and haste to leave said car, through fear that he would be violently thrown therefrom by said conductor, his feet slipped from said running board, and his right leg fell under the wheels of the said moving car, which ran over it, so injuring the limb that the foot and ankle had to be amputated; that the said injury was caused by the negligence of the appellant, as set out in the complaint, and without fault or negligence on the part of the appellee.

The answers of the jury to the questions of fact which are supposed to entitle the appellant to a judgment in its favor notwithstanding the general verdict are the following: "(12) Did the conductor order the plaintiff to get off before the car started? Answer. Yes. (13) If you answer the twelfth interrogatory in the negative, did the conductor order the plaintiff from the car just after the car started from Washington street? Answer. Yes." "(17) Did the plaintiff obey the order of the conductor to get off the car? Answer. No." "(23) Did the conductor step down from the platform to the running board of the car? Answer. Yes. (24) Did the conductor start forward from the rear end of the running board? Answer. Yes. (25) If the conductor said anything to the plaintiff after he, the conductor, got on the running board, what did he say? Answer. 'Get off!' (26) If the conductor said anything to the plaintiff after the conductor got on the running board, how far was he from plaintiff when he said it? Answer. 4 to 6 feet. (27) If the conductor said anything with the intention of injuring plaintiff, what was it? Answer. Nothing. (28) If the conductor did anything with the intention of injuring the plaintiff, what was it? Answer. Nothing. (29) Did the plaintiff try to jump off the car while the same was in motion? Answer. Yes." "(32) At what rate of speed was the car going when plaintiff's feet left the running board? Answer. 4 to 5 miles. (33) Could the plain-

Indianapolis St. Ry. Co. v. Hockett

tiff have gotten off the car safely before it started from Washington street? Answer. Yes. (34) Could the plaintiff have gotten off safely just after the car started from Washington street? Answer. Yes. (35) Could the plaintiff have gotten off the car safely just after the conductor spoke to him at or near Washington street? Answer. Yes. (36) If the conductor did anything to the plaintiff after the conductor got on the running board, what did he do? Answer. Ordered him off. (37) If the conductor did anything to the plaintiff after the conductor got on the running board, how far was he from the plaintiff at the time? Answer. Very near him."

The general verdict must be understood as establishing the truth of every material averment of the complaint, except so far as such averments are contradicted or modified by the answers to the questions of fact. The facts constituting the misconduct of the conductor of the car, as corrected and modified by the special answers, may be thus stated: Before the appellee had time to discover the passenger who signaled him for a newspaper, the conductor started toward the appellee, along the running board, and, while the car was running from four to five miles an hour, commanded the appellee to get off. The appellee was frightened by the words and manner of the conductor, and prepared to leave the car. The conductor continued to walk along the running board toward him in a threatening manner, and, in his fright and haste to leave the car, appellee's feet slipped on the running board, and he fell under the wheels of the car and was injured. Although the jury found specially that the conductor ordered the appellee to get off before the car started, and again just after it left Washington street, they did not find that the appellee heard or could have heard such order. Under the established rule in such cases, if necessary to sustain the general verdict, it must be presumed that these orders to get off the car when it was safe to do so were not heard by the appellee. We cannot supply by intendment or presumption so material a fact as that the appellee heard the orders, when the jury did not specially find that it existed, but, by their general verdict, presumptively, found that such orders, though given, were not heard. *Ohio & Miss. Ry. Co. v. Trowbridge*, 126 Ind. 391, 393, 394, 26 N. E. 64, 45 Am. & Eng. R. Cas. 200; *Chicago, etc., R. Co. v. Hedges*, 105 Ind. 398, 410, 7 N. E. 801, 25 Am. & Eng. R. Cas. 550; *Hobbs v. Salem, etc., Co.*, 22 Ind. App. 436, 53 N. E. 1063; *Shoner v. The Pennsylvania Co.*, 130 Ind. 170, 28 N. E. 616, 29 N. E. 775; *Consolidated Stone Co. v. Summit*, 152 Ind. 297, 300, 53 N. E. 235; *Stoy, Adm'r, v. The Louisville, etc., Co.* (at the present term) 66 N. E. 615.

The special findings of fact leave uncontradicted the allegations of the complaint that newsboys were permitted to come upon the appellant's cars upon signals from passengers to sell and deliver newspapers to such passengers, and that upon

Indianapolis St. Ry. Co. v. Hockett

a signal of this kind the appellee got upon this car. He was, therefore, not a trespasser in the first instance, and he did not become a trespasser afterwards, unless his right to remain upon the car for the purpose of selling newspapers was terminated by a reasonable notice to leave the car. Until the appellee's right to remain on the car for such purpose was terminated by a reasonable notice to get off the car at a time and place and under such circumstances, with respect to the speed at which the car was running, and the condition of the street at the time and place, as rendered it reasonably safe for him to do so, he could not be ejected as a trespasser. According to the averments of the complaint, which the general verdict affirmed, the entry of the appellee on the appellant's car was lawful. It had the approval of the appellant, and the sanction of a long-established custom known to the appellee, and acquiesced in by the appellant. The appellee, therefore, cannot be regarded as a trespasser, unless it appears from the answers to the questions of fact that the license by which he entered the car was subsequently revoked with his knowledge, and under such conditions as rendered it possible for him to withdraw from the car without risk of injury. If the conductor ordered him to get off before the car started, and also just after it started, yet, if the appellee did not hear these orders, they did not operate to terminate his right to be upon the car. If, after the car started, the conductor commanded the appellee to leave the car while it was running at such a rate of speed as rendered it hazardous for the appellee to obey, then the order was an unreasonable and an unlawful one; and if, under the influence of fear, induced by the manner or words of the conductor, the appellee, exercising such care as was reasonable under the circumstances, attempted to comply with the command, and to get off while the car was running at such dangerous rate of speed, and was injured without fault on his part, the appellant must be held liable for the injury.

The proper determination of the case depends upon the answer to a single inquiry: Had the conductor the right to compel a boy 12 years of age to get off an electric car while running at the rate of from four to five miles an hour, the boy having entered upon the car with the permission of the railway company? He had such right, provided it was safe for the boy to alight. If the appellee could not get off without risk of injury, then the order was unreasonable, and, if unreasonable, unlawful. Whether it was safe for a boy of the size, age, activity, and intelligence of the appellee to alight from the car while it was running at a speed of from four to five miles an hour along one of the principal streets of Indianapolis, at 5 o'clock in the afternoon of July 28, 1899, was a question of fact for the jury. They decided that it was not safe, and that the expulsion of the newsboy from the car was wrongful. Giving to the appellant the benefit of

MacDonald v. New York, etc., R. Co

every answer made by the jury to the interrogatories submitted to them, the fact remains that the order to leave the car was given when it was running at considerable speed, and when the act of alighting from it was necessarily attended with some degree of danger. The order to leave the car, enforced by the threatening manner, and perhaps menacing tone of voice, of the conductor, was as effective as the application of physical force, and resulted in a very natural and serious injury to the appellee. The wrongful expulsion of the appellee from the car while in motion was the proximate and sole cause of the accident and injury. The injury done to the appellee was in no sense a willful one, but was occasioned by the negligence of the conductor in causing him to alight from the car when it was not safe for him to do so. The jury expressly found that the conductor did not intend to injure the appellee. His error was one of judgment, and must be characterized as an act of carelessness or negligence, and not of willfulness. The trial court did not err in overruling appellant's motion for judgment on the answers of the jury to the questions of fact submitted to them.

We find no error in the record. Judgment affirmed.

MACDONALD v. NEW YORK, N. H. & H. R. Co.

(*Supreme Court of Rhode Island, Feb. 14, 1903.*)

[54 Atl. Rep. 795.]

Fires—Damages—Sufficiency of Bill of Particulars.

In an action against a railroad for damages by fire, a bill of particulars showing the number of acres of each kind of wood burned, the years of growth, the kinds of fence destroyed, etc., was sufficient, without showing the value of the wood growing on certain oak-sprout land, the value of a certain pine grove, the value of wood growing on certain pasture land, the value of a rail fence, and the value of other wood claimed to have been destroyed by the fire.

Same—Evidence—Other Fires.*

In an action against a railroad for damages by fire, evidence of fires originating prior and up to the time of the fire in issue, of cinders lying along defendant's tracks, and as to whether or not defendant's locomotives were in the habit of throwing off sparks and cinders prior to the time of the fire in issue, and whether these cinders and sparks were of such a nature as to be able to ignite fires, was admissible on the issue of the cause of the fire.

Same—Same—Same.

Evidence that some of defendant's own land had been burned over was admissible on the same issue, though defendant had a right to intentionally do what it chose with its own property.

Same—Same—Same—Harmless Error.

In an action against a railroad company for damages by fire, the admission of evidence as to who owned the land lying between plaintiff's land and the right of way, and on which the fire was supposed to have originated, was harmless to defendant.

*See foot-note appended to *Abrams v. Seattle & M. Ry. Co.* (Wash.), 2 R. R. R. 465, 25 Am. & Eng. R. Cas., N. S., 465.

MacDonald v. New York, etc., R. Co

Same—Same.

In an action under R. I. Acts & Res. June Sess. 1836, p. 3, § 2 (being an act to incorporate the New York, Providence & Boston Railroad Company, and providing that that corporation should be liable to the owner for all damages arising from the burning of property by fire communicated from its engines), the plan and report of relocation of the company mentioned, filed for record in the court of common pleas, and purporting to be filed by the executive committee, stated that it was filed by the railroad in compliance with the act of 1836. It appeared that the persons signing the report as executive committee of the company were dead, and the defendant company, which was the successor of the New York, Providence & Boston Company, did not deny that the relocation was in fact made, and offered no testimony on that question: *held*, that the report was properly admitted, without specific proof that the persons who signed it as executive committee were such in fact.

Instructions.

Refusal to charge in the exact words of a request is not error, where the point presented is covered in other instructions.

Same—Same.

In an action against a railroad for damages by fire, refusal to permit defendant to ask what plaintiff paid for his farm was not error.

Action by James N. MacDonald against the New York, New Haven & Hartford Railroad Company. Verdict for plaintiff. Heard on petition of defendant for a new trial. Petition denied.

Argued before STINESS, C. J., and TILLINGHAST and ROGERS, JJ.

James C. Collins, Jr., for plaintiff.

John W. Sweeney, for defendant.

ROGERS, J. This is the defendant corporation's petition for a new trial, after a verdict for the plaintiff, of an action of debt brought under section 2 of an act entitled "An act in amendment of an act entitled 'An act to incorporate the New York, Providence & Boston Railroad Company' passed at June session, A. D. 1836" (R. I. Acts & Res. June Sess. 1836, p. 3), which reads as follows, viz.: "Sec. 2. And be it further enacted, that said corporation shall be liable to pay to the owner or owners for all damages which may arise from the burning of houses, wood, hay, or any other substance whatever, by fire communicated from the engines, cars or other vehicles of said corporation, or by those in their employ, damages equal to the value thereof, with all the lawful costs; to be recovered in an action of debt, in any court competent to try the same." The defendant had succeeded the said New York, Providence & Boston Railroad Company, and was liable in this case to all the duties, liabilities, and obligations imposed by said act upon said last-named corporation.

There were 23 grounds alleged for a new trial, many of which were practically duplicates. The first ground was that the trial court erred in not requiring the plaintiff to state in his bill of particulars the value of the wood growing upon said oak-sprout land, value of the pine grove, the value of the wood growing on the pasture land, the value of the rail fence,

MacDonald v. New York, etc., R. Co

and the value of the wood claimed to have been damaged, injured, or destroyed by the fire. The defendant had asked for a bill of particulars in extremely minute detail; and the plaintiff had furnished many particulars, giving the number of acres of each kind of wood burned, the years of growth, the kind of fence, etc.; and the trial court ruled that the order for a bill of particulars had been sufficiently complied with. We think that ruling was a proper exercise of that court's discretion. The purpose of a bill of particulars is to give the defendant such information as will enable it intelligently to prepare its defense and to guard against surprises; but, as said by Durfee, C. J., in *Cox v. Providence Gas Co.*, 17 R. I. 200, 21 Atl. 344: "The rule of certainty in pleading is not too rigid to be reasonable. It was designed to further, not to defeat, the ends of justice, and it is elementary that it requires no more particularity than the nature of the thing pleaded admits." In *Lee v. Reliance Mill Co.*, 21 R. I. 323, 43 Atl. 536, this court said: "The rules of pleading require reasonable certainty in the statement of essential facts, to the end that the adverse party may be informed of what he is called on to meet at the trial, and to this end the allegations should be as precise and definite as the nature of the case will reasonably permit." See, also, *Sullivan v. Waterman*, 21 R. I. 72, 41 Atl. 1006. In *Muller et al. v. Bush, etc., Mfg. Co.*, 15 Abb. N. C. 90, Dykman, J., said: "The plaintiff has commenced this action to recover damages sustained by reason of injuries to his house from an explosion in the defendant's oilworks. The complaint states the injuries with considerable particularity, and the amount of damages sustained. The defendant, desiring a bill of particulars of the items of damages, made a motion therefor to the special term, which was denied, and an appeal is brought from the order of denial. This is not a case where the plaintiff should be required to furnish particulars. The action is for damages which the plaintiff cannot specify with certainty. The amount will depend on proof to be furnished after examination of the injuries, and may well consist of the testimony of experts. Great caution should be exercised by the courts in requiring parties to furnish particulars in actions for damages resulting from negligence. It is usually impossible for a plaintiff to know with any degree of precision what the proof will be, and the bill of particulars would in most cases of that character be an instrument of embarrassment and injustice." Although the case at bar is not one of negligence, yet it approximates sufficiently to it to come within the application of the learned judge's words. In the case at bar the declaration gave the gross amount of damage claimed, and the bill of particulars gave various other details sufficient to inform the defendant for all the purposes of defense.

A class of exceptions relating to the admission of testimony

MacDonald v. New York, etc., R. Co

of fires originating prior and up to the time of the fire in this case, or of cinders lying alongside of the track, either inside of the railroad company's land or outside of it, or as to whether or not locomotives on the road of this defendant were in the habit of throwing off sparks and cinders prior to May 4, 1901, the date of the fire in this case, or whether these cinders and sparks are capable of igniting fires, or of such a nature that they could and do ignite fires, form eight grounds for the petition for a new trial.

It devolved upon the plaintiff, in order to entitle him to recover, to show that the damage complained of was caused by fire communicated from the engines, cars, or other vehicles of the defendant, or by those in their employ, but whether with or without negligence was quite immaterial. *MacDonald v. N. Y., N. H. & H. R. Co.*, 23 R. I. 577, 51 Atl. 578. As there are few, if any, cases where persons see the fire directly communicated, proof of the communication must necessarily be more or less circumstantial. As tending to show that the fire was set by the defendant, it has been held competent to prove that at various times before the fire occurred the engines of the company set out fires along its line in the vicinity, and it has also been held competent to show that coals of fire had previously been dropped or been found on the track at or near the place where the injury occurred. See 3 Elliott on Railroads, § 1243, and notes 1 and 3 on page 1939, and 1 and 3 on page 1940. In *Smith v. Old Colony, etc., R. Co.*, 10 R. I. 22, 27, Durfee, C. J., said: "A second purpose for which such testimony might be admissible is this, namely, to show the possibility of communicating fire by sparks from a locomotive, if any question were made upon that point, and for this purpose it would be immaterial whether the testimony related to fires of an earlier or later date than the one in question. If, however, the possibility were not questioned, and especially if it were admitted that the fire so originated, testimony relating to fires of a later date should be carefully excluded, as being irrelevant, and as having a tendency to excite prejudice against the company." In the case at bar the defendant did not admit anything. By his plea of the general issue the defendant held the plaintiff up to strict proof, and the record of the trial shows no oral admissions as to how the fire originated, or as to the possibilities in relation thereto, and the presiding justice excluded all testimony as to any such fires subsequent to the date of the fire complained of in this case. In *Union Pacific Ry. Co. v. De Busk*, 12 Colo. 294, 20 Pac. 752, 38 Am. & Eng. R. Cas. 321, 3 L. R. A. 350, 13 Am. St. Rep. 221, where it was shown that a fire sprang up just after a train had passed, and that there was no other fire on the premises before, and no other apparent cause for the fire, it was held that the evidence was sufficient to warrant a finding that it was set by the passing train. See, also, *A., T. & S. F. R. Co. v. Gibson*, 42 Kan. 34, 37, 21 Pac. 788. We think the

MacDonald v. New York, etc., R. Co

testimony showing the circumstances referred to was competent, as tending to show the origin of the fire in this case.

As to a lot of the defendant corporation's land inside its fence being burned over, we think it comes within the rule laid down as to other lands just passed on, for it was apparent that the sole purpose of the question was as to the possibility of the defendant's engines igniting fires, and not as to the right of the defendant to intentionally do with its own property what it chose.

The several grounds of exceptions relating to the questions of damage do not seem to us sustainable. What the defendant corporation is liable for under the act is "for all damages which may arise from the burning of houses, wood, hay, or any other substance, * * * damages equal to the value thereof." The declaration alleges the damage to be \$2,000, and the declaration and bill of particulars give many details of the kind and amount of damage done, and we think that is a sufficient allegation to support the verdict. In *Spink* against this same defendant (24 R. I. 560, 54 Atl. 47), this court, in construing this act, said the terms of the act making the company liable for damage caused by fire from its engines, embracing the burning of "houses, wood, hay, or any other substance whatever," are broad enough to cover all kinds of property. It is to be noted that the act under which the action in this case is brought has no clause providing for the railroad company's insuring property against the liability entailed by said act, as the statutes in some other states do. So the reasoning of the courts of some of those states, predicated upon such an insurance provision, has no force here.

The eighteenth ground for asking for a new trial is because the trial court, it is alleged, erred in admitting the question to the plaintiff as to who owned the land south of the railroad fence, where the fire is supposed to have originated, and his answers thereto, because it was irrelevant and immaterial. Though the defendant would be liable for damages to the plaintiff if it set out the fire that caused the damage on his land, whether with or without negligence, whoever owned the intervening land, yet we cannot say that the question of ownership of such intervening land would necessarily be so irrelevant and immaterial as to afford sufficient ground for a new trial. Under some circumstances, it might be highly relevant; and though, in the circumstances of this case, we fail to see the materiality of the ownership of that intervening land, yet we think its admission was utterly harmless to the defendant, and could not have confused the jury or have prejudiced the jurors against said defendant, and hence we think it does not form a sufficient ground for granting a new trial.

The nineteenth ground alleged for a new trial is that the trial court erred in admitting the report of location or relocation of the New York, Providence & Boston Railroad filed in the court of common pleas for Washington county on October 17,

1836, without first proving that S. F. Denison and Ephraim Williams, who signed it as executive committee of said New York, Providence & Boston Railroad Company, were the executive committee of said company. The liability under which the defendant was sued in this case arose under section 2 of the amendment of June 25, 1836, of the charter of the New York, Providence & Boston Company. The declaration does not formally state that "within ninety days from the rising of this General Assembly" (viz., the one that passed the said amendment) the corporation did "signify in writing to the secretary of this state, their assent to the requirements and provisions of this act," as provided for in section 10 of said act; but it did set out, step by step, the proceedings under said act by said New York, Providence & Boston Railroad Company, and, among other things, its relocation of said road as authorized under said section 10, and which relocation was tantamount to an acceptance. On demurrer to the plaintiff's declaration, this court so decided, and that the acceptance was sufficiently alleged. See 23 R. I. 558, 51 Atl. 578. The defendant's contention now seems to be that the relocation is not sufficiently proved. We think the plan and report of the relocation of the New York, Providence & Boston Railroad Company, filed for record in the court of common pleas for Washington county October 17, 1836, was properly admitted. It purports to be filed by the executive committee of said railroad, which had not then completed its formal organization. It states that it is filed by said railroad, and in compliance with the amending act of 1836. These are all formal acts necessary for the preservation of its charter, and were performed nearly 70 years ago. It is stated that Messrs. Denison and Williams are now dead, and it is not denied. The defendant does not deny that the relocation was made in 1836, and its charter thus preserved—in fact, it more than half admits it—but contends that strict proof of the agency must be shown. It offers no testimony itself upon the matter, though it must have succeeded to its predecessor's books and papers and to this relocation. It takes but slight evidence to make out a prima facie case under circumstances like these, where the defendant has such ample and exclusive means of protecting itself against possible error; the best evidence being exclusively within its own control. We think there is a presumption that an official report like this, of such paramount importance to this defendant and its predecessor, filed officially in court in compliance with a legislative act, is done with authority. The age of the writing should cause it to be taken for what it purports to be until the contrary is shown. The authority of these members of the executive committee is of cardinal importance to this defendant and its predecessor, for it goes to the base of its organization. The defendant offered no evidence to rebut it in any way, and we think that, under the circumstances, the evidence is at least prima facie admis-

sible and sufficient, in the absence of any proof to the contrary.

The twentieth ground alleged for a new trial is the court's alleged refusal to charge in the defendant's exact words in defendant's third request as to the value of oak sprouts, as requested. We think the court had substantially covered the question of the value of oak sprouts previously in its charge, and that there was no reversible error there.

In the refusal of the court to allow the defendant to ask the plaintiff what he paid for his farm, we find no error. It is utterly immaterial what the plaintiff paid for it, and the price would not shed, nor tend to shed, any light upon the question at issue.

As to the other grounds alleged for a new trial, all of which we have carefully considered, we fail to find any sufficient to warrant us in granting a new trial. The verdict does not seem to us to be against the law and the evidence, and the weight thereof; nor does the verdict, \$982.13, seem to us to be excessive.

For the reasons above set forth, the defendant's petition for a new trial is denied and dismissed, and the case is remitted to the common pleas division, with directions to enter judgment on the verdict for the plaintiff.

CHICAGO, B. & Q. R. CO. v. LILLEY.

(*Supreme Court of Nebraska, Feb. 17, 1903.*)

[93 N. W. Rep. 1012.]

Contributory Negligence—Erroneous Conduct When Seeking to Avoid Danger.*

Without attempting an exact definition of what is, perhaps, not precisely definable, it may be said, generally, that when a person whose conduct is being considered has not been called upon suddenly and unexpectedly to choose, without time for deliberation, between two or more ways of escaping from imminent danger, and his course is such that its probable consequences may be predicated from the common and general experience and observation of ordinarily sane and prudent men, and when, moreover, there are not present other circumstances tending to obscure the usual and direct connection between cause and effect, or to disturb the ordinary relation between antecedent and consequent; when, in short, from want of any more definite phrase, it may be said that "common sense" would have been sufficient to have assured him of safety or warned him of danger—the question whether he was negligent is one of law for the court, and not one of fact for the jury.

Contributory Negligence.

When, in an action to recover damages for an alleged negligently inflicted injury, there is evidence tending to prove contributory negli-

*See *Reed v. Missouri, K. & T. Ry. Co. (Mo.)*, 3 R. R. R. 262, 26 Am. & Eng. R. Cas., N. S., 262; foot-note appended to *Gulf, C. & S. F. Ry. Co. v. Bryant (Tex.)*, 1 R. R. R. 952, 24 Am. & Eng. R. Cas., N. S., 952; *Weeks v. Wilmington & W. R. Co. (N. Car.)*, 5 R. R. R. 28, 28 Am. & Eng. R. Cas., N. S., 28; *Missouri, K. & T. Ry. Co. of Texas v. Rogers (Tex.)*, 8 Am. & Eng. R. Cas., N. S., 141.

Chicago, etc., R. Co. v. Lilley

gence by the party injured, it is error for the court to withdraw that evidence from the jury by an instruction which in substance directs a verdict for the plaintiff.

Same—Doctrine of the "Last Clear Chance."

The rule known as the doctrine of the "last clear chance," as it has been adopted in some of our sister states, is in conflict with the law respecting contributory negligence as it has been settled by a long series of decisions by this court, and it will not be enforced by this state.

Commissioners' opinion. Department No. 3. Error to district court, Butler county; Good, Judge.

"Not to be officially reported."

Action by Eliza A. Lilley against the Chicago, Burlington & Quincy Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

J. J. Deweese, F. E. Bishop, and R. S. Norval, for plaintiff in error.

Thomas S. Allen and Matt Miller, for defendant in error.

AMES, C. This is an action in which the defendant in error recovered a judgment, as administratrix of the estate of Michael W. Lilley, because of the death of the latter by the alleged negligence of the plaintiff in error. The circumstances of the injury resulting in the death were as follows:

Lilley was a carpenter employed by the railroad company in repairing freight cars in its yards at Lincoln. The accident in which he lost his life occurred on January 28, 1901, in the north end of the railroad freightyards, on the tracks immediately adjacent to the place where he had been at work repairing cars for over two months before that day.

The railroad company has extensive freight yards and tracks on the west side of the city of Lincoln, between the viaduct over O street and the railroad roundhouse five or six blocks north of it. These tracks lie parallel to each other in a north and south direction. Toward the north end of that freight-yard are several tracks which unite in going over a combined three-throw switch at a part of the yard which is commonly nicknamed the "Bull Ring." These switches open onto many tracks both east and west of a main-line track which runs north and south directly through the switches. Immediately opposite this combined switch, on the west side of the main track, is a small shanty, in which a switchman is sheltered while he operates the combined switches, and has a general supervision of the switching in that end of the yard. This shanty is known as the "Bull Ring Shanty." There are no switch tracks immediately west of this main-line track passing the Bull Ring Shanty. But beyond an open space of 50 or 60 feet west of this main line there are located several other tracks, which are not used for switching or making up trains, but are used to hold freight cars while they are being repaired and put in condition for operation. These tracks are known as the "repair tracks," and this was the place where Lilley had worked, for over two months before his

death, as a carpenter repairing freight cars. He was engaged at the work with some 30 or 40 other men during the time of his employment.

The Bull Ring section of the freightyard is a very busy place. All of the freight trains from the northwest lines and from the Omaha lines enter the yards over this combination switch, and are there broken up by switch engines, and arranged into trains ready to proceed in other directions upon the road. Switch engines constantly ran back and forth over this combination switch, and past the switch shanty, within 50 feet of the repair tracks, day and night, during the time Lilley was engaged in repairing cars. There are no other structures than the switch shanty either west, east, or south of the switch shanty, and the view that way was unobstructed.

At about 5:30 o'clock on the evening of the accident Lilley finished his day's work, and walked across the open space between the repair tracks and the main track, in a course immediately north of the switch shanty, to a point at or near the main track. Thus far there is no apparent conflict in the testimony, nor is there any dispute that, either at the point of his approach to the main track or at some place a short distance further north, he stepped between the rails of the track, and was run over by a switch engine and killed.

There were five witnesses only who testified to any knowledge of the circumstances. These all say that the place at which the deceased was struck by the engine was at a distance of about 100 feet north of the point at which he first approached the track. Two of these witnesses, called by the plaintiff, were Grosscup, a fireman upon the engine, and Corbin, an employee upon the grounds. The former testified that after Lilley had come near the track he turned north and walked at a safe distance therefrom in an open space until he suddenly stepped between the rails not more than six or eight feet in front of the moving engine. The latter saw the deceased just as he stepped between the rails, as described by Grosscup, but does not appear to have seen him previously. Two other witnesses, also employed upon the grounds, saw the deceased only at the instant of the collision. The engineer was upon the opposite side of the engine from the deceased, and his view was so obstructed thereby that he did not see the latter until after the accident happened. Higby, a witness for the administratrix, testified that he was some 350 or 400 feet northeast from the deceased when he first saw him upon the track, a little north of the shanty, and at a distance, as he thought, of 150 to 200 feet from the place where he was struck; but the evidence shows that the distance was at most considerably less than 100 feet. Hyatt, the remaining witness for the administratrix, testified that when he was about 200 feet south of the shanty he was passed by the engine, with one car attached, and that at that time he saw the deceased step upon the track, at or near the shanty, and turn

and walk rapidly towards the north, and that the latter continued upon the track until he was struck and killed. It was agreed by all the witnesses that there was no obstruction to the view upon the main track, and Hyatt said that the engine, when it passed him, was exhausting steam violently and throwing out large volumes of smoke. All the witnesses for the company testified that the engine bell was kept ringing all of the time, and are not disputed, except inferentially, by Higby and Hyatt, who said that they did not hear it. There was a headlight burning, and at and shortly before the happening of the collision the steam had been turned off and the air brake applied, in the course of ordinary operation, so that the engine was not running more than four or five miles per hour at the instant of collision. But it was impossible to stop the engine moving at that speed in less than 20 or 25 feet. On the instant that the fireman discovered deceased was stepping over the track he signaled the engineer, and assisted him to apply the emergency brake, so that the engine was stopped within the shortest possible time. All the witnesses agree that neither at the time Lilley stepped upon the track, nor afterwards, did he look backward or toward the south. If he had done so he would, according to the witnesses for the company, have seen the engine moving within 7 or 8 feet of him; according to the witnesses for the administratrix, he would have seen it approaching 200 feet away at a speed, at that time, of at least 15 or 20 miles an hour, at which rate it would have overtaken him in from 6 to 9 seconds, or as soon as he would have walked, at the ordinary gait of 3 miles per hour, from 10 to 15 paces.

At the beginning of the discussion it will be convenient to assume, temporarily, that the jury believed the testimony in behalf of the prosecution rather than that of the defense, and that that evidence is sufficient to convict the latter of negligence. The inquiry will thus be narrowed to one of contributory negligence. It should be premised, however, that a servant assumes the ordinary and obvious risks of his employment. *Evans Laundry Company v. Crawford* (decided at the present term) 93 N. W. 177. Among these risks are, of course, the patent dangers attendant upon going to and from the place where his services are to be performed.

So far as we have been able to discover, courts and text-writers have alike failed to announce a comprehensive definition of what is to be regarded as negligence as a matter of law, or negligence *per se*, as it is usually called. The reason is, we presume, that it is a matter dependent upon so many varying circumstances that words of precise description are not infrequently not applicable to it. But perhaps an approximate definition may be phrased as follows: When a person whose conduct is being considered has not been called upon suddenly and unexpectedly to choose, without time for deliberation, between two or more ways of escaping from imminent

danger, and his course is such as that its probable consequences may be predicted from the common and general experience and observation of ordinarily sane and prudent men, and when, moreover, there are not present other circumstances tending to obscure the usual connection between cause and effect, or to disturb the ordinary relation between antecedent and consequent; when, in short, from want of any more definite phrase, it may be said that "common sense" would have been sufficient to have assured him of safety or warned him of danger—the question whether he was negligent is one of law for the court, and not one of fact for the jury. In other words, if, having an opportunity to observe his surroundings, he deliberately adopts a course of conduct which is attended with danger, or adopts such a course without deliberation, he assumes the consequences of so doing, and he cannot, in a civil action, recover damages for a resulting injury, although without the concurring negligence of another person such injury would not have happened. Wharton on Negligence, paragraph 420 et seq., and notes; Thompson on Negligence, volume 1, paragraph 436.

For more than 60 days the deceased had been employed in these yards, and knew, from daily observation, that engines and cars were continually passing and repassing over the railway track upon which he chose to walk. Without taking the slightest precaution to observe whether his pathway was then, or was then about to be, subjected to such use, he stepped and walked upon the track as above stated. That he might have escaped injury by so doing was possible, but that he incurred great danger by that course he must, if he had stopped to reflect, have been fully conscious. If he failed to reflect, that failure was itself negligence. If the testimony of the witnesses for the prosecution, Higby and Hyatt, is true, the deceased had, after he stepped between the rails, from 6 to 9 or 10 seconds within which he might, with ordinary precaution, have observed the approach of the engine, and within which, by taking two or more steps, he might have put himself in a place of safety. If he had seen it, and had remained on the track for so long a time, his negligence would not be the subject of discussion. Knowing, as he did, the circumstances, and the constant use to which the tracks were being put, his failure to see it was equally unquestionable negligence. We are unable to distinguish this case in principle from that of the C., B. & Q. R. R. Co. v. Yost, 56 Neb. 444, 76 N. W. 903, from the opinion of this court, in which we quote the following: "A person may have gone upon a railway track under such circumstances as would exonerate him from the charge of negligence. But in the case at bar the record discloses no excuse whatever for Yost's going on this track without looking to the east. This is not a case in which he was in a position of danger and in his confusion chose the more dangerous of two ways; nor is it a case in which he went

from a place of safety into one of danger in an attempt to save life or property. Nor is that a case in which a section-man, while in the performance of his duties on the track, was hurt by an engine creeping upon him without giving any signal of its approach, as in *Union P. R. Co. v. Elliott*, 54 Neb. 299 [74 N. W. 627]. Yost had been just warned off this track because of the danger of the approaching engine and train, and he left a place of safety and heedlessly and carelessly stepped back on the track without exercising any care whatever for his safety by looking east on the track to see if there was a train or an engine following. Yost's argument is that the railway company was guilty of negligence in permitting this switch engine to follow so close to the gravel train. It may have been guilty of negligence in that respect. But, if so, the answer is that such negligence was not the proximate cause of Yost's injury. As to whether the engine sounded a whistle at the time it approached the crossing, it may be said there is a conflict in the evidence; but, assuming that no signal was given by the switch engine at that time, that neglect did not cause Yost's injury. Yost alleged in his petition that he had been injured through the negligence of the railway company, without fault on his part, and while in the exercise of ordinary care. We assume that it shows that the railway company was guilty of negligence, but the evidence does not sustain his contention that he himself was at that time in the exercise of ordinary care, but, on the contrary, it affirmatively shows that the proximate cause of his injury was his own neglect." Cases from the courts of other states involving the same principle might be quoted almost ad libitum. *Wabash R. Co. v. Skiles* (Ohio) 60 N. E. 576, 21 Am. & Eng. R. Cas., N. S., 881; *Gahagan v. Boston R. R. Co.* (N. H.) 50 Atl. 146, 55 L. R. A. 426, 23 Am. & Eng. R. Cas., N. S., 1077; *Roys-Koyek v. St. Paul R. R. Co.* (Minn.) 78 N. W. 872; *Spavin v. Lake Shore Ry. Co.* (Mich.) 90 N. W. 325, 3 R. R. R. 135, 26 Am. & Eng. R. Cas., N. S., 135; *Sours v. Great Northern R. Co.* (Minn.) 87 N. W. 766, 23 Am. & Eng. R. Cas., N. S., 457.

Thus far the discussion has proceeded upon the theory that in instances of conflict the testimony of the witnesses for the prosecution is to be accepted, to the exclusion of that of those for the defense. Continuing upon this assumption, we are not convinced that there is sufficient evidence to convict the railway company of negligence. The engine, so far as appears, was properly constructed and equipped, the headlight was in use, and there is positive evidence that the bell was ringing, and no affirmative evidence that it was not. The engine, at the time of the collision, was moving at the speed of a fast walk, and was being operated in the customary manner. The men employed upon the grounds were of mature years, and were skilled mechanics, and therefore presumably of more than ordinary intelligence. They were familiar with their surroundings, and with the use to which the main track

Chicago, etc., R. Co. v. Lilley

was being put, and with the dangers incident to that use. The enginemen were in their proper places, and attentive to their duties. They had no reason to anticipate that any one would intrude between the rails, or that, if he did so, he would not provide for his own security by keeping a sharp lookout for an approaching engine, and betaking himself, when occasion should require, to a place of safety. In other words, there was nothing in the circumstances or surroundings having a tendency to arouse in them an apprehension of imminent or unusual danger to any person, but, on the contrary, they might reasonably have inferred therefrom a condition of comparative immunity from accident. Within the meaning of the rule above formulated, and within the purview of the authorities above cited, they cannot lawfully be adjudged guilty of negligence. As is said by this court in *Mo. Pac. Ry. Co. v. Hansen*, 48 Neb. 235, 66 N. W. 1105: "Ordinarily, an engineer has a right to presume that persons walking along the track are in possession of their sense, and will appreciate the danger and act with discretion; and he is under no obligation to stop the train, or even lessen the speed thereof, before discovering that such person is heedless of warnings given of the approach of the train, or otherwise in imminent peril. A mere failure to stop a train when a trespasser is seen, or should be seen, upon the track, can, therefore, create no presumption of negligence."

But we are by no means satisfied that the jury adopted the testimony of the witnesses for the prosecution to the exclusion of that of those for the defense, or that they felt themselves bound to give much attention to any of the evidence. The court gave to the jury the following instruction, which was excepted to: "If the jury believe from the evidence that Lilley negligently went upon the track of the company and exposed himself to injury, still the defendant engineer and railroad company would have no right to kill him because he was upon the tracks of the company. If the jury believe from the evidence that the engineer could by the exercise of ordinary care have seen Lilley upon the tracks in time to have stopped the engine, and thereafter negligently ran over and killed him, the defendants would be liable in this action, and your verdict should be for the plaintiff." This instruction withdrew from the jury the question of contributory negligence altogether, and decided it as a matter of law in favor of the plaintiff. It told them explicitly that if the enginemen were negligent the plaintiff was entitled to recover, notwithstanding the concurrent negligence of the deceased might have contributed to the accident, and it left them at liberty to infer negligence by the company from the mere fact of the killing. So to instruct was to ignore, or, rather, to negative, the settled law of this state, which has been established by a multitude of decisions by this court. The giving of this instruction was doubtless

Chicago, etc., R. Co. v. Lilley

due to a confusion in the mind of the court of the law relative to contributory negligence with what has lately come to be known as the new "last clear chance" doctrine. *Smith v. Norfolk & S. R. Co.*, 114 N. C. 728, 19 S. E. 863, 923, 25 L. R. A. 287; *Pickett v. W. & W. R. R. Co.* (N. C.) 23 S. E. 264, 5 Am. & Eng. R. Cas., N.S., 710, 30 L. R. A. 257, 53 Am. St. Rep. 611; *Bogan v. R. R. Co.*, 129 N. C. 154, 39 S. E. 808, 23 Am. & Eng. R. Cas., N. S., 322, 55 L. R. A. 419.

In the case last cited, the principle announced is expressed in the syllabus as follows: "A railroad company is liable for injuring, by means of its train, a person negligently walking on its trestle without ability to save himself from injury, if those in charge of the train discovered, or by the exercise of ordinary care might have discovered, the peril of the injured person, and might, by the exercise of such care, have avoided the accident." We submit that the doctrine here laid down, notwithstanding the excessive subtlety of the reasoning by which it is supported by the court announcing it, is inconsistent with that of contributory negligence which obtains in this state, and that both doctrines cannot subsist in the same jurisdiction at the same time. Ordinary care by a person in the performance of daily tasks is that degree of care which men of ordinary prudence exercise under the ordinary and usual circumstances of their occupations. If lack of such care results in the injury of one who is guiltless of negligence, the latter is entitled to recover damages, but, if the person injured has contributed to the misfortune complained of by his own negligence, he is remediless. It is not until the person first alluded to has become aware of some fact or circumstance productive of unusual or extraordinary danger that a duty to exert increased vigilance is imposed upon him. It is the duty of railroad enginemen to keep a lookout for such objects and obstructions upon the track ahead of them as under ordinary or known circumstances are frequently or likely to be found thereon, and from injuries resulting solely from their failure so to do their employer is liable in damages, but, if the injury is due in part to the negligence of the party injured, the employer is not liable. If the circumstances or surroundings are unusual, and such as to arouse an extraordinary apprehension of danger, or if the enginemen, in the exercise of ordinary care, discover a person in a position of peril from which, by the exertion of additional effort or vigilance, they have an opportunity to extricate him, and fail to make use of such effort or vigilance, they are guilty of a new act of negligence with which the person in peril does not concur or contribute. To adopt the doctrine of the so-called "last clear chance" decisions, would be to require, not only of railway enginemen, but of all other users of dangerous or ponderous machinery, the constant exertion of that extreme degree of vigilance and care which ordinarily prudent men employ only in cases of extreme and unusual peril. To our minds such a

Birmingham Southern R. Co. v. Powell

requirement would be impracticable and unjust, but if the "last clear chance" rule is to be adopted it should be done frankly and openly, without any of the delusive limitations and qualifications of the jurisdiction of its origin, which, in practice, do not limit or qualify; and the hitherto prevailing rule as to contributory negligence ought to be explicitly and decisively abrogated and set aside. The rule of law is not difficult of statement, and business men, litigants, and lawyers have a right, if it is adopted, to its unequivocal announcement. We do not suppose that this court will for a moment contemplate so radical and revolutionary a change in the jurisprudence of this state. We are of opinion that, upon the evidence disclosed by this record, the request of the defense for a peremptory instruction in its behalf should have been granted.

It is recommended that the judgment of the district court be reversed, and a new trial granted.

ALBERT and DUFFIE, CC., concur.

PER CURIAM. The conclusions reached by the Commissioners are approved, and, it appearing that the adoption of the recommendations made will result in a right decision of the cause, it is ordered that the judgment of the district court be reversed, and the cause remanded for further proceedings according to law.

BIRMINGHAM SOUTHERN R. CO. v. POWELL.

(*Supreme Court of Alabama, Feb. 28, 1903.*)

[33 So. Rep. 875.]

Accident at Crossing—Assumption of Risk.

In an action for an alleged intentional injury of plaintiff at a railroad crossing, plaintiff's alleged assumption of risk constituted no defense.

Same—Injury to Street Car Conductor—Failure to Observe Statutory Precaution—Contributory Negligence.

Code 1896, § 3441, provides that, when the tracks of two railroad companies cross each other, engineers and conductors must cause the trains of which they are in charge to come to a full stop within 100 feet of the crossing, and not proceed until they know the way to be clear: *held*, that where the conductor of a street railway car attempted to cross the tracks of defendant railroad company without stopping and knowing that the way was clear, and the car became stalled on the track for want of electricity, and the conductor was struck and injured by cars being kicked over the crossing, the conductor was guilty of contributory negligence.

Same—Same—Violation of Ordinance—Wantonness or Intentional Wrong.

A city ordinance prohibited a railroad company from making drop or flying switches across grade crossings. The railroad, in violation of such ordinance, dropped nine loaded coal cars from the engine, and permitted them to run down a grade over a street crossing at a speed of 15 miles per hour across the tracks of a street railway. The cars struck a street car attempting to cross, and the conductor was injured. Defendant's employees were familiar with the crossing, and knew that street cars crossed every few minutes, and that there were no safety

Birmingham Southern R. Co. v. Powell

appliances to prevent collisions there: *held*, that the evidence was sufficient to submit the question of wantonness or intentional injury to the jury.

Same—Wantonness and Contributory Negligence.*

Where, in an action for injuries at a railroad crossing, the evidence justified a finding that the injury was wantonly committed, requested charges instructing the jury generally to find for defendant on the ground that plaintiff was guilty of contributory negligence were properly refused.

Same—Contributory Negligence—Statutory Precautions.

In an action for injuries to a street car conductor while crossing a railroad track, an instruction on contributory negligence that it was the conductor's duty to stop within 100 feet, as required by statute, and know that the way was clear, but that the conductor had a right to assume that the trainmen would not approach the crossing nearer than 100 feet without stopping, unless the circumstances indicated that the train would not stop, was proper.

Harmless Error.

Where, in an action for injuries to a street car conductor at a railroad crossing, the court charged, at defendant's request, that plaintiff was guilty of contributory negligence in going on the crossing without knowing that the way was clear, as required by statute, error, if any, in the court's charge on the question of contributory negligence, was harmless.

Appeal from City Court of Birmingham; Chas. A. Senn, Judge.

Action by Thomas E. Powell against the Birmingham Southern Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The facts necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion.

The defendant separately excepted to the following portions of the court's oral charge to the jury: "(1) The duty of the conductor and motorman on approaching the crossing, first, is the duty to stop. The duty is on both, because the conductor is in charge of the motorman, and they must stop within the 100 feet. Then they must see and know the way is clear. If, in the exercise of a high degree of care, it appears to a reasonably prudent man any train in motion beyond the 100 feet will stop, he has a right to indulge in the presumption of the law that a man will do his duty, will stop at 100 feet, when the way is clear. But he must exercise his sight—see the way is clear. This must be done under a very high degree of care, and he must take into account all the circumstances. He has no right to rely that in any event the car will stop, but if, under all the circumstances, the car being beyond the 100 feet and in motion, it appears to a reasonably prudent man, in the exercise of that high degree of care given you, the presumption the law allows the man to indulge in that every man will do his duty— I say, under those circumstances, he has a right to presume the car will stop within 100 feet. But if the speed of the train is such, or the circum-

*See *Elgin, etc., Ry. Co. v. Duffy* (Ill.), 23 Am. & Eng. R. Cas., N. S., 361, and foot-note.

Birmingham Southern R. Co. v. Powell

stances, in any event, are such, an ordinary, prudent man would think they would not, could not, or did not intend to, stop, then it would be negligence for him to cross."

"(3) After you have examined the complaint—the 1st, 3d, 4th, and 5th counts—if you come to the conclusion plaintiff is not entitled to recover, by reason of the pleas of contributory negligence, it will be your duty to investigate the second count of the complaint, and if you are reasonably satisfied from all the evidence that this injury was wantonly or intentionally done—find as I have just defined it—why, then, he would be entitled to recover, regardless of the pleas of contributory negligence."

Smith & Weatherly and E. D. Smith, for appellant.

Bowman & Horsh, for appellee.

DOWDELL, J. This is an action brought by the plaintiff to recover damages for personal injuries received in a collision between the cars of the defendant company and a car of the Birmingham Railway & Electric Company at an intersection or crossing of the tracks of the two companies in one of the public streets of the city of Birmingham. The complaint contained five counts, all of which, except the second, charged simple negligence. The second count, as amended after demurrer sustained to it, charged wanton or intentional injury. Six pleas were filed by the defendant; the first plea being the general issue to all the counts; the second, third, fourth, and fifth pleas being pleas of contributory negligence, and were pleaded to each of the counts, except the second count. The sixth plea was a special plea to the second, setting up an assumption of risk on the part of the plaintiff. To this plea a demurrer was interposed by the plaintiff, and was sustained by the court, and this action of the court constitutes the first assignment of error.

The assumption of risk by one, no more than contributory negligence, can be set up as a defense to a count charging intentional injury and wrong. This doctrine was plainly laid down by this court in the case of *L. & N. R. Co. v. Orr*, Adm'r, 121 Ala. 489, 26 South. 35. See, also, *L. & N. R. Co. v. Markee*, 103 Ala. 160, 15 South. 511, 49 Am. St. Rep. 21. The court properly sustained the demurrer to this plea, under the principle stated in the two cases cited above.

At the time of the accident in which the injury complained of was received, the plaintiff, Powell, was a conductor on the car of the Birmingham Railway & Electric Company that was run into by a train of cars of the defendant company. The collision occurred at a crossing of the tracks of the two companies in a public street of the city of Birmingham. The undisputed evidence shows that the defendant company's agents or employees in charge of its train were at the time making what is called a "drop switch" of a number of its cars which were loaded with coal; that a train of nine cars was detached or cut loose from the engine, and permitted to run

or roll of its own momentum down an incline to the said crossing; that this train of nine cars was detached from the engine at a point about 670 feet from the crossing. The undisputed evidence further shows that the car of the railway and electric company, of which the plaintiff had control as conductor, and which was run into by the defendant's train of cars which had been detached from the engine, stopped within about 15 feet of the crossing of the two roads before proceeding to make the crossing, and, after having so stopped, did proceed to cross, and, in doing so, stopped again upon the crossing, in front of the approaching detached train of cars; that the stop of the electric car upon the crossing was due to a failure of the electric current just at that moment, and by reason of such failure of the electric current the said car was rendered helpless. The motorman of the electric car, seeing the perilousness of his situation, abandoned his post, when the plaintiff went to it, and attempted to work the controller, with the purpose of backing the car off of the crossing; and, while so engaged in this effort, the collision occurred, producing his injury. The evidence fails to show that the plaintiff, conductor of the electric car, in making the stop before attempting to cross the tracks of the defendant company's road, made any effort to ascertain or know that the way was clear before proceeding to cross. The evidence shows that the stop was made within 15 feet of the crossing, but, as to any attempt on the part of the plaintiff to know that the way was clear, it is perfectly silent. On the contrary, his own testimony is that he was at the time collecting fare from a passenger. The evidence is in conflict as to the speed at which the detached train of cars of the defendant company was running at the time of the collision; the plaintiff's witnesses testifying to a speed of 15 miles an hour, while the witnesses for the defendant testify to a speed of 3 or 4 miles an hour. There was also a conflict in the evidence as to whether there was any one on the detached cars, and as to whether there was a flagman at the crossing to give warning of the approach of the detached cars. The evidence of the plaintiff tended to show that there was no person on the detached cars, but that the same were running loose, without any one in control, and also that there was no flagman at the crossing. The defendant's evidence tended to show that a brakeman was on the detached cars, and was at the time setting up the brakes to stop the cars; also that there was a flagman at the crossing to guard against danger, and that such flagman gave warning to the motorman on the electric car not to come onto the crossing. There was also introduced in evidence an ordinance of the city of Birmingham making it a penal offense to make what is known as a flying or running switch, or drop switch, over, on, or across any street, avenue, or alley in the city.

Counsel for appellant do not deny, but, on the other hand, concede, that the defendant company is chargeable with

Birmingham Southern R. Co. v. Powell

simple negligence in the acts and conduct of its employees in making the drop switch in violation of the city ordinance which prohibited it; but they contend that the plaintiff was also guilty of negligence, which contributed proximately to his injury, in entering upon or attempting to make the crossing without first stopping and knowing that the way was clear before proceeding to cross, in obedience to the mandate of the statute (section 3441 of the Code of 1896).

That the provisions of section 3441 of the Code of 1896, imposing certain duties upon railroad companies whose tracks cross each other at such crossings, are applicable to railways using electricity as a motive power, seems to have been definitely settled by this court in the case of *L. & N. R. Co. v. Anchors, Adm'x*, 114 Ala. 492, 22 South. 279, 62 Am. St. Rep. 116. Approving the doctrine there laid down, and applying the principle to the undisputed facts in this case, the plaintiff was guilty of negligence in his failure to exercise that high degree of care and diligence which the law put upon him to know that the way was clear, before proceeding to cross with his car. For, as was said in the case of *Southern Railway Co. v. Bryan*, 125 Ala. 297, 28 South. 445, 21 Am. & Eng. R. Cas., N. S., 542, the duty of knowing the way to be clear before attempting to cross is just as imperative as the duty of stopping within the distance designated in the statute before attempting to make the crossing.

It is insisted that there was no evidence of intentional or wanton injury, and therefore the court erred in refusing the general charge requested by the defendant. The evidence of the plaintiff tended to show that there was no brakeman or other person on the train of the nine loaded coal cars when the same were cut loose from the engine, to control them, and, without any one to manage or control the same, these were suffered to run down grade at a speed of 15 miles an hour across the tracks of the electric car line, and across a public street of the city; that the conductor of the defendant company's train, who cut the cars loose, was familiar with the crossing; "that they all knew that there were electric cars running out to Ensley and back over the crossing every few minutes in the day, and that cars were running over the same crossing from Birmingham to Avondale and back every few minutes during the day, and that there were no interlocking crossings or derailing switches at the crossing; that there were no safety appliances to prevent collisions at this crossing." This phase of the evidence made it proper to submit the question of wantonness to the jury. For under it, if believed, when taken in connection with the additional tendency, showing a willful violation of both the statute—section 3441 of the Code—and the city ordinance above mentioned, the jury would have been authorized to infer from the acts and conduct of the defendant's agents a reckless indifference to probable consequences of harm and injury to others, and that such

Kelly v. Pittsburg & B. Traction Co

acts were performed with a knowledge of facts and conditions that rendered the same greatly dangerous to the lives of others, and a probability that they would result injuriously. This degree of recklessness, with a conscious knowledge of its probable harmful consequences, constitutes that wantonness which, in law, finds its equivalent, in point of responsibility, to willful or intentional wrong. The tendencies of the plaintiff's evidence in this case make a stronger case than that of *L. & N. R. Co. v. Webb*, 97 Ala. 308, 12 South. 374, 55 Am. & Eng. R. Cas. 121, where it was held that the question of wantonness was properly submitted to the jury. See, also, *A. G. S. R. Co. v. Anderson*, 109 Ala. 299, 19 South. 516. We do not find anything that is said in the cases cited by appellant's counsel, under the facts in those cases, inconsistent with what we have above stated as applicable to the facts which the evidence tended to show. The general charge requested by the defendant was properly refused. And likewise the written charges requested, instructing the jury generally to find for the defendant on the theory of contributory negligence, pretermittting all inquiry as to wantonness under the evidence.

That portion of the oral charge of the court excepted to by the defendant, and here insisted on as error, is nothing more than a statement of the law as laid down in *R. & D. R. Co. v. Greenwood*, 99 Ala. 515, 14 South. 495, and in *B. M. R. Co. v. Jacobs* (Ala.) 13 South. 411. Moreover, we find in the record, among the written charges given by the court at the request of the defendant, a charge instructing the jury that the plaintiff was guilty of negligence in going onto the crossing before knowing the way to be clear. This was nothing more nor less than the general charge in favor of the defendant as to the defense of contributory negligence, which was set up in answer to counts in simple negligence.

We find no reversible error in the record, and the judgment will be affirmed.

KELLY v. PITTSBURG & B. TRACTION CO.

(*Supreme Court of Pennsylvania, Jan. 5, 1903.*)

[54 Atl. Rep. 482.]

Appeal—Review.

A verdict on conflicting evidence will not be set aside because the appellate court would, on the same evidence, have reached a different conclusion.

Children—Apprehension of Danger.*

The question whether a boy of 12 years of age had sufficient capacity to be sensible of danger and to avoid it is not a question of law, but one of fact for the jury.

Same—Personal Injuries—Right of Action.

Act June 26, 1895 (P. L. 316). giving a wife, under certain circum-

*See *Kreuzer v. Pittsburg, etc., Ry. Co. (Ind.)*, 12 Am. & Eng. R. Cas., N. S., 343, and extensive note, 369.

Kelly v. Pittsburg & B. Traction Co

stances, equal authority with the father, and equal right to the custody and services of a minor child, gives no right of action for an injury to such minor child caused by the negligence of another, and not resulting in death.

Judgments.

Where a father sues in his own right for an injury to his minor son, and as next friend, to recover for injuries not resulting in death, and pending suit the father dies, and the mother is substituted, a judgment for her in her own right cannot be sustained.

Appeal from Court of Common Pleas, Allegheny County.

Action by Charles H. Kelly, by his next friend, Mary Kelly, against the Pittsburg & Birmingham Traction Company. Judgment for Mary Kelly for \$2,000, and for Charles H. Kelly for \$2,700, and defendant appeals. Affirmed as to Charles H. Kelly, and reversed as to Mary Kelly.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Clarence Burleigh, for appellant.

L. B. Cook, for appellee.

BROWN, J. After reviewing the testimony in this case, we are not surprised that the learned judge below, in his opinion refusing a new trial said, "The conclusion of the jury was not that which the court would have reached on the same evidence," adding at the same time, however, that it was not so manifestly against the weight of the evidence as to require him to set the verdict aside. The principal reason advanced for the new trial below, and the one most urgently pressed upon us here for reversing the judgments, is that the verdict was against the weight of the evidence. The testimony was conflicting, and though to the mind of the trial judge, as well as to our own, it ought fairly to have led the jury to a different conclusion on the questions of the defendant's negligence and the contributory negligence of the boy, these were questions of fact for the determination of the triers of facts, and not for the court. For this reason the court below properly refused to invade the province of the jury, and, in affirming the judgment in favor of Charles H. Kelly, we adopt as our own the following language from the opinion refusing a new trial: "The plaintiff's evidence was to the effect that the car was running at a high rate of speed, without any light, at a time of night when a light was necessary. We think this is evidence of negligence on the part of the company which must go to the jury. The only remaining question is as to the contributory negligence of the plaintiff. Being under the age of fourteen years, the general rule is that his contributory negligence is a matter to be passed upon by the jury. We see nothing in this case which would authorize the court to take from the jury the question of the complainant's contributory negligence." At the time the boy was hurt, May 6, 1897, he was not quite 12 years old, and there was nothing developed on the trial that took the case out of the rule as laid down in

Kelly v. Pittsburg & B. Traction Co

Strawbridge v. Bradford, 128 Pa. 200, 18 Atl. 441, 5 L. R. A. 515, 15 Am. St. Rep. 670, where the injured boy was 13 years and 4 months old: "It is claimed, however, that the plaintiff's own negligence contributed to his injury, and prevents a recovery, and that the court should have so instructed the jury. But it must be borne in mind that this plaintiff had not attained the age when sufficient capacity to be sensible of danger and to avoid it is presumed. *Nagle v. Railroad Co.*, 88 Pa. 35, 32 Am. Rep. 413. A boy's capacity is the measure of his responsibility, and, if he has not the ability to foresee and avoid the danger to which he may be exposed, negligence will not be imputed to him if he unwittingly exposes himself to it. *Phila. Ry. Co. v. Hassard*, 75 Pa. 367; *Crissey v. Railway Co.*, 75 Pa. 86. When an infant who has not reached the age of discretion is charged with concurrent negligence, it becomes important to inquire if he had sufficient understanding to comprehend and guard against the peril he was in, and this matter is ordinarily to be considered by the jury, in connection with the other circumstances of the case, and under proper instructions from the court."

Turning to the judgment in favor of Mrs. Kelly, the mother, we are at a loss to understand how she recovered, for she never had a cause of action against the defendant, and, even if she had, she is not on the record as suing for herself. It is urged that these objections were not made in the court below, and if this be true, as we assume it is, it was unfair to the learned trial judge not to have called his attention to what would have led him to direct a verdict against the mother. If we could avoid disturbing this judgment, we would do so, for the reason that the objections now made were not raised below; but we must consider them here because one of them, at least, is fundamental, and was always in the way of the mother's right to recover. When the boy was hurt, his father, Patrick Kelly, was living. The suit was originally brought by the father in his own right and as the next friend of his son. The cause of the father's action was the alleged negligence of the traction company, resulting in injuries to the minor son, in consequence of which his services would be lost to the father during his minority. The cause of action arose May 6, 1897. At that time there was nothing for which the mother could have sued, and the appellant was guilty of nothing subsequently which gave her a cause of action against it. The boy was not killed, but simply injured; and in such a case the cause of action is in the father alone, as we have held, for reasons which need not be repeated here, in *Fairmount & Arch Street Passenger Railway Co. v. Stutler*, 4 Pa. 375, 93 Am. Dec. 714, and in *Pennsylvania Railroad Co. v. Bantom*, 54 Pa. 495. This cause of action was not split by the death of the father, and until the Legislature gives the mother the right to sue in a case of injury to a minor child, caused by the negligence of another, and not resulting in death, we cannot

Daum v. North Jersey St. Ry. Co

give it to her. The act of June 26, 1895 (P. L. 316), gave Mrs. Kelly no right to sue. It simply gives a wife, under certain circumstances, equal power, control, and authority with the father over a minor child, and an equal right to its custody and services. It does not appear from the testimony that the family circumstances were such at the time of the injury as gave Mrs. Kelly, under the act of 1895, this equal right with her husband in the power, control, and authority over her child, and to his custody and services. Two years after the suit was brought, the father died, and about six months after his death the following substitution was made on the record: "And now, June 7, 1900, death of Patrick Kelly suggested, and, on motion of L. B. Cook, Mary Kelly, mother of Charles Kelly, is substituted instead Patrick Kelly, deceased, as next friend," etc. The substitution was only of a next friend for the minor boy, to enable him to prosecute his suit. It affected the case only as it would have been affected by the substitution of any one else as the next friend of the boy, and it could not have been for any other purpose. Mrs. Kelly, as the widow of Patrick Kelly, and in her individual capacity, could not have been substituted as the personal representative of the deceased, who had sued for himself; and, as stated, there was no place for her on the record to sue in her own right, because she had no cause of action against the appellant. But she did not even attempt to get on the record as the plaintiff in her own right, and yet there is a judgment for her in such right. It must be, and is now, reversed.

The judgment for the son, Charles H. Kelly, is affirmed.

DAUM v. NORTH JERSEY ST. RY. CO.

(Supreme Court of New Jersey, Feb. 24, 1903.)

[54 Atl. Rep. 221.]

Street Railways—Injury to Laborer in Street—Signals—Assumption of Duty.

Plaintiff, engaged in work on the public street which necessitated his kneeling on defendant's track to hand boards down into a trench, was injured by defendant's car, which came upon him, without warning, contrary to the usual custom, which was for those in charge of the car to ring a gong when approaching the point where plaintiff was at work. Plaintiff looked before kneeling, and there was no car in sight. He did not look again, and the car came around the curve, 250 feet distant, about a minute later, and struck him: *held*, assuming that the company was under no duty to give a warning of the approach of the car, whether it was negligent in failing to do so, having once assumed such duty, was a question for the jury.

Same—Same—Care Required in Looking Out for Cars.

Whether the plaintiff was guilty of contributory negligence, in failing to look repeatedly for approaching cars, was a question for the jury.

Same—Same—Trespassers.

In an action against a street railway for injuries to a person working in the street, the absence of proof that plaintiff's employer had a right to prosecute any work on the street does not justify the conclu-

Daum v. North Jersey St. Ry. Co

sion that plaintiff was a trespasser as to defendant, there being nothing in the record to show that the presence of defendant's tracks in the street was authorized.

Same—Same—Presumptions.

There is no presumption that the prosecution of a work by a corporation in the public streets is unauthorized and its employees trespassers.

Same—Same—Evidence.

In an action against a street railway for personal injuries, one of plaintiff's witnesses having testified on cross-examination that he had once been injured by one of defendant's cars, a question, "Did you present any claim to the company?" was properly excluded.

Same—Same—Same.

A question asked the motorman, "Do you know whether [plaintiff] saw you?" was properly excluded.

Witnesses—Impeachment.

A written statement, signed by one of plaintiff's witnesses, offered for the purpose of impeaching his testimony, no foundation having been laid, was properly excluded.

Error to court of common pleas, Hudson county.

Action by John F. Daum against North Jersey Street Railway Company. From a judgment for plaintiff, defendant brings error. Affirmed.

Argued November term, 1902, before GUMMERE, C. J., and VAN SYCKEL, FORT, and PITNEY, JJ.

Vredenburg, Wall & Van Winkle, for plaintiff in error.

Simpson & Lillis, for defendant in error.

GUMMERE, C. J. This action was brought to recover for personal injury received by the plaintiff under the following circumstances: He was an employee of the Hudson County Gas Company, which at the time when he received his injury was engaged in laying a gas main through Summit avenue, in the city of Jersey City. For the purpose of laying the main the company had opened a trench in the street, about four feet wide, between the westerly curb line and the tracks of the defendant company, the east line of the trench being about three feet distant from the nearest rail of the car track. The duty of the plaintiff was to carry pieces of lumber from a point where it was piled to the trench, and there deliver it to other employees, who were at work in the trench, and who used the lumber for the purpose of blocking up the gas main in order to keep it level. It was while engaged in doing this work that he received the injury on account of which the suit was brought. The evidence produced by the plaintiff shows that for the purpose of delivering these pieces of timber, or braces, to his fellow workmen, he went upon that part of the street between the trench and the car track, and knelt down there with his back to the tracks, and with one of his feet upon or over the nearest rail, and that, while engaged in handing the braces to the men in the trench, one of the cars of the defendant company came by and ran over his foot. It further appeared that the plaintiff, when he knelt down, looked in the direction from which the car approached, and

Daum v. North Jersey St. Ry. Co

that at that time there was no car in sight; that he did not look again before the accident happened; that the accident occurred about a minute after he knelt down; that the car came into Summit avenue at "Five Points," which was about 250 feet distant from the point where the plaintiff was kneeling; that no warning was given of the approach of the car, either by the ringing of a gong or otherwise; and that it was the custom of those of the defendant company's employees who were operating these cars to ring a gong when approaching the point where the gas company's servants were at work.

At the close of the plaintiff's case there was a motion to nonsuit, upon the ground that no negligence was shown on the part of the defendant company or its employees, and upon the further ground that it affirmatively appeared that the plaintiff contributed by his own negligence to the injury which he received. This motion was refused by the trial judge, and the first assignment of error is directed to this refusal.

Assuming, but not admitting, that it cannot be said, as a matter of law, that it is the duty of a street railway company to give notice to persons working in a public highway, in dangerous proximity to its tracks, of the approach of its cars, it is at least a question for the jury, and not the court, whether, when the company assumes such a duty, its failure to perform it in a given instance is not negligence. And that was the situation in the case before us. As has already been stated, it was the custom of the defendant's employees, who were operating its cars, to ring a gong when approaching the place where the servants of the gas company were at work. It is further contended, on the point that no negligence was shown on the part of the defendant or its employees, that, so far as the proofs showed, the gas company was prosecuting its work in the public street without right, and that consequently the plaintiff was a trespasser on the track of the defendant. But if absence of proof on the subject justifies the conclusion that the gas company was without authority to do the work in which it was engaged, it must also be concluded that the presence of the defendant's tracks in the street was unauthorized, for there is an entire absence of proof on that subject also. Consequently, notwithstanding the unwarranted action of the gas company (if it was such), the plaintiff was not a trespasser so far as the defendant company was concerned.

But we do not consider that want of proof on the subject justifies the conclusion that the gas company and its employees were not lawfully prosecuting the work in which they were engaged. In the absence of proof, there is no presumption either in favor of or against such a conclusion. There being no evidence that the plaintiff was a trespasser upon the track of the defendant company, it was not entitled to have its responsibility to him limited to injuries which were willfully inflicted.

Daum v. North Jersey St. Ry. Co

We conclude, therefore, that it could not have been said, as a matter of law, at the close of the plaintiff's case, that there was no evidence upon which the negligence of the defendant company could have been predicated.

Nor do we think, as the case then stood, that the trial judges would have been justified in taking it from the jury upon the ground that contributory negligence on the part of the plaintiff had been conclusively shown. Although he was bound to use reasonable care for his own safety, this did not require him to look continuously for the approach of a car. To have done this would have made it impossible for him to perform his work. He knew that he was in a place where he was safe, except when a car was passing. He knew, too, that it was the custom, when a car was approaching, for the motorman to ring his gong as a warning, and he had a right to expect that this warning would be given to him. Having looked, when he knelt down near the track, for the purpose of ascertaining whether a car was approaching, it was a question for the jury to determine whether it was negligent in him, under the existing circumstances, not to make another observation during the minute which elapsed before the accident occurred. *Harmer v. Reed Apartment, etc., Co.* (N. J. Err. & App.) 53 Atl. 402.

The second assignment of error is directed at the action of the trial court in overruling a question asked of one of the plaintiff's witnesses upon cross-examination. The witness, having stated that he himself had on one occasion been injured by one of the defendant company's trolley cars, was asked, "Did you present any claim to the company?" and, on objection being made, the question was overruled. It seems manifest that this question was immaterial. The contention is that it called for an answer which would have shown bias on the part of the witness, thereby affecting his credibility. But the mere fact that he did or did not present a claim to the company could not have had any such effect. If the witness had presented a claim, and his claim had been refused recognition, this fact might have tended to show bias; but the question asked did not call for the disclosure of any such fact. It was properly overruled.

The defendant produced as a witness the motorman who was operating the car which ran over the plaintiff. He testified that, as the car approached the point where the accident happened, the plaintiff was facing him, and appeared to him to see the car. He was then asked by the defendant's counsel this question: "As you came along, do you know whether this man Daum [the plaintiff] saw you?" This question was overruled on the ground that the witness could not know whether the plaintiff saw him, and this ruling is the ground of the third assignment of error. The trial judge properly excluded this question. The witness had already testified that the plaintiff appeared to him to see the car, and

Cox v. Wilmington City Ry. Co

this was the limit to which he could truthfully go in his testimony. He could not know, absolutely, whether the plaintiff did or did not see the car.

The fourth assignment of error, and the last which is argued on behalf of the defendant company, is directed at the ruling of the trial judge in excluding a written statement, signed by one of the plaintiff's witnesses, with his mark. The statement was offered for the purpose of impeaching the witness, the facts set forth therein being said to be contradictory of evidence given by him on the witness stand. But in order to make it competent, for the purpose for which it was offered, it was necessary for the plaintiff in error to have first inquired of the witness whether he had not made a statement, setting forth the facts which were contained in it, and this was not done. Neither was it shown that the witness had any knowledge of what the statement contained when he signed it. It was not written by him, he was unable to read, and it does not appear that it was read over to him. The statement was properly excluded.

The assignments of error relied upon by plaintiff in error being without substance, the judgment under review should be affirmed.

COX v. WILMINGTON CITY RY. CO.

(Superior Court of Delaware, New Castle, Dec. 12, 1902.)

[53 Atl. Rep. 570.]

Street Railway—Collision—Negligence—Burden of Proof.

In an action against a street railway company for injuries owing to a collision with a car, the burden is on plaintiff to show defendant's negligence.

Same—Right of Way.*

A street railway company has the right of way within the limits of its tracks.

Same—Speed—Signals.†

It is incumbent on a street railway company to exercise such care as to speed, giving signals, and slowing up and stopping the car in presence of danger, as is reasonably demanded by the surrounding circumstances.

Same—Care Required of Person Using Highway.‡

A person using a highway occupied by a street railway company must exercise reasonable care to avoid an injury to himself.

Contributory Negligence—Presumptions.

In an action against a street railway company for injuries, it is to be presumed, in the absence of evidence to the contrary, that plaintiff exercised reasonable care to avoid injury.

*See foot-note appended to *North Jersey St. Ry. Co. v. Schwartz* (N. J.), 22 Am. & Eng. R. Cas., N. S., 620.

†As to the care required of street car companies in using streets, see foot-note appended to *Chicago City Ry. Co. v. Tuohy* (Ill.), 4 R. R. R. 1, 27 Am. & Eng. R. Cas., N. S., 1.

‡As to the care required of persons driving along street railway tracks, see foot-note appended to *Tunison v. Weadock* (Mich.), 4 R. R. R. 203, 27 Am. & Eng. R. Cas., N. S., 203.

Cox v. Wilmington City Ry. Co**Negligence and Contributory Negligence.**

Where the negligence of one injured in a collision with a street car entered into the accident, he may not recover, though defendant was also guilty of negligence.

Same—Proximate Cause.

Where one is injured in a collision with a street car, he is entitled to recover, though there had been some negligence on his part, if the street railroad's negligence alone was the proximate cause of the injury, and his negligence did not enter into the accident at the precise time thereof.

Death by Wrongful Act—Damages.

In an action by a widow for wrongful death, the damages awarded should be such a sum as to reasonably compensate her for all damage sustained or that she may subsequently sustain by reason of the death; basing the calculation on the number of years deceased would probably have lived.

Action by Eva M. Cox against the Wilmington City Railway Company. Verdict for plaintiff.

Argued before LORE C. J., and SPRUANCE and GRUBB, JJ.

William T. Lynam and J. Harvey Whiteman, for plaintiff.
Walter H. Hayes, for defendant.

LORE, C. J. (charging jury). It is conceded in this case that on the 18th day of September, 1901, a horse and light delivery wagon of the Hartmen & Fehrenbach Brewing Company, under the control of Elmer E. Cox, as driver, moving eastwardly on Ninth street between Walnut and French streets, in this city, collided with a summer trolley car owned and operated by the defendant company, moving westwardly on the same street; that in the collision Cox received injuries of such a nature that he died on the following Sunday, September 22d. This action is brought by Eva M. Cox, the widow of said Elmer E. Cox, deceased, to recover the damages she claims to have sustained, as such widow, by reason of the death of her said husband, which death, she charges, resulted from the negligence of the defendant company, in that at the time of the accident the car of the defendant company was being managed and run recklessly by the motorman at a violent and dangerous rate of speed, and without the sounding of gong or ringing of bell. The defendant denies these allegations, and claims that the accident resulted from the negligence of said Elmer E. Cox, and not from that of the company. The one question for you to determine is, was the accident the result of negligence, and, if so, whose negligence,—that of Cox or of the defendant? In order to aid you in reaching a correct conclusion, the court will state certain principles of law applicable to the case:

The plaintiff bases her right to recover upon the negligence of the defendant. The burden of proving such negligence is upon the plaintiff, and is to be shown by a preponderance of evidence to your satisfaction. If she has failed so to satisfy you, she cannot recover.

It is admitted that at the time of the accident Ninth street

Cox v. Wilmington City Ry. Co

was a public highway of this city, and that both the said Elmer E. Cox and the said defendant had the right to use the same lawfully, for their respective purposes. In the use of the said highway, each party was bound to exercise such caution and care to prevent injury to others as ordinarily prudent and careful men would exercise under all the conditions and circumstances surrounding the time and place of accident. The deceased was free to use any and all parts of the street fit for public travel, at his will. The car could move only over and along its fixed tracks, and of necessity must move in those tracks if it moved at all, and to that extent had the right of way therein. But in so using the said highway, it was incumbent upon the defendant to exercise all such care in respect to speed, sounding of gong, the ringing of bell, the slowing up and stopping of car in the presence of danger as was reasonably demanded by all surrounding conditions. The court will not attempt to specify just what particular acts must be done or left undone. In every case they must be such as a due regard for the rights and safety of all other persons lawfully using the said highway reasonably demand. If the company failed to use such reasonable care, and the injury resulted from such failure alone, the company would be liable. A like duty of exercising reasonable care rested upon Cox, and, if the injuries complained of resulted from his failure so to do, the plaintiff cannot recover. In the absence of any evidence to the contrary, the law presumes that at the time of the accident the deceased did his duty, and did exercise reasonable care and caution. This, however, is merely a presumption of law.

If the negligence of Cox entered into the accident at the time the injuries were received, the plaintiff cannot recover, even though the company was also guilty of negligence. In such a case Cox would be guilty of contributory negligence, and the court will not attempt to measure how much of the negligence each one contributed.

The plaintiff, however, would be entitled to recover, notwithstanding there had been some negligence on the part of Cox, if it was the negligence of the defendant alone that was the proximate or immediate cause of the injuries, provided the negligence of Cox was not then continuing, and did not at that precise time enter into the accident,—in other words, if, notwithstanding any previous negligence of Cox, the company could have prevented the accident by the use of ordinary and reasonable care. In every case each party has a right to presume that the other party will do his duty, but such presumption in no wise relieves such party of the duty of exercising ordinary and reasonable care on his own part.

Your verdict must be reached by applying the law as we have declared it to the facts in this case.

If you find for the plaintiff, it should be for such a sum of money as will reasonably compensate her for any and all dam-

Klair v. Wilmington Steamboat Co

ages that she has sustained or may hereafter sustain by reason of the death of her said husband; basing your verdict upon the number of years the deceased would probably have lived, and have given to her the benefits of his society and support as such husband.

Verdict for plaintiff for \$6,000.

KLAIR *et al.* v. WILMINGTON STEAMBOAT CO.

(*Supreme Court of Delaware, New Castle, Feb. 24, 1902.*)

[54 Atl. Rep. 694.]

Carriers of Live Stock—Liability for Death from Disease.

A carrier is not liable for the death of a mare due to an attack of meningitis, of which it was not forewarned, when it did all in its power to care for the animal after the attack.

Same—Limiting Liability.*

A rule of a carrier that its liability is limited by the rate of freight paid on shipments is binding on shippers having notice.

Action on the case for damages by William H. Klair and another against the Wilmington Steamboat Company. Verdict for plaintiffs.

Argued before LORE, C. J., and PENNEWILL and BOYCE, JJ.

T. Bayard Heisel, for plaintiffs.

Horace G. Knowles, for defendant.

LORE, C. J. (charging the jury). Gentlemen of the Jury: William H. Klair, the plaintiff, has brought an action against the Wilmington Steamboat Company to recover the value of a gray Percheron mare, which he alleges he delivered on or about the 14th or the 13th of May, 1901 (the time we think not material in this case), to the Wilmington Steamboat Company, here in this city, for safe carriage to the city of Philadelphia, claiming that at that time the defendant was a common carrier between Wilmington and Philadelphia. He claims that while in the care of defendant for such safe carriage the mare was injured so that it subsequently died, and this suit is brought to recover from the defendant the sum of \$175 as damages, which the plaintiff claims is a fair valuation of the mare. The defendant, on the other hand, claims that it is not liable; that it exercised all due care that was incumbent upon it as a common carrier; and that the injuries to the horse did not result from any act or misconduct or neglect on its part whatever.

It is conceded in this case that the defendant company was

*See generally, foot-note appended to *O'Malley v. Great Northern Ry. Co.* (Minn.), 4 R. R. R. 180, 27 Am. & Eng. R. Cas., N. S., 180.

Limiting liability by agreement fixing value of stock, see foot-note appended to *Normile v. Oregon R. & Nav. Co.* (Ore.), 5 R. R. R. 306, 28 Am. & Eng. R. Cas., N. S., 306.

Klair v. Wilmington Steamboat Co

a common carrier, and that as such common carrier on that day (either the 13th or 14th of May, 1901) received this mare from the plaintiff for transportation from Wilmington to Philadelphia. We find the liability of common carriers nowhere better expressed than in our own reports, by Chief Justice Booth, in *McHenry v. The Philadelphia, Wilmington & Baltimore R. R. Co.*, 4 Har. 448, 449: "A common carrier is bound to exercise the strictest care, and to deliver safely at their place of destination the goods intrusted to him. He is regarded by the law in the light of an insurer; and, in case the goods are injured, lost, or destroyed, nothing will excuse or discharge him but the act of God or of the public enemies. By the act of God is meant such inevitable accident as cannot, be prevented by human care, skill, or foresight, but results from natural causes, such as lightning and tempest, floods and inundation, etc. This rule of the common law has been spoken of as severe and rigorous; but, like most of the principles of the common law, it is founded in wisdom and dictated by sound policy. The exigencies of society require the adoption of the rule. Men engaged in the various business transactions of life are obliged from necessity to intrust common carriers with their goods. If such carriers are to be excused from all loss, destruction of, or injury to goods, in case it be shown that they have used due care, precaution, or attention, the party employing them could never show the want of such care, unless he had an agent to accompany his goods during the whole time occupied in their transportation. The carrier might at all times, by fraud and collusion, or by means of his own agents or servants, throw the burden of proof upon the owner or consignee of goods, by making out a statement of facts which although untrue in itself would show the exercise of ordinary care and diligence. Therefore, in actions against common carriers, founded on their ordinary liability for the loss of goods, the inquiry is not whether the carrier has used due care or been guilty of negligence, but whether he can show that the loss happened by inevitable accident or by the public enemies."

That doctrine is stated also in *Reed & Walker v. P. W. & B. R. Co.*, 3 Houst. 206, and is modified to some extent by Chief Justice Gilpin in *Truax v. P. W. & B. R. Co.*, Id. 245, as follows: "And, as common carriers, they are held responsible for all losses, except those occasioned by inevitable accident, called the act of God, or of the public enemy. The act of God denotes such causes as are beyond the control of the carrier, and produce loss without the intervention of human agency. This rule of law, however, must be understood with the following qualifications, namely, that the carrier is not to be held responsible for ordinary wear and tear and chafing of the goods in the course of their transportation, or for their ordinary loss or deterioration in quantity or quality, or of any inherent natural infirmity or tendency to damage, depreciation, or decay," etc.

Hamilton v. Chicago, etc., Ry. Co

We say to you, therefore, that if you believe from the evidence that the injury to and death of this animal was due to an attack of meningitis, of which the defendant was not forewarned, and that defendant did all in his power to protect the animal after being so attacked with meningitis, then that would be an unavoidable accident.

Having given you thus far the principles of law governing the liability of a common carrier, the next question is as to the matter of damages. The ordinary rule controlling the subject of damages, in case the article is lost, destroyed, or injured during transportation, is the value of the article so lost, destroyed, or injured. But we will say to you in this case that if you believe from the evidence that there was a rule of the company, of which the plaintiff had notice when he shipped this mare, that the liability of the company was fixed by the rate of freight paid, and that for the purpose of obtaining a certain rate of freight he reported to the company a value of the mare, thereby limiting, as it were, by tacit agreement, the liability to such a sum as was named by him, that would be the amount of the liability of the company. Otherwise, although there may have been such a rule, if he had no notice of it, the measure of damages would be the fair value of the mare at the time of shipment, if the injuries and death resulted from the defendant's want of care, as a common carrier, as we have laid the law down to you covering the matter.

Verdict for plaintiffs for \$100.

HAMILTON *v.* CHICAGO, M. & ST. P. RY. CO.

(*Supreme Court of Iowa, Feb. 12, 1903.*)

[93 N. W. Rep. 594.]

Trespasser on Passenger Train—Ejection—Liability of Company for Beating by Conductor.*

Plaintiff, who was a trespasser on a passenger train, had been twice ejected. He again climbed to the rear steps of the last coach, when the conductor, coming from inside the vestibule door, seized him by the collar, and slapped and beat him with his hand. The train was again stopped, and plaintiff ejected: *held*, that the beating administered by the conductor was within the scope of his authority as agent of the railroad company, so as to render it liable therefor.

Appeal from district court, Linn county; H. M. Remley, Judge.

Action to recover damages for personal injuries inflicted on plaintiff by a conductor in charge of one of defendant's trains.

*As to the liability of railroad companies for assaults by employees, see note appended to *Turley v. Boston & M. R. R.* (N. H.), 20 Am. & Eng. R. Cas., N. S., 440; monograph appended to *Birmingham Ry. & Electric Co. v. Baird* (Ala.), 22 Am. & Eng. R. Cas., N. S., 909.

Hamilton v. Chicago, etc., Ry. Co

Verdict for plaintiff for \$50. From judgment on the verdict, defendant appeals. Affirmed.

J. C. Cook, for appellant.

P. W. Tourtellot and W. E. Steele, for appellee.

McCLAIN, J. Just prior to the injury complained of, plaintiff had been riding on the platform of a car of a passenger train of defendant, confessedly as a trespasser. Being driven from the platform by a brakeman while the train was stopped at a railroad crossing, plaintiff climbed upon another platform, after the train was in motion. Again the train was stopped, and he was put off. When the train was started a second time, he climbed on the rear steps of the last coach, and stood outside of the vestibule doors. The conductor of the train opened the doors from the inside, seized plaintiff by the collar, and slapped and beat him with his hand; and, when plaintiff exclaimed, "Don't kill me!" the conductor responded, "No, I won't kill you, but I give you to understand when the train is stopped twice and you are put off you will stay off." Thereupon the train was again stopped, and plaintiff was put off or got off. This action is to recover damages for the beating.

Counsel for defendant contends that the acts of the conductor were outside of the scope of his authority, and, as plaintiff was a trespasser, the defendant is not liable. It is not easy to determine in every case what acts are so far the result of personal motives of the servant as to relieve the master from liability therefor, where the servant is at the time engaged in general in the discharge of duties for his master. There is no question that if, in removing plaintiff as a trespasser, the defendant's conductor, who was charged with the duty of removing trespassers from the train, caused him to suffer personal injury by reason of attempting to put him off at a dangerous place or by using unreasonable and unnecessary violence, the defendant would be liable for his acts, even though they were wanton, willful, malicious, and unlawful. *Marion v. Chicago, R. I. & P. R. Co.*, 64 Iowa, 568, 21 N. W. 86; *Johnson v. St. P., M. & O. R. Co.* (Iowa) 88 N. W. 811; *Hoffman v. New York Cent. & H. R. R. Co.*, 87 N. Y. 25, 4 Am. & Eng. R. Cas. 537, 41 Am. Rep. 337. This proposition is conceded by counsel for appellant, but he contends that the evidence shows the beating of the plaintiff to have been a separate and distinct transaction from that of putting him off the train. So it appears from the testimony of the conductor, but, according to the testimony of plaintiff, he was struck and beaten and put off as a part of one continuous transaction, and we think it was for the jury to say whether this was so. But even if the beating was a distinct transaction, it was not as the result of any personal malice or ill will of the conductor, but because, as conductor, he was irritated by the conduct of plaintiff, and, as he declares, was actuated with the

Mathis v. Southern Ry. Co

purpose of teaching the plaintiff a lesson, so that when he was put off he would stay off. There is nothing to indicate that the conductor, under pretense of discharging his duty as conductor, was taking the opportunity to injure plaintiff on account of his own personal ill will. He was confessedly acting throughout as conductor,—discharging the duty of preventing plaintiff, as a trespasser, from riding on the train. We think the case is plainly one where the wrongful acts of the conductor, if any, were chargeable to the defendant.

Complaint is made of refusal to give an instruction asked by defendant, but the law of the case was correctly stated to the jury in instructions given which sufficiently covered the instruction asked.

The judgment is affirmed.

MATHIS v. SOUTHERN RY. CO.

(Supreme Court of South Carolina, Feb. 27, 1903.)

[43 S. E. Rep. 684.]

Liability for Failure to Furnish Iced Cars.*

Where a railway company had contracted to ship melons in iced cars, the liability of the railroad company for failure so to do does not depend upon whether the company who was to furnish the cars was a common carrier.

Same.

A common carrier is not exempt from liability for failure to ship melons by the fact that the refrigerator company whose cars it was intending to use failed to furnish them.

Same.

Where a carrier fails to furnish refrigerator cars as agreed for a shipment of melons, the plaintiff has only to show that defendant is such a carrier, and refuses to carry the fruit, which was the cause of the damage to the shipper; and the carrier is liable, whether the melons were more than enough to fill the cars agreed to be furnished, or not, and it is not necessary for him to show that the carrier agreed to furnish the cars properly iced.

Same.

In an action against a carrier for failure to furnish iced cars for shipment of melons as agreed, it cannot show as a defense that it held itself out as willing to haul iced cars to be furnished by another company under a contract with the shipper.

Appeal from Common Pleas Circuit Court of Barnwell County; Klugh, Judge.

Action by Charles H. Mathis against the Southern Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

This is an action for damages arising out of the defendant's alleged failure to provide suitable refrigerator cars for transporting the plaintiff's melons to Northern markets. The

*See foot-note appended to *New York, P. & N. R. Co. v. Cromwell* (Va.), 17 Am. & Eng. R. Cas., N. S., 328.

Mathia v. Southern Ry. Co

questions presented by the exceptions are so largely dependent upon the exact issues raised by the pleadings that we have deemed it advisable to set forth one of the causes of action alleged in the complaint, which is as follows:

“(1) That at the times hereinafter set forth the defendant above named was, and is now, a railroad corporation, duly created and existing under and by virtue of the laws of the state of Virginia, under the name and style of Southern Railway Company, and as such was at said times, and is now, engaged as a common carrier for hire of watermelons, cantaloupes, and other fruits and vegetables, from the town of Blackville, in the said county and state, and from other towns and cities in said state and county, and elsewhere, to the Northern markets, including the city of Washington, in the District of Columbia, Philadelphia, in the state of Pennsylvania, and New York, in the state of New York.

“(2) That, as such common carrier, defendant, for the purpose of such transportation, provided and had divers railroad freight cars of special construction, commonly known as ‘refrigerator cars,’ which are provided with tanks or receptacles for ice, which is necessary to preserve such shipment from decay and deterioration during the transportation thereof to said markets; and the defendant, for the purposes above set forth, held itself out to the public who might be engaged in the production and handling of such fruits and vegetables, and continues so to do, for furnishing to said public, when desired, such cars, at certain stipulated rates and charges, properly iced and refrigerated, and in proper condition to receive and transport safely and in good condition all such fruits and vegetables offered or delivered for transportation as aforesaid to and from said points and elsewhere, as required by said public so engaged.

“(3) That within a reasonable time before the 10th day of July, A. D. 1900, the plaintiff, who was engaged in the cultivation and shipping of cantaloupes and watermelons at and near the town of Blackville, in the said county of Barnwell, and also in otherwise handling the same for market, in pursuance of said business and for the purpose and intention of shipping cantaloupes to the said city of Washington, D. C., duly notified the defendant of his purpose to have a car load of cantaloupes crated and prepared for shipment on the said date at its depot in the said town of Blackville, which was a point from which the defendant usually handled such shipments; ordered a car of the defendant of the class above described, and to be properly refrigerated, which the defendant agreed to furnish as ordered.

“(4) That the plaintiff duly hauled to the said depot a car load of 502 crates of cantaloupes upon the said date, in pursuance of said contract, and the defendant had the refrigerator car at said point, on the said date as agreed, but to the plaintiff's great disappointment, regret, and loss, the same was not

Mathis v. Southern Ry. Co

iced or otherwise refrigerated, as was its duty to have done, and hence totally unfit for shipment of said cantaloupes or any other fruits, and the defendant's agents and servants refused to receive the same for shipment; and the plaintiff was forced by reason thereof, and because of the perishable character of the said freight, and the necessity of quick transportation, to ship the said cantaloupes to the said city of Washington by express—a method of shipment much more expensive and unsatisfactory than that agreed on with the defendant.

“(5) That by the said contract the plaintiff was to pay the defendant the sum of \$147.35 for the said transportation, including refrigeration, which was the rate for such cargo from Blackville to Washington; and the plaintiff on the said day was ready and willing to pay the same, had the defendant not refused to receive the said shipment as above stated, and failed and neglected to ice and refrigerate the car as aforesaid.

“(6) That the express charges on the said shipment which were paid by the plaintiff were \$234, and plaintiff has been damaged by the defendant by reason of the matters and things above set forth, and by said violation of its duty as said common carrier, in the sum of \$146.65, which is the difference between the cost of shipment by freight in refrigerator cars on the said date and the express rates which plaintiff was compelled to pay as aforesaid.”

The second cause of action is identical with the first, except as to dates and amounts.

The answer of the defendant was a general denial. The jury rendered a verdict in favor of the plaintiff for \$511.34.

The defendant appealed upon the following exceptions:

“(1) Because it is respectfully submitted that his honor erred in charging the jury as follows: ‘In determining the issues in this case, if you should find that both the railroad company and the company known as the Swift Company were involved in this matter of transportation, and you should have any question in your mind as to which company is liable, or whether they are both liable, or whether the Swift Company is liable and the railroad company is not liable, the difficulty will be solved by determining for yourselves the question as to who was the common carrier;’ thus making the liability of the defendant company depend upon the question as to whether the refrigerator company, which defendant contended furnished the cars, was a common carrier or not, whereas it is submitted that the liability of the defendant company was not to be determined by the question as to whether the refrigerator company was a common carrier or not, but by the question, ‘Did the railroad company, defendant, hold itself out as a common carrier of vegetables by refrigerator cars or not?’—whether such cars were furnished by a common carrier or private carrier.

“(2) Because it is respectfully submitted that his honor

Mathis v. Southern Ry. Co

erred in charging as follows: 'Now, the Swift Company, if it also held itself out to the public generally for the business of common carrying, would, of course, also be a common carrier; but if the plaintiff has established that the railroad company was the common carrier in this instance, and the proof fails to show that the Swift Company was a common carrier, then, as a matter of course, the Swift Company cannot be held liable for any failure to perform the duty of a common carrier whatever. It might be held liable for failing to perform any other contract which it might be capable of entering into, and might enter into;' thus making the liability of the defendant company dependent upon the question whether the refrigerator company, commonly called the Swift Company, was a common carrier or not, and upon the question whether the Swift Company was liable for any failure to perform its duty or not, whereas, it is submitted that the liability of the defendant company did not depend upon whether the company which furnished the cars was a common carrier or not, or whether it could be held liable or not, but upon the question whether the defendant had failed to do any duty in not furnishing refrigerator cars.

"(3) Because it is respectfully submitted that his honor erred in charging as follows, as requested by the plaintiff in his third request: 'That if the jury find that the defendant railroad company owned no cars of suitable build and construction for safely carrying and preserving perishable fruits and products; that cantaloupes are a perishable fruit or product, requiring quick transportation, in refrigerated or iced cars; and that the defendant company used or employed the cars of another company, whose duty was to furnish refrigerator cars, and to ice them, and to keep them iced, and such cars became a part of the trains of the defendant company—then the refrigerator car company and its employees were, in law, the servants and employees of the defendant company, and their negligence in furnishing cars, or in furnishing suitable cars, or in furnishing the ice to refrigerate them, was the negligence of the defendant company.'

"(4) Because it is respectfully submitted that his honor erred in charging as follows, as requested by the plaintiff in his fourth request: 'The law will not permit a railroad company engaged in the business of carrying freight for hire, through any device or arrangement with a refrigerator car company, whose cars are used by the railroad company, and constitute a part of its train, to evade the duty of seeing to it that the cars thus employed are properly constructed and properly iced, if the preservation and safety of the freight which the railroad company has undertaken to carry, or holds itself out to the public to carry, depends upon such proper construction and icing.'

"(5) Because it is respectfully submitted that his honor erred in charging as follows, as requested by the plaintiff in

Mathis v. Southern Ry. Co

his fifth request: 'The defendant cannot excuse itself from liability to the plaintiff for failure to furnish cars by saying that the cars belong to some other company, which had undertaken to supply suitable cars, and to see to it that the same were properly refrigerated. It knew, or ought to have known, that the goods it was inviting the public to ship over its line, if you believe it so invited the public, were perishable, and the law imposed upon it the duty to use due diligence in providing suitable cars to carry the goods which its invitation would naturally bring.'

"(6) Because it is respectfully submitted that his honor erred in refusing to charge the following, as requested by the defendant in its first request: 'That the plaintiff, Charles H. Mathis, cannot recover anything from the defendant, the Southern Railway Company, on either cause of action set out in the complaint, unless he proves by the preponderance of the evidence that the railroad company held itself out to the public who might be engaged in the production and handling of fruits and vegetables as a company furnishing to the public, when desired, certain freight cars, of special construction, commonly known as "refrigerator cars," provided with tanks or receptacles for ice necessary to preserve such fruits and vegetables from decay and deterioration during transportation, in which case it would be liable only for unreasonable delay, or unless the plaintiff proves that the said company, defendant, made an agreement or contract with the plaintiff to furnish the car or cars of the class above described, properly refrigerated, on the days mentioned in said causes of action, respectively, and unless they find from the preponderance of the evidence that having so held itself out, or having so agreed, the defendant failed to furnish the cars on the days mentioned in said causes of action, respectively.'

"(7) Because it is respectfully submitted that his honor erred in refusing to charge the jury as requested by the defendant in its second request, as follows: 'That if the jury find from the evidence that a company known as the Swift Refrigerator Transportation Company, or California Fruit Transportation Company, alone furnished refrigerator cars suitable for the transportation of fruits and vegetables, and that the same were not furnished by the defendant company, and that the railroad company did not solicit the business, and that the contract or agreement referred to or alleged in the said cause of action was not entered into with the defendant company, or its agents, but between the plaintiff and the said California Fruit Transportation Company, commonly known as the Swift Refrigerator Company, alone, and that the said transportation company failed to furnish refrigerator cars, or ice for the same, and not the defendant, then the plaintiff cannot recover anything from the railroad company, defendant.'

"(8) Because it is respectfully submitted that his honor

erred in refusing to charge the jury as requested by defendant in its third request, as follows: 'That if the jury find from the evidence that there was no agreement on the part of either the railroad company or the California Fruit Transportation Company, commonly known as the Swift Company, to furnish the plaintiff with cars on the days mentioned in the said causes of action, respectively, then the plaintiff cannot recover from the defendant in this suit.'

"(9) Because it is respectfully submitted that his honor erred in refusing to charge the jury as requested by the defendant in its fourth request: 'That if the jury find from the evidence that there was such a contract on the part of the California Fruit Transportation Company, commonly called the Swift Company, but that the plaintiff had agreed prior to the day of shipment that he would look to some other company for the refrigerator cars to transport his vegetables or fruits, then the plaintiff cannot recover anything in this suit.'

"(10) Because it is respectfully submitted that his honor erred in refusing to charge the jury as requested by the defendant in its first additional request: 'That if the jury find the defendant liable, yet, if they find from the evidence that the amount of cantaloupes permitted to be carried in the refrigerator cars alleged to have been engaged or contracted for was limited to a less amount than the amount alleged or proved to have been shipped by express, then the plaintiff cannot recover any express charges on any excess in the amount shipped by express over and above the amount limited to be carried in the refrigerator cars so engaged or contracted for.'

"(11) Because it is respectfully submitted that his honor erred in refusing to charge the jury as requested in the defendant's second additional request: 'That if the Southern Railway Company simply held itself out to the public as prepared and willing to haul the refrigerator cars of refrigerator transportation companies, when shippers perfected their arrangement with such refrigerator companies, that would not bind the railroad company to itself furnish refrigerator cars.' "

The twelfth exception was withdrawn.

B. L. Abney, Joseph W. Barnwell, and Robert Aldrich, for appellant.

Bates & Simms, for respondent.

GARY, A. J. (after stating the facts). The first and second exceptions will be considered together. We agree with the appellant that the liability of the defendant was not to be determined by the question as to whether the refrigerator company was a common carrier or not. But the defendant was not prejudiced by the charge, as it tended to relieve it of liability in case the jury found that the refrigerator company was a common carrier.

The third, fourth, and fifth exceptions will be considered together. These exceptions are open to the objection that they fail to specify in what particulars the charge was

Mathis v. Southern Ry. Co

erroneous. But waiving this objection, and considering the exceptions, we are satisfied that the charge was free from error. In the case of *Pa. Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141, 1 Am. & Eng. R. Cas. 225, the plaintiff, while occupying a berth in the Pullman car as a passenger, was injured by the falling of the berth. On appeal from a judgment in his favor, the court thus stated the law: "As between the parties now before us, it is not material that the sleeping car in question was owned by the Pullman Palace Car Company, or that such company provided at its own expense a conductor and porter for such car, to whom was committed the immediate control of the interior arrangements. * * * For the purposes of this contract under which the railroad company undertook to carry Roy over its line, and in view of its obligations to use only cars that were adequate for safe conveyance, the sleeping car company, its conductor and porter, were, in law, the servants and employees of the railroad company. Their negligence, or the negligence of either of them, in any matters involving the safety and security of passengers while being conveyed, was the negligence of the railroad company. The law will not permit a railroad company engaged in the business of carrying persons for hire, through any device or arrangement with a sleeping car company whose cars are used by the railroad company, and constitute a part of its train, to evade the duty of providing proper means for the safe conveyance of those whom it has agreed to convey." The same principle was applied to carriers of freight in *N. Y., P. & N. R. Co. v. Cromwell* (Va.) 35 S. E. 444, 17 Am. & Eng. R. Cas., N. S., 238, 49 L. R. A. 462, 81 Am. St. Rep. 722. The plaintiff in that case shipped strawberries over the New York, Philadelphia & Norfolk Railroad in one of the Swift Company's cars, and the ice failed in transit. The railroad company contended that the Swift Company, and not the railroad company, was liable. The court used this language: "Recognizing the higher duty by common carriers to passengers, we are of opinion that the principles announced by the Supreme Court in this case [*Roy*] are applicable to the case at bar. * * * The California Fruit Transportation Company for a consideration furnishes its cars to the plaintiff in error. These cars were agencies or means employed by the plaintiff in error for carrying on its business and performing its duty to the public as a common carrier, one of which was to provide suitable cars for the safe and expeditious carriage and preservation of the freight it undertook to carry. A railway company cannot escape responsibility for its failure to provide cars reasonably fit for the conveyance of the particular class of goods it undertakes to carry by alleging that the cars used for the purposes of its own transit were the property of another. The undertaking of the plaintiff in error was to properly care for and safely carry the fruit of the defendant in error, and it is immaterial that the cars in which

Mathis v. Southern Ry. Co

they were carried were owned by the California Fruit Transportation Company, or that such company undertook to ice said cars, or to pay for the ice. As between the plaintiff in error and the defendant in error, the California Fruit Transportation Company and its employees were the agents of the plaintiff in error."

We proceed to the consideration of the sixth exception. Unless all the propositions of law embodied in a request are sound, it cannot be successfully contended that there was error in refusing it. The proposition that the plaintiff cannot recover from the defendant unless he proves that the railroad company held itself out to the public as furnishing refrigerator cars for transporting fruits and vegetables is erroneous, inasmuch as it was only necessary for the plaintiff to show that the defendant was a common carrier of freight, and that the defendant refused to transport articles of freight, which resulted in damage to the plaintiff. If there were reasons excusing the defendant for refusing to ship the articles, it was incumbent on it to establish such facts. In *Porcher v. R. R. Co.*, 14 Rich. Law, 181, the court says: "A common carrier is bound to receive and carry all goods offered for transportation by any persons whomsoever, upon receiving a suitable hire. This is the result of his public employment as a carrier, and he will be liable to an action unless there is a reasonable ground for the refusal. But if he refuses to take charge of the goods because his coach is full, or because they are of a nature which will at the time expose them to extraordinary danger or to popular rage, or because he has no convenient means of carrying such goods with security, etc., these will furnish reasonable grounds for his refusal, and will, if true, be a sufficient legal defense to a suit for the noncarriage of the goods;" citing *Story on Bailments*, § 508. The proposition that the defendant would only be liable for unreasonable delay is also erroneous. The defendant would be liable for all damages that were the direct and proximate result of its refusal to transport. The articles of freight tendered were of a perishable nature. It was reasonable to suppose that they would either decay, or that the shipper would be compelled to resort to a more expensive mode of transportation to market.

Neither was the proposition a correct statement of the law, that the plaintiff cannot recover unless he proves that the defendant made an agreement to furnish cars properly refrigerated at the times mentioned. The defendant, as a common carrier of freight, was bound to transport, even in the absence of an agreement, unless it showed facts excusing it for failure to ship the articles of freight. *Porcher v. R. R.*, 14 Rich. Law, 181.

The proposition is likewise unsound, that the plaintiff cannot recover unless the jury find that the defendant failed to furnish the cars after holding itself out or having agreed to do so. In *Piedmont Mfg. Co. v. R. R.*, 19 S. C. 353, 16 Am.

Mathis v. Southern Ry. Co

& Eng. R. Cas. 194, the court says: "It is admitted that common carriers in this state cannot limit their common-law responsibility by any notice or declaration or special contract for or in respect of any goods to be carried by them;" citing the statute. Section 1709 of the Civil Code is as follows: "No public notice or declaration shall limit or in any wise affect the liability at common law of any public common carriers for or in respect of any goods to be carried and conveyed by them; but they shall be liable, as at common law, to answer for the loss for injury to any articles and goods delivered to them for transportation, any public notice or declaration by them made and given contrary thereto, or in any wise limiting such liability, notwithstanding."

We proceed to consider the seventh exception. While the facts set forth in this exception would make the refrigerator company liable, it does not follow that they would relieve the defendant of liability; for if, as alleged in the complaint, the plaintiff made application to the defendant to ship the cantaloupes, it was bound to do so, unless there were circumstances excusing its failure. The complaint alleges that the plaintiff not only notified the defendant of the intended shipment, but that it agreed to furnish the refrigerator cars. If this was the fact, the defendant could not relieve itself from liability under the facts mentioned in the exception.

We will next consider the eighth exception. It has already been shown that, in the absence of an agreement either with the defendant or the refrigerator company, the defendant may still be liable, by reason of the rule that a common carrier is bound to transport unless there are circumstances justifying its failure.

The ninth exception will next be considered. We have already shown that, if an agreement was made with the refrigerator company, it would not relieve the defendant from liability, in case the plaintiff, as alleged, not only notified it of the intended shipment, but that it agreed to furnish suitable cars.

We proceed to consider the tenth exception. The authorities hereinbefore mentioned make it plain that even if there was an agreement for a certain number of cars, and the plaintiff tendered for shipment a larger number of crates than could be shipped in those cars, the defendant was nevertheless bound to transport all the crates tendered, unless excused from so doing under the circumstances of the case. If the circumstances were not such as to excuse the defendant's failure, the plaintiff had the right to recover damages directly and proximately caused by the defendant's failure, not only to ship the number of crates that could have been transported in the cars mentioned, but likewise the other crates tendered for shipment. The request was therefore erroneous.

The eleventh exception will next be considered. The request therein set out embodies an erroneous principle of law.

Lucas v. St. Louis & S. Ry. Co

Such a rule would enable a railroad company to shift its responsibility as a common carrier on others, which cannot be done. It must transport when the demand is made, unless excused, and it cannot refuse on the ground that others had assumed any part of the duty resting on it as a common carrier. In addition to the foregoing authorities, we cite the cases of *Bank v. R. R. Co.*, 25 S. C. 222; *Harmon v. R. R. Co.*, 28 S. C. 401, 5 S. E. 835, 13 Am. St. Rep. 686; *Parr v. R. R. Co.*, 42 S. C. 197, 20 S. E. 1009, 49 Am. St. Rep. 826; *Youngblood v. R. R. Co.*, 60 S. C. 9, 38 S. E. 232, 20 Am. & Eng. R. Cas., N. S., 622, 85 Am. St. Rep. 824.

It is the judgment of this court that the judgment of the circuit court be affirmed.

LUCAS v. ST. LOUIS & S. RY. CO.

(*Supreme Court of Missouri, Division No. 1, March 18, 1903.*)

[73 S. W. Rep. 589.]

Street Railway—Maintaining Stump in Platform—Injury to Prospective Passenger.*

A street railway which builds a platform for passengers around a stump placed by an electric light company in a street is not liable, on the ground of maintaining the stump, to one who, hurrying to catch a car, fell over it.

Appeal from St. Louis Circuit Court; Walter B. Douglas, Judge.

Action by Ella Lucas against the St. Louis & Suburban Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

This is an action for damages for personal injuries. There was a verdict for \$3,000, and the defendant appealed. The constitutionality of the jury law is called in question, and that gives this court jurisdiction. The negligence charged on the petition is "that at or near the intersection of Euclid avenue and defendant's right of way in the city of St. Louis the defendant at the times herein mentioned was maintaining a platform to enable passengers to get on its cars bound east; that in the said platform, which was of granitoid, there was a stump about eleven inches in height, and defendant was negligently maintaining said platform at said times with said stump therein, which was a dangerous obstruction to passengers intending to get upon defendant's cars from said platform; that on the 1st day of January, 1900, the plaintiff was upon said platform, intending to become a passenger upon defendant's east-bound car, and, whilst she was signaling the car to stop for her as a passenger, her foot struck said stump, and she fell from said platform upon defendant's track, and was struck

*As to the carrier's duties with respect to stations and stopping places, see monograph attached to *Muhlhouse v. Monongahela St. Ry. Co. (Pa.)*, 2 R. R. R. 131, 25 Am. & Eng. R. Cas., N. S., 131.

Lucas v. St. Louis & S. Ry. Co

and dragged by defendant's east-bound car, and was thereby greatly and permanently injured." The answer is a general denial and a plea of contributory negligence.

The case made is this: The parties stipulated that in 1857 Charlotte Lay dedicated to the county of St. Louis a strip of land 80 feet wide, running north and south, as a public road, and called it "Lay Avenue." At that time there was no railroad there. Subsequently the Narrow Gauge Railroad was built, and it crossed the said road. The defendant is the mesne grantee of that railroad, and operates a street railroad across said strip of land. When the city limits were extended so as to embrace this territory, the city changed the name to "Euclid Avenue." At that time the street was an unimproved dirt road, and there were no sidewalks. At a time not disclosed by the evidence, the Missouri Edison Electric Lighting Company placed one of its poles in the sidewalk on the east side of said Euclid avenue. The pole was about 12 inches in diameter, and stood a little to the right of the middle of the sidewalk. The defendant owns its own right of way, but, of course, does not own the street. It only crosses the street by permission. The pole stood entirely within the lines of the street, and no part of it was upon the defendant's right of way. Formerly, for the convenience of the traveling public, the defendant constructed a wooden platform, 7 or 8 yards in length, and 3 or 4 feet wide, and which ran parallel with its tracks, and which was partly upon its right of way and partly upon the sidewalk—in fact, extending across the sidewalk on the east side of Euclid avenue. The pole aforesaid being already there, the platform was built around the pole. The platform was raised from 4 to 6 inches above the ground. Thereafter the lighting company sawed down the pole and beveled the edges, but left the stump of the pole projecting about 11 inches above the platform. The lighting company then put up a pole in the sidewalk, to the east of the stump, and nearly touching it, and near the east side of the sidewalk. Thereafter the defendant removed the wooden platform, and replaced it with a granitoid platform, and left the stump and the new pole standing; building the granitoid platform around them. Immediately south of the granitoid platform there is an alley running eastwardly, which is paved with brick. Immediately south of the alley there is a drug store, and south of that a butcher shop, both of which have large glass windows, and are brightly lighted. In front of these two stores there is a cement sidewalk. South thereof there does not appear to be any improved sidewalk, and the street does not appear to be improved. The plaintiff's daughter lives, and has for some time lived, on the east side of Euclid avenue, just a short block south of the railroad. On the tall pole aforesaid there was an electric light. The defendant's car that was approaching had a headlight. So that between the lights in the windows of the drug store and the butcher shop, and the

Lucas v. St. Louis & S. Ry. Co

electric light on the tall pole, which was almost touching the stump, and the headlight on the approaching car, the place was well lighted, and the stump could have been easily seen. The plaintiff was familiar with the place, and knew of the existence of the stump on the platform, and had frequently spoken of it and wondered why it was allowed to remain there. She visited her daughter frequently, and always got off and on the car at that place. On January 1, 1900, she visited her daughter. About half past 5 o'clock she started home. It was dusk, but not dark. As she approached the platform she saw the car coming from the west, and fearing she would be left, when she was 70 or 80 feet from the track she increased her pace and ran, signaling the car as she ran. She reached the platform, got up on it in safety, and, while signaling the car to stop, she stumbled against the stump of the old pole, and was thrown against the side of the car, near the rear portion thereof, and seriously injured.

For the plaintiff the court gave the following instructions, which are claimed to be erroneous:

"If the jury find from the evidence in this case that the defendant on the 1st day of January, 1900, was a carrier of passengers for hire by street railroad, and, as such, had erected and was maintaining the platform mentioned in the evidence for the purpose of receiving passengers therefrom bound east from Euclid avenue, then the defendant was bound, in duty, to exercise ordinary care to keep said platform reasonably secure and safe for passengers who should be thereon for the purpose of entering defendant's cars therefrom; and if the jury find from the evidence that on said day there was existing in said platform a stump of a post, extending above the surface of said platform, and that said stump in said platform made it dangerous for persons on said platform for the purpose of entering upon defendant's cars as passengers; and if the jury further find from the evidence that defendant did not exercise ordinary care in maintaining said platform for passengers in such condition; and if the jury further find from the evidence that on said day the plaintiff was on the said platform for the purpose of becoming a passenger upon defendant's east-bound car, and that whilst so upon said platform for said purpose she stumbled over said stump, and was thereby caused to fall and be injured by defendant's car; and if the jury believe from the evidence that the plaintiff was exercising ordinary care at the time of her injury—then the plaintiff is entitled to recover, although said stump, or the post of which it was a stump, had been planted in said place by some other person or corporation than the defendant."

"No. 3. The court instructs the jury that the mere fact that the plaintiff knew that the stump mentioned in the evidence existed in the platform, and that she stumbled over it (if she did stumble over it) and was injured, will not defeat a recovery in this case."

Lucas v. St. Louis & S. Ry. Co

At the close of the plaintiff's case, and also at the close of the whole case, the defendant asked peremptory instructions to the jury to find for the defendant, and also asked other instructions, which, in the view taken of the case, it is unnecessary to set out or refer to.

McKeighan & Watts and Robt. A. Holland, Jr., for appellant.

A. R. Taylor, for respondent.

MARSHALL, J. (after stating the facts). The plaintiff predicates a right to recover solely upon the charge that the defendant maintains the stump in the granitoid platform. The stump is within the lines of a public street, and not upon the defendant's property. It was placed there by the lighting company, and the defendant had nothing to do with its being placed there. It is on public property, and the defendant is under no duty and has no right to remove it. The defendant built a wooden platform, and left the stump projecting above it, on the public highway, for the benefit of the traveling public. It was under no duty to build the platform. Subsequently it replaced the wooden platform with a granitoid platform. This is the sum of its offending. Yet it is sued, and a recovery had against it, on the charge and theory that it maintains the stump in the platform, and that this makes it dangerous. Webster's International Dictionary defines "maintain" to mean: "(1) To hold or keep in any particular state or condition; to support; to sustain; to uphold; to keep up; not to suffer to fail or decline. (2) To keep possession of; to hold and defend; not to surrender or relinquish. (3) To continue; not to suffer to cease or fail. (4) To bear the expense of; to support; to keep up; to supply with what is needed." It is demonstrable that the defendant has done nothing which would bring it within any of these meanings of the word "maintain." It did not put the pole or stump there. It was under no obligation to remove it. It has done nothing to keep it there, or to prevent it from failing or declining. The pole was put there by the lighting company, and was cut down and the stump left there by that company, and the stump has kept itself there ever since. It is located upon a public highway. It was there before there was any platform. Neither the wooden nor the granitoid platform affected the stump, or the dangers arising therefrom, in any manner whatever. If an owner raises up, or permits any one else to do so, or keeps up or fails to remove, a nuisance, on his own premises, by which any one suffers injury, he is liable, because he violates his duty as a citizen. If any one creates a nuisance on a public highway, he is primarily liable to any one who is injured thereby, because he has violated his duty as a member of society, and has been guilty of a wrongful act for which he is primarily liable. But no citizen is under any personal, legal obligation to remove a nuisance from a public highway, notwithstanding he may know it is

Lucas v. St. Louis & S. Ry. Co

calculated to do injury to a traveler on the highway if it is allowed to remain there. To make any man liable for a tort, he must have done or omitted to do a duty imposed upon him by law. In the absence of such a duty, there is no liability. The law imposes no duty upon the defendant to remove a nuisance in a public highway which it did not put there, and has nothing more to do with than any other citizen. The building the platform around the stump neither increased nor diminished the danger. The proximate cause of the accident in this case was the stump. The platform in no way had anything to do with the accident. The proximate cause would be the same whether there had been a platform there, or whether it had been allowed to remain a dirt walk, as it was when the pole was put up, when it was sawed off, and when the stump was left there. The defendant maintains the platform, but it does not maintain the stump. The stump, and not the platform, caused the accident. The only thing the defendant did with respect to the stump was to leave it in the highway, where some one else had placed it; and, being under no legal duty to remove it, it cannot be adjudged guilty of negligence in failing to remove it, or in building the platform around it.

All of the adjudicated cases wherein a citizen has been held liable for an obstruction or nuisance in a highway have been cases where the person held liable placed the obstruction or nuisance on the highway, or was under some duty to remove it. *Schweickhardt v. St. Louis*, 2 Mo. App. 571; *Waltemeyer v. Kansas City*, 71 Mo. App. 354; *Donoho v. Vulcan Ironworks*, 75 Mo. 401; *Wiggin v. St. Louis*, 135 Mo. 558, 37 S. W. 528; *Grogan v. Foundry Co.*, 87 Mo. 321; *Merrill v. St. Louis et al.*, 83 Mo. 244, loc. cit. 255, 53 Am. Rep. 576; *Campbell v. Pope*, 96 Mo. 468, 10 S. W. 187. Of course, if one creates the nuisance, and another adopts it, and continues it, and keeps it up, as where one constructs a coal hole in a sidewalk, and another uses it and maintains it, both are liable. *Merrill v. St. Louis*, 83 Mo., loc. cit. 255, 256, 53 Am. Rep. 576. The general rule is thus stated in 2 Smith's Modern Law of Municipal Corporations, § 1525: "The general rule is that the primary duty to keep highways and streets in repair rests upon the municipal corporations within whose limits they are, this duty being implied in the acceptance of a charter from the state. Such duty is not discharged by the fact that a duty is also imposed upon abutting owners to keep the highway in repair in front of their land. A lot owner's obligation to repair streets or sidewalks does not exist at common law, but is statutory or arises from contract. It seems well settled that the neglect of an abutting owner to keep the sidewalk in repair, and to keep it free from snow and ice, as required by a city ordinance, does not render him liable to a party injured or to the city himself, *unless such owner himself caused the defect.*" (The italics are added.)

Williams v. Central of Georgia Ry. Co

In support of the text the author cites *St. Louis v. Insurance Co.*, 107 Mo. 92, 17 S. W. 637, 28 Am. St. Rep. 402, and cases from New York, Massachusetts, Wisconsin, New Jersey, Maryland, Rhode Island, Connecticut, California, Kansas, and Iowa. This defendant never caused this defect in the sidewalk; never adopted it, used it, continued it, or maintained it. It did not remove it, it is true, but it owed no duty to the city or its citizens to remove it. It was neither the active, primary, nor remote cause of its being there, and it did not keep it there for its own use or benefit or at all. It simply left it where it found it, and let it remain in no more dangerous condition than it was when it found it.

It follows that the defendant is not liable for the plaintiff's injuries, and the trial court should have so peremptorily charged the jury. The judgment of the circuit court is therefore reversed. All concur.

WILLIAMS v. CENTRAL OF GEORGIA RY. CO.

(*Supreme Court of Georgia, April 8, 1903.*)

[43 S. E. Rep. 980]

Carriers of Live Stock—Patent Defect in Car—Burden of Proof—Contract.

A shipper of live stock entered into a special contract with the carrier, and, in consideration of a reduced freight rate and free passage of the shipper, agreed to release the carrier from any loss that might be occasioned by the animals injuring each other or themselves, or that might arise in consequence of their fright or viciousness. The contract recites that the shipper had examined the car provided for the transportation of the stock and found it in good order and condition, and stipulated that he accepted the same, and agreed that it was suitable and sufficient for the purpose intended: *held*, upon the trial of an action brought by the shipper against the carrier for damages for the value of one of the animals alleged in the petition to have died from injuries caused by a defect in the car, consisting of a crack therein in which the animal got its foot, the burden of proof was upon the plaintiff to show that such defect was not patent when he examined the car, and was therefore not covered by his agreement.

Same—Same—Same.

Such burden was not carried by showing merely that the crack into which the animal got its foot was the space between the slats of the car, some 3½ or 4 feet above the floor thereof.

(Syllabus by the Court.)

Error from Superior Court, Houston County; W. H. Felton, Jr., Judge.

Action by O. D. Williams against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

H. A. Mathews and A. C. Riley, for plaintiff in error.

L. L. Brown, for defendant in error.

FISH, J. Williams sued the Central of Georgia Railway Company for damages for the loss of a mule. The petition

Williams v. Central of Georgia Ry. Co

alleged that the death of the mule was caused by the negligence of the defendant; that the injury from which its death resulted was occasioned by a defect in the car in which it was being transported from Atlanta to Fort Valley, "the defect consisting in a crack in the car in which the mule got his foot fastened."

Upon the trial the plaintiff put in evidence a written contract, signed by himself and the agent of the defendant, wherein the plaintiff agreed, in consideration of a reduced freight rate for the car load of live stock, and free passage of himself over the defendant's road from Atlanta to Fort Valley, that he would release the defendant from any loss occasioned by the animals injuring each other or themselves, or that might arise in consequence of their fright or viciousness. This contract recited: "It is further understood that the owner or shipper has examined and found in good order and condition the car * * * provided for the transportation of said live stock, and hereby accepts the same and agrees that [it is] * * * suitable and sufficient for said purpose." The testimony of the plaintiff, who was the only witness introduced upon the trial, was to the effect that, when the car load of mules arrived at Fort Valley, the one for the loss of which the action was brought had got its foot in the space between the slats of the car, some $3\frac{1}{2}$ or 4 feet from the floor thereof, which caused him to fall, and the other animals in the car had trodden upon him, and so injured him that he died within a few days thereafter; that the state of the car between which the mule's foot was caught had to be cut away with an ax in order to release the foot. The value of the mule was proved to be \$100. Upon the motion of the defendant the court granted a nonsuit, to which ruling the plaintiff excepted.

As the contract recited that the plaintiff had examined the car and found it in good order and condition, and had agreed that it was suitable and sufficient for the transportation of the stock, and that he had accepted it as such, the burden was upon him to show that the injury to the mule was not caused by a defect covered by his agreement. In other words, if the defect was patent—could have been easily discovered by him when he examined the car—he must be held to have waived, by his admission and agreement, any injury which might be caused by such defect; the ordinary presumption of negligence arising against a railroad company, upon proof of the injury, not being applicable in such a case. Did the plaintiff successfully carry such burden? We think not. There was no evidence that there was any defect in the slats, or that the spaces between them were any larger than in cars of this character of standard make, or those ordinarily used for the transportation of live stock; and, even had it been otherwise, it is evident that the plaintiff could easily have seen the size of the spaces between the slats. Moreover, the defendant was exempt from liability for loss or injury to the stock caused

Indianapolis St. Ry. Co. v. Wilson

by the nature and propensities of the animals, and had expressly contracted against loss occasioned by such causes. *Cooper v. Railroad Co.*, 110 Ga. 659, 36 S. E. 240, 18 Am. & Eng. R. Cas, N. S., 412. It would seem, from the height of the crack from the floor of the car, that the mule had gotten its foot caught therein from the inherent nature, vice, or propensity of the animal. It follows that the court did not err in granting a nonsuit.

Judgment affirmed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

INDIANAPOLIS ST. RY. CO. v. WILSON.

(*Supreme Court of Indiana, March 19, 1903.*)

[66 N. E. Rep. 950.]

Defective Transfer Ticket—Mistake of Agent—Duty of Conductor.*

Where a passenger is aboard a street car without the proper transfer ticket, which is due to the mistake or fault of the conductor of the car from which he was transferred, and not to the fault of the passenger, the conductor in charge of the car must accept the reasonable explanations of the passenger in regard to the transfer in dispute.

Same—Same—Ejection.

In an action against a street railway company for the forcible expulsion of a passenger from one of its cars because of defects in transfer ticket, evidence considered, and *held* to show that the expulsion was unjustifiable.

Gillett and Monks, JJ., dissenting.

Appeal from Circuit Court, Johnson County; W. J. Buckingham, Judge.

Action by Samuel J. Wilson against the Indianapolis Street Railway Company. From a judgment for plaintiff, defendant appeals. Transferred from the Appellate Court under Burns' Rev. St. 1901, § 1377u. Affirmed.

Chambers, Pickens & Morres, F. Winter, and W. H. Latta, for appellant.

Wm. A. Johnson and Wymond J. Beckett, for appellee.

JORDAN, J. Action by appellee against appellant to recover damages for an unlawful expulsion from one of its street cars. A trial by jury resulted in appellee being awarded damages, and, over appellant's motion for a new trial, judgment was rendered on the verdict of the jury. From this judgment appellant appeals, and the sole question involved is, can the expulsion of appellee by appellant from its car, under the circumstances, be legally justified.

The following are facts material to the point in issue: Appellant is a corporation engaged as a common carrier in operating a street railway in the city of Indianapolis. By

*See foot-note appended to *McGhee v. Reynolds* (Ala.), 10 Am. & Eng. R. Cas., N. S., 49.

Indianapolis St. Ry. Co. v. Wilson

the provisions and terms of the franchise granted to it by said city, and under which it is operating its railroad therein, a passenger, on the payment of the required fare, is entitled to demand and receive, without extra charge, from the conductor of the car upon which he first takes passage, a transfer ticket, which entitles him to be carried as a passenger over the line to which he is transferred. Appellant's grant or franchise, which it obtained from the city of Indianapolis, under its terms and conditions not only imposes upon it the duty of granting to the passenger the privilege of transfer upon his request, but provides particularly that the line to which the passenger is transferred "shall be plainly indicated on said transfer ticket." It is shown that appellee on the evening of September 23, 1899, took passage upon one of appellant's cars running on and over its College avenue line, and upon paying his fare he requested the conductor in charge of said car to give him a transfer ticket to the Virginia avenue line, his destination being a point on the latter line. Upon his taking passage on one of the cars running on and over the Virginia avenue line the conductor in charge of said car demanded fare of appellee, and the latter tendered to said conductor the transfer ticket which he had received from the College avenue conductor. Upon the tender of this ticket it appears that a controversy arose between appellee and the conductor on the Virginia avenue car in regard to said ticket, the conductor claiming that the ticket was a South East street transfer instead of Virginia avenue transfer, and demanded that appellee pay his fare or leave the car. He explained to the conductor that he had requested the College avenue conductor to give him a transfer ticket to the Virginia avenue line, and had received the ticket which he then tendered. The following is what appellee testified to as a witness upon the trial in respect to what took place between him and the conductor after he took passage on the Virginia avenue car: "The conductor asked me for my fare, and I handed him this transfer ticket, and he said it was not a Virginia avenue transfer, I said I got it from the College avenue conductor for a Virginia avenue, and I believe it is a Virginia avenue, and I examined it very closely, and I could hardly distinguish it then. That was the first time I examined it very closely. I told him I received it from the College avenue conductor, and asked the College avenue conductor for a Virginia avenue transfer, and that is what he gave me for a Virginia avenue transfer. He said it was a South East street transfer, and I thought it was a Virginia avenue transfer." It appears it was dark when the appellee boarded the College avenue car, but the latter was illuminated with electric lights, and he is shown to have been on the car for about 10 minutes before he alighted therefrom to take passage on the transfer line. The transfer ticket was of the usual form used by the company, and contained spaces

Indianapolis St. Ry. Co. v. Wilson

or points where the conductor was to punch in order to indicate the line to which the passenger was to be transferred. Immediately at the left of the word "Virginia" was the word "Avenue." The last five letters of the word "Virginia" ran through the dark space in which the conductor was to punch to indicate that the passenger had been transferred to the Virginia avenue line. Immediately below this space was one intended to be punched in the event the passenger was transferred to South East street, a line dividing the two spaces. In punching the transfer ticket in question it appears that the College avenue conductor had awkwardly used the punch, and, instead of plainly indicating that appellee had been transferred to the Virginia avenue line, he punched out what might be said to be the entire space opposite South East street, and also a part of the Virginia avenue space, the puncture made extending across the line dividing the two spaces, and this, as it seems, gave rise to the controversy between the appellee and the conductor of the Virginia avenue line; the latter insisting that the ticket indicated that the former had been transferred to the South East street line, while appellee, on the other hand, insisted that he had requested a transfer to the Virginia avenue line, and stated that he believed the ticket indicated such transfer. Upon appellee's refusal to pay the additional fare which the conductor on the Virginia avenue line demanded, he was forcibly ejected from the car by the conductor and motor-man.

Appellee, as the facts show, became a passenger upon one of appellant's street cars, and paid the required fare, and thereupon requested, as he had a right to do, to be furnished a transfer ticket over the Virginia avenue line of appellant's road, in order that he might be carried to the end of his journey. Upon the payment of his fare and making the request which he did, the duty then rested upon appellant, under the provisions and conditions of the franchise which it had obtained from the city of Indianapolis, to furnish or provide appellee, as such passenger, with a transfer ticket plainly indicating thereby the line of its railway to which he, in accordance with his request, had been transferred, and over which, under the circumstances, he had the right to be carried. It is possibly true, as counsel for appellant seemingly insist, that appellee had ample time and opportunity to inspect his transfer ticket, and thereby ascertain whether the conductor of the College avenue car had properly performed his duty by correctly indicating the line of transfer. The duty of inspection, under the circumstances, the law did not exact of him, for, in the absence of any notice to the contrary, he had the right to presume that appellant's conductor and agent had correctly discharged his duty in punching the ticket, and thereby indicating the transfer over the line in accordance with his request. Appellee had nothing to do with the prep-

Indianapolis St. Ry. Co. *v.* Wilson

aration of the ticket, for appellant seems to have prescribed the form and contents thereof, and also the method or means to be employed to indicate or point out thereon the line of its railway over which a transferee was entitled to be carried. The many words, figures, spaces, and abbreviations which the ticket furnished by appellant to appellee, as exhibited by the record, contained, would *prima facie* be unintelligible to many persons, and certainly it would be an unreasonable imposition to require of a passenger, upon receiving one of these tickets, the duty to inspect the same in order to discover if the conductor had made a mistake in the performance of his duty. Appellee, a mere passenger, under the circumstances, was not, in the eye of the law, either presumed or bound to know the meaning of the various figures, abbreviations, punch marks, and other mystic symbols which the transfer ticket in question contained. These possibly could only be correctly interpreted or read in the light of the rules and regulations adopted by appellant company for the guidance of its conductors and employees. Neither was he presumed to know or required to take notice of these rules and regulations made by appellant for the aforesaid purposes. The above propositions are well and firmly established by the authorities. It may be said, it is true, that there is a sharp conflict between the authorities in respect to the question as to whether a ticket furnished by a common carrier for transportation shall be treated and regarded as conclusive evidence of the holder's right of passage. There is a line of decisions which affirm the rule that the ticket must be considered as conclusive evidence of the passenger's rights, although it may not, in its true sense, express or evidence the contract into which the passenger and the carrier entered. These cases hold that, in the event a ticket is defective, the defects of which are due to the negligence or carelessness of the agent or agents of the carrier, then, under the circumstances, the expulsion of the holder thereof, upon his refusal to pay the additional fare required, is justified. While, on the other hand, there is another long line of cases which rule to the contrary, and deny the conclusive force of a ticket furnished by the carrier to the passenger. The latter cases, in effect, affirm that the ticket is only the evidence of the contract as made between the passenger and the carrier, and, if it fails to disclose the true contract, its infirmity or fault in this respect must be charged to the carrier, and the latter is liable for the natural consequences resulting by reason of the defects in the ticket due to the negligence of its agents. They affirm the rule that, inasmuch as the passenger is neither required under the law, nor in fact permitted, to print, write, or stamp the ticket, or to have anything to do whatever with its preparation, this privilege or right being reserved by the carrier to itself, therefore the passenger has the right to believe or presume, in the absence of notice to the contrary,

Indianapolis St. Ry. Co. v. Wilson

that the ticket furnished and delivered to him is a correct expression of the contract as made between him and the carrier. The following line of authorities or cases decided by the higher courts of other states are adverse to the contention of counsel for appellant in the case at bar. Many of them directly, and others, in effect, indirectly, deny the conclusive force of a railroad ticket sold by the carrier to a passenger. *Trice v. Chesapeake, etc., R. Co.*, 40 W. Va. 271, 21 S. E. 1022; *Northern Pac. R. Co. v. Pauson*, 17 C. C. A. 287, 70 Fed. 585, 30 L. R. A. 730; *Ray v. Cortland, etc., Traction Co. (Sup.)* 46 N. Y. Supp. 521; *Jenkins v. Brooklyn, etc., R. Co. (Sup.)* 51 N. Y. Supp. 216; *Eddy v. Syracuse, etc., R. Co. (Sup.)* 63 N. Y. Supp. 645; *New York, etc., R. Co. v. Winter's Adm'r*, 143 U. S. 60, 12 Sup. Ct. 356, 36 L. Ed. 71; *Murdock v. Boston, etc., R. Co.*, 137 Mass. 293, 21 Am. & Eng. R. Cas. 268, 50 Am. Rep. 307; *Gulf, etc., R. Co. v. Rather*, 3 Tex. Civ. App. 72, 21 S. W. 951; *Gulf, etc., R. Co. v. Copeland*, 17 Tex. Civ. App. 55, 42 S. W. 239; *Texas, etc., R. Co. v. Dennis*, 4 Tex. Civ. App. 90, 23 S. W. 400; *St. Louis, etc., R. Co. v. Mackie*, 71 Tex. 491, 9 S. W. 451, 37 Am. & Eng. R. Cas. 94, 1 L. R. A. 667, 10 Am. St. Rep. 766; *Missouri, etc., R. Co. v. Martino*, 2 Tex. Civ. App. 634, 18 S. W. 1066, 21 S. W. 781; *Burnham v. Grand Trunk, etc., R. Co.*, 63 Me. 298, 18 Am. Rep. 220; *Ellsworth v. Chicago, etc., R. Co.*, 95 Iowa, 98, 63 N. W. 584, 2 Am. & Eng. R. Cas. 80, 29 L. R. A. 173; *Yorton v. Milwaukee, etc., R. Co.*, 62 Wis. 367, 21 N. W. 516, 23 N. W. 401, 18 Am. & Eng. R. Cas. 332; *Philadelphia, etc., R. Co. v. Rice*, 64 Md. 63, 21 Atl. 97; *Appleby v. St. Paul City R. Co.*, 54 Minn. 169, 55 N. W. 1117, 40 Am. St. Rep. 308; *Laird v. Pittsburg Traction Co.*, 166 Pa. 4, 31 Atl. 51, 2 Am. & Eng. R. Cas., N. S., 161; *Hot Springs R. Co. v. Deloney*, 65 Ark. 177, 45 S. W. 351, 67 Am. St. Rep. 913; *Head v. Georgia, etc., R. Co.*, 79 Ga. 358, 7 S. E. 217, 11 Am. St. Rep. 434; *Georgia, etc., R. Co. v. Olds*, 77 Ga. 673; *Hufford v. Grand Rapids & I. R. Co.*, 64 Mich. 634, 31 N. W. 544, 8 Am. St. Rep. 859; *Georgia, etc., R. Co. v. Dougherty*, 86 Ga. 744, 12 S. E. 747, 22 Am. St. Rep. 499; *Kansas City, etc., R. Co. v. Riley*, 68 Miss. 768, 9 South. 443, 47 Am. & Eng. R. Cas. 476, 13 L. R. A. 38, 24 Am. St. Rep. 309; *Lawshe v. Tacoma R. Co. (Wash.)* 70 Pac. 118; *O'Rourke v. Citizens' St. R. Co.*, 103 Tenn. 124, 52 S. W. 872, 46 L. R. A. 614, 76 Am. St. Rep. 639; *Wood on Railroads*, 3d vol., § 349; 25 Am. & Eng. Ency. of Law, pp. 1075, 1076. The following decisions of our own courts are in harmony with and support the doctrine affirmed by the decisions in the foregoing cases; *Pittsburg, etc., R. Co. v. Hennigh*, 39 Ind. 509; *Toledo, etc., R. Co. v. McDonnough*, 53 Ind. 289; *Lake Erie, etc., R. Co. v. Fix*, 88 Ind. 381, 45 Am. Rep. 464, 11 Am. & Eng. R. Cas. 109; *Pennsylvania Co. v. Bray*, 125 Ind. 229, 25 N. E. 439; *Louisville, etc., R. Co. v. Conrad*, 4 Ind. App. 83, 30 N. E. 406; *Chicago, etc., R. Co. v. Graham*, 3 Ind. App. 28, 29

Indianapolis St. Ry. Co. v. Wilson

N. E. 170, 50 Am. St. Rep. 256; Cleveland, etc., R. Co. v. Beckett, 11 Ind. App. 547, 39 N. E. 429; Evansville, etc., R. Co. v. Cates, 14 Ind. App. 172, 41 N. E. 712; Cleveland, etc., R. Co. v. Kinsley, 27 Ind. App. 135, 60 N. E. 169, 87 Am. St. Rep. 245.

The extent to which these cases support the doctrine in question and sustain appellee's right to a recovery in this case is that, where the passenger is aboard the cars of the carrier without the proper evidence or token of his right of passage, which is due to the mistake or fault of the carrier's agent, and not to the fault of the passenger, then, under such circumstances, the carrier's agent in charge of the train must heed or accept the reasonable explanations of the passenger in regard to the ticket in dispute. An examination of the cases pro and con upon the question herein involved convinces us that the weight of authority and the better reason are against the contention of counsel for appellant, and that the right of the appellee to recover under the facts in this appeal is well supported by the decisions of our own, as well as other courts.

We deem it useful to specially refer to some of the many decisions herein above cited, several of which are virtually identical with the case before us for consideration. In the appeal of the Pennsylvania Co. v. Bray, 125 Ind. 229, 25 N. E. 439, it appears that the passenger presented to the conductor of the railroad company a going coupon of a round-trip ticket from Mooresville to Indianapolis as his fare from Indianapolis to Mooresville. This coupon the conductor refused to receive upon the ground that it was the wrong coupon. It is disclosed that this was the first knowledge that the passenger had that the coupon which he presented was the going instead of the returning part of the ticket, and he explained to the conductor that he had purchased the ticket a few days previous from the company, and had presented it to a conductor in charge of one of the company's trains going from Mooresville to Indianapolis, and the conductor took up the returning coupon, and gave him back the going coupon. This statement or explanation upon the part of the passenger the conductor refused to accept or heed, but demanded fare, and upon refusal to pay the same he ejected the passenger from the car. This court held that the expulsion, under the circumstances, was wrongful, and that the passenger was entitled to recover damages therefor.

In the appeal of Lawshe v. Tacoma Railway Co., 70 Pac. 118, recently decided by the Supreme Court of Washington, the facts are virtually identical with those in the case at bar. It is disclosed that the railway company in that case was a common carrier, engaged in operating a street car line in the city of Tacoma, and issued transfer tickets to passengers, good for passage over the various connecting lines operated by the said company. The plaintiff in that case became a

Indianapolis St. Ry. Co. v. Wilson

passenger on the street car running over the Pacific avenue line, and requested a transfer to the I street line. By mistake it appears the conductor gave him a transfer ticket to a line other than the I street line. Not observing the mistake, the plaintiff took passage on a car running over the I street line, and presented the ticket to the conductor in charge thereof, who refused to accept it, and demanded fare, which the plaintiff declined to pay, and consequently he was ejected from the car. The court held, under the facts, that his expulsion was wrongful, for which he was entitled to a recovery. In the course of the opinion the court said: "It seems to us that, in accordance with the general principles of law, the appellant should recover. It is too plain for argument that only the right to sue for the recovery of the fare or a portion of the fare received by the company will be totally inadequate, and, through the plain, everyday law governing agency, the company is responsible for the acts of its agent and for his mistakes. This mistake it was the duty of the company to correct. It must necessarily correct it through its agents. It makes no difference, in reason, that the agent who was called upon to correct the mistake was another and different agent from the one who made the mistake. They were both agents of the company, and the act of the first conductor was, in effect, the act of the second conductor, because the acts of both were the acts of the company; the company having, for its own convenience, intrusted its business to two agents instead of one. The contract was made when the passenger paid the fare, and it was a contract not with any particular agent of the company, but with the company through its agents. The first conductor, who made the mistake, was not the agent of the passenger, but was the agent of the company, and his mistake was, therefore, the mistake of the company. If any other rule prevailed, the result would be that the company would be allowed to deprive the passenger of part of the benefit of his contract on account of the mistake made by the company, and for which he was in no wise to blame, for he had a right to assume that the conductor furnished him with the transportation for which he asked and for which he paid."

In the case of *O'Rourke v. Citizens' Street Ry. Co.*, supra, the plaintiff, with his wife and three children, took passage on a Beale and Lane avenue street car of the defendant's road in the city of Memphis. Upon paying the proper fares, he requested to be furnished by the conductor in charge of the car with the requisite number of transfer tickets to a north-bound Main street car of the same company. The conductor punched the tickets in such a manner as to indicate that the time of their issue was 1:40 p. m., when in fact they were issued nearly an hour later, and were fully within the time limit. The conductor in charge of the transfer car, over the plaintiff's explanation showing that the first conductor, in

Indianapolis St. Ry. Co. v. Wilson

punching the tickets, must have made a mistake in the time, refused to accept them, claiming that under the rules of the company the time limit of the tickets had expired, and, the plaintiff refusing to pay additional fare, he and his family were expelled from the car. The Supreme Court in that case on appeal held that the expulsion was wrongful and the plaintiff was entitled to recover damages therefor. In speaking in respect to the rules of law governing the case, the court said: "The ticket, whether for transfer, as in the present case, or for original passage, may well be called the carrier's written direction by one agent to another agent concerning the particular transportation in hand; and, if the direction be contrary to the contract, and expulsion follow as a consequence, the carrier must be answerable for all proximate damages ensuing therefrom, just as any other principal is liable for the injurious result of misdirection to his agent. * * * The plaintiff had a right to believe the transfer ticket all that it should be. With it he diligently sought and promptly entered the first transfer car, and, upon being challenged by the conductor of that car as too late to use the ticket, he made a fair and reasonable statement, showing that he had just left the car, and that the first conductor must have wrongly indicated the hour of issuance on the face of the ticket. On that statement the plaintiff should have been allowed to pursue his journey to its end. He owed the company no other duty, and his expulsion under such circumstances was a tortious breach of the contract, for which he became entitled to recover all approximately resulting damages, including those for humiliation and mortification, if such were in fact sustained."

In the case of *Laird v. The Pittsburg Traction Co.*, 166 Pa. 4, 31 Atl. 51, 2 Am. & Eng. R. Cas. 161, a conductor of the defendant's car issued a transfer ticket to the plaintiff. This ticket contained two punch marks in respect to the time of its issue. One indicated 7:30 a. m. and the other 9 a. m. The conductor on the transfer car refused to accept it upon the ground that it was two hours old, and not within the time limit as provided by the rules of the company. The plaintiff explained to him that the ticket had been in fact issued at 9 a. m., just before he took passage on the transfer car. On his refusal to pay the fare demanded he was ejected from the car. The court in that appeal held that the company was liable for the wrongful expulsion of the plaintiff, for the reason that it was responsible for the defective or doubtful character of the transfer ticket.

In the case of *Hufford v. The Grand Rapids, etc., Ry. Co.*, 64 Mich. 634, 31 N. W. 544, 8 Am. St. Rep. 859, the agent of the railroad company sold and delivered to the plaintiff as a good ticket one which had been canceled. The conductor declined to receive it, and the plaintiff, in order to prevent his expulsion from the car, paid the fare which the conductor exacted. He instituted an action for damages, and the

Indianapolis St. Ry. Co. v. Wilson

Supreme Court of Michigan, in the appeal cited, sustained his right to recover. The case appears to have been twice appealed to the Supreme Court, the first decision being reported in 53 Mich. 118, 18 N. W. 580, entitled "Hufford v. The Grand Rapids, etc. Ry. Co.," and the decision in that appeal is cited by counsel for appellant in the case at bar in support of their contention. It is true that the court in the first appeal affirmed that, as between the passenger and the conductor, the ticket must be regarded as the conclusive evidence of the extent of the passenger's right to travel, but in the second appeal—64 Mich. 634, 31 N. W. 544, 8 Am. St. Rep. 859—the court seems to have modified its holding in the first appeal, saying: "When the plaintiff told the conductor on the train that he had paid his fare, and stated the amount he had paid to the agent who gave him the ticket he presented, and told him it was good, it was the duty of the conductor to accept the statement of the plaintiff until he found out it was not true, no matter what the ticket contained in words, figures, or other marks."

In Ellsworth v. The Chicago, etc., R. Co., 95 Iowa, 98, 63 N. W. 584, 2 Am. & Eng. R. Cas. 80, 29 L. R. A. 173, the ticket agent of the defendant sold the plaintiff a ticket, which, by mistake of the agent, was antedated three days from the time of its purchase. The plaintiff presented it for passage on the day it was actually issued, but the conductor in charge of the train refused to accept it because on its face it disclosed that the time for using it had expired. The plaintiff refused to pay the fare, and was ejected. The court, under the facts, held that the railroad company was liable for damages by reason of the unlawful expulsion of the plaintiff.

In Evansville, etc., R. Co. v. Cates, 14 Ind. App. 172, 41 N. E. 712, the passenger requested of the railroad company's agent at Evansville, a ticket from the latter city to the city of Terre Haute, and paid therefor the regular price of the fare. By mistake the agent furnished and delivered to the passenger a ticket good only from Evansville to Vincennes, a station on the carrier's road between Evansville and Terre Haute. The passenger, without any fault on his part, believing the ticket so furnished and delivered to him by the agent under his request was in compliance therewith, took passage on a train running from Evansville to Terre Haute, and surrendered the ticket in question to the conductor in charge of the train. After the train had passed beyond Vincennes, the conductor demanded of him additional fare on the ground that the ticket which he had surrendered was only good from Evansville to Vincennes. The passenger explained the situation in regard to the ticket to the conductor, informing him that the ticket which he had surrendered to him was one good from Evansville to Terre Haute, which he had purchased and paid for, and that he had no money with which to pay additional or extra fare, as the conductor demanded. The conductor re-

Indianapolis St. Ry. Co. v. Wilson

fused to heed or accept his explanation, and, upon the failure of the passenger to pay the fare demanded, he was ejected. It was held in that case, under the circumstances, that he was entitled to recover damages for the wrongful expulsion. In answering the contention of appellant in that appeal that it is impracticable for a conductor to investigate the explanations or statements of a passenger in regard to his ticket for the reason that while so doing, the passenger may reach his destination, and depart from the train, and that the company cannot pursue him without inconvenience and expense, the court said: "This is not much more impracticable than for a passenger to pay a second time who has no more money; nor is it, perhaps, much more inconvenient for the company to pursue the passenger for his fare than for the passenger to go to the expense and trouble of convincing the company that its official has made a mistake, and compelling the return of the money improperly exacted. As a rule, the amount involved and the expense and trouble required would be widely disproportionate."

In 3 Wood on Railroads, 1894, § 349, the author says: "Where the passenger asks and pays for a certain ticket, and the station agent by mistake gives him a different one, which does not entitle him to the passage desired, the conductor has no right to expel him, and the company is liable in damages if he is expelled. The passenger has a right to rely on the agent to give him the right ticket. There are authorities which hold the other way, but it seems that their views are indefensible."

In 25 Am. & Eng. Ency. of Law, p. 1076, the authors of this work, after stating that some of the authorities assert that a railroad conductor cannot be expected to listen to the passenger's explanation in regard to the ticket in dispute; that the passenger should either pay the fare demanded by the conductor or leave the train, and then sue the company for a breach of contract; otherwise, if he attempts to remain on the train without paying the fare, and is expelled therefrom, he can recover no damages for the expulsion—say: "Others hold that the conductor has no right to expel the passenger, and, if he does so, the company is liable for damages therefor. The latter would seem to be the better doctrine. It certainly has the support of the more recent cases."

In Hot Springs, etc., R. Co. v. Deloney, 65 Ark. 177, 45 S. W. 351, 67 Am. St. Rep. 913, the passenger presented to the conductor of the defendant's train a ticket which he had purchased for passage to a certain point on the railroad. This ticket, by mistake or fault of the ticket agent, had not been properly made out so as to show that the passenger was entitled to passage to the place to which he had paid his fare. On his refusal to pay the additional fare demanded, he was ejected. It was held in that case that the expulsion was

Indianapolis St. Ry. Co. v. Wilson

wrongful, and the company liable therefor in damages. The appellant in that appeal insisted that the conductor could only rely upon the face of the ticket to determine his duty in the premises, and was not required to heed the explanations of the passenger to the effect that the ticket agent had made a mistake in issuing the ticket. This contention was opposed by counsel for appellee. The court, after reviewing the authorities pro and con, said: "There is this much to be said, however, and that is that the tendency of more recent decisions is towards at least a conservative view of the principle contended for by appellee's counsel; and we adopt that in this case, to wit, that, notwithstanding the conductor has only carried out the company's rules and regulations, and these are reasonable, and he therefore may be exonerated from the blame personally, yet as the company, through its ticket agent, acting for it, was guilty of doing that which produced all the injury the plaintiff may have suffered from being put off the train, it is liable for such, and cannot shield itself behind the faithfulness of its servant the conductor for its negligence in not delivering a proper ticket to the plaintiff, and has not only injured the plaintiff—if, indeed, he was injured—but placed the conductor in the attitude of participating in the wrongdoing, while yet performing his duty personally, while, of course, ignorant of the wrong done to the plaintiff, if any was done."

Ordinarily, as the authorities affirm, a railroad ticket for passage is regarded as a mere token, voucher, or receipt adopted by the carrier for its convenience to show that the passenger to whom it has been issued or sold has paid the required fare for his right to be carried from one point on the railroad to another. It is merely evidence of such right, and cannot be said, in its ordinary form, as such a token or voucher, to constitute the sole contract for passage between the carrier and the passenger. But where a railroad ticket, in addition to the ordinary and usual form, contains some reasonable stipulation, limitation, or condition to which the purchaser has assented, then it may be said as to such stipulation, limitation, or condition it constitutes a binding contract between the parties. 25 Am. & Eng. Ency. of Law, pp. 1074, 1075, and authorities there cited; 3 Elliott on Railroads, § 1593. There can be no sound reason advanced for holding that such a voucher or token, as is a passage ticket in its ordinary form, must be regarded or considered as the exclusive evidence of the passenger's right to be carried, and that the agent of the carrier may, over the reasonable explanations or statements of the passenger in regard to his right to be carried thereon, expel him from the car on which he has taken passage, unless he pays the extra fare demanded, without subjecting the carrier to damages by reason of such expulsion, where the latter, under the circumstances, as between the passenger and the carrier company, is shown to have been wrongful.

Farmers' Loan & Trust Co. v. Northern Pac. R. Co

When the case at bar, under the facts, is tested by the principles affirmed by the authorities to which we have referred, the conclusion which we reach will be found to be amply sustained upon cogent and sound reason. The fact that the wrong of which appellee complains may be said to be due to the combined faults of two of appellant's conductors or agents exerts no material influence over his right to recover, for, under the circumstances, appellant must be presumed to have been present and acting at the time through the agency of the conductor who issued the transfer ticket, and through the agency of the other, who, over the explanations of appellee in regard to the issue of the ticket, refused to accept it, and thereupon expelled him from the car upon which, as shown, he was entitled to be carried. The mistake which the first conductor made in failing to plainly point out or indicate upon the transfer ticket the line to which appellee had requested to be transferred in the eye of the law, must be considered as the mistake or fault of the appellant. And the latter must be treated or regarded as a wrongdoer in not honoring the ticket when it was presented by appellee to the second conductor, and in expelling him from the car, over his explanation in respect to the issue of the ticket. These explanations it should have accepted as true until the contrary was shown. It was certainly as much the duty of the appellant to correct the mistake which it had made in punching the ticket in the first instance when the opportunity to do so was presented to it through the agency of the second conductor, as would have been its duty to have rectified the same had the attention of the first conductor been called to the mistake by appellee before he left the College avenue car. Consequently there is no force or merit in the contention that he should have examined the transfer ticket which he received before leaving the car, and have presented it to the conductor who issued it, in order that the mistake made by him in punching the ticket might be corrected.

We have given the propositions presented in this appeal a patient consideration. All of them lead up to the single question, can the expulsion of appellee, under the circumstances in this case, be justified? As previously indicated, we are constrained to answer this question in the negative.

Judgment affirmed.

HADLEY, C. J., concurs with JORDAN, J. DOWLING, J., concurs in the result. _____

FARMERS' LOAN & TRUST CO. v. NORTHERN PAC. R. CO. et al.
(AMERICAN TRADING CO., Intervener).

(Circuit Court of Appeals, Second Circuit, January 15, 1903.)

[120 Fed. Rep. 873.]

Railroad Receivers—Powers—Contract for Transportation over Connecting Lines.

Receivers, authorized by order of court to continue the business of a railroad company, are clothed with substantially the same powers with

Farmers' Loan & Trust Co. v. Northern Pac. R. Co

respect to such business, and are subject to substantially the same liabilities as such receivers, as those applicable to the company; and in the exercise of such powers they may contract for transportation beyond the line of their road and assume liability for the entire distance over connecting lines.

Same—General Freight Agent—Power to Bind Receivers.

The general Eastern freight agent of a Western railroad being operated by receivers, having his office in New York, has apparent power, by virtue of his position, to contract for the through carriage of goods over his line of road and a connecting steamship line across the Pacific, and a contract so made by him, when clear in its terms, will bind the receivers, when the shipper has no notice of any limitation on his authority, and no knowledge that the steamship line is not owned by the railroad company and operated by the receivers.

Carriers—Contract of Affreightment—Effect of Bill of Lading.*

The mere receipt of a bill of lading does not alter or affect a prior contract, under which goods have been actually shipped and are in course of transit, without an actual consent to the change.

Same.

The fact that a shipper, after receiving a bill of lading, negotiates the same, is not a ratification or adoption of its terms, as between him and the carrier, which will operate to annul a prior valid contract under which the goods were shipped, and under which rights have vested and obligations have accrued.

Same—Through Shipment—Liability for Delay in Forwarding.

A railroad company, whose road was being operated by receivers, had a contract with a connecting steamship company, by which a close traffic arrangement was established between them for through shipments to Japan, the steamship company being required to supply ships to meet the demands of the joint business. The receivers, through their general freight agent in New York, made a contract for a through shipment of lead from there to Japan, to be sent by a ship leaving Tacoma on a certain date. After the shipper had contracted for the sale and delivery of the lead, in reliance on such agreement the freight agent attempted to annul the same, on the ground that the lead might be contraband of war, but, being notified that the receivers would be held liable for damages, they authorized him to reinstate the agreement, and the lead was shipped thereunder to Tacoma, and loaded on the vessel. On the day for sailing the deputy collector refused to clear the ship, on the ground that the lead was contraband of war. The ruling was reversed the following day, and before the vessel sailed, but in the meantime the lead had been unloaded and was left. It was shipped on a later vessel, but the purchaser then refused to accept it, and it was sold at a loss: *held*, that it was incumbent on the receivers at least to use all reasonable means to prevent the delay from a risk which they had foreseen and assumed, and that, in the absence of proof that they made any effort to see that the vessel was cleared, they were liable for the resulting damages.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 112 Fed. 829.

F. B. Jennings, for appellant.

Edw. B. Hill, for appellees.

Before WALLACE, LACOMBE and TOWNSEND, Circuit Judges.

*As to whether consent of shipper is conclusively presumed from acceptance of bill of lading, see note appended to *Hengstler v. Flint & P. M. R. Co.* (Mich.), 20 Am. & Eng. R. Cas., N. S., 707.

TOWNSEND, Circuit Judge. This is an appeal from the decree of the United States Circuit Court for the Southern District of New York, dismissing the petition of the American Trading Company for the recovery of its claim against the receivers of the Northern Pacific Railroad Company. The decree under which the property of said corporation was sold provided that such sale should be subject to all obligations or liabilities contracted or incurred by said receivers, and that such claims might be enforced by such a petition in this court.

The case was tried to the court without a jury upon an agreed statement of facts, from which, *inter alia*, it appeared that at the time of the transactions in question the receivers of the Northern Pacific Railroad Company were carrying on the business of said road under authority of court; that the road in their possession extended from Duluth, Minn., to Tacoma, Wash.; that under contracts with various carriers they issued through bills of lading to and from points outside of their line, and that among such carriers was the Northern Pacific Steamship Company, an English company operating a line of steamers between Tacoma and points in Japan, including Yokohama; that the freight business of said railroad company over its railroad and outside connections in the eastern part of the United States was in charge of one George R. Fitch, the general Eastern agent of the receivers, at their office in the city of New York; that his only authority to act as agent of said steamship company was under a contract between the railroad company and the steamship company, but that he had been instructed by said receivers to solicit freight and to issue such bills of lading as the one herein involved, providing for through transportation by said railroad company and steamship company, and that he had no express general authority to make such contracts except as provided in said bills of lading, and no express authority to make the contract herein unless by virtue of certain telegrams to be hereinafter set forth; and that the petitioner herein did not know that the steamship company was a separate and independent company.

The material part of the agreed statement as to the transaction in question is as follows:

"(5) In September, 1894, the trading company applied to Fitch for a rate upon a proposed shipment of pig lead from New York to Yokohama, Japan, and informed him that it was of vital importance that the lead should be transported promptly and go forward by the earliest possible steamer without delay, in order to enable the trading company to fulfill a proposed agreement which it was about to make for the sale of the lead in Japan, and which would require its delivery there at a fixed date. Fitch thereupon named a rate, and undertook to forward the lead from New York on or before September 29th, and via the Northern Pacific steamer Tacoma, sailing from Tacoma October 30, 1894."

Farmers' Loan & Trust Co. v. Northern Pac. R. Co

The petitioner thereupon accepted Fitch's proposition, purchased said lead in bond, and closed said proposed agreement for the sale of said lead. Fitch subsequently wrote the petitioner, confirming contract for shipment, "to be forwarded from New York on or before Sept. 29th, in accordance with shipping instructions given by me, to be forwarded from Tacoma, Washington, via Northern Pacific steamer sailing from thence October 30th," which the petitioner accepted in a letter repeating the aforesaid terms, and it arranged for shipment in accordance with Fitch's request to "see that same are rushed through without delay to connect with our steamer at Tacoma." On September 24, 1894, Fitch informed the trading company that he declined to ship, upon the ground that it might be contraband of war, and thereupon, upon the same day, the trading company wrote him a letter stating that they would hold his company responsible for any loss from failure to fulfill the contract. Thereupon Fitch notified the general freight agent of the receivers, and received the following telegram in reply:

"September 25, 1894.

"G. R. Fitch, 319 Broadway, New York.

"Your wire this date to Mr. Hannaford: Dodwell, Carhill & Co., have consented to accept the lead already contracted. Do not contract for any more. Advise quick number of pounds contracted by you and say how it will be routed. Think we should receipt for lead subject to delay.

0-900

J. B. Baird. WDB."

Dodwell, Carhill & Co. represented the said steamship company.

Thereupon the refusal was withdrawn, and the shipment was made under said contract, the lead being in course of transportation on the afternoon of September 27th, and reached Tacoma in time for shipment as agreed on the steamer sailing October 30th. On September 28, 1894, petitioner gave Fitch its check for the freight, and Fitch subsequently delivered a bill of lading in the usual printed form, but upon which were stamped the words, "Subject to delay," to a clerk of the petitioner, who received it without any stated objection to its terms, and it was not read or examined by him or by any officer of the company, and was immediately hypothecated for moneys borrowed thereon. Said check was payable to the order of the Northern Pacific Railroad, was indorsed by Fitch, as general Eastern agent, and the proceeds were remitted to said receivers, and were divided and distributed under said contract with the steamship company. On September 29th, Fitch sent a copy of said bill of lading to the agent of said steamship with the following letter:

"September 29, 1894.

"Dodwell, Carhill & Co., Tacoma, Wash. .

"Gentlemen:

"I hand you herewith my B L 1507 covering shipment of

Farmers' Loan & Trust Co. v. Northern Pac. R. Co

pig lead for export to Amer. Trading Co., Yokohama, Japan. As I have previously advised you, I have made contract guaranteeing delivery of this shipment at Yokohama by our S. S. Tacoma sailing October 30th. Will you kindly see that this connection is made, without fail.

"Yours truly,

[Sgd.] Geo. R. Fitch,
"G. E. A."

At Tacoma the lead was delivered by the receivers to the Northern Pacific Steamship Company, and was loaded upon the Tacoma, the vessel of the steamship company which was to sail on October 30th; but about 4 o'clock of the afternoon of that day the deputy collector of the port refused to clear the vessel while the lead was on board, on the ground that it was contraband of war, and telegraphed to the collector of Port Townsend for instructions. On the following day the deputy collector at Tacoma received a telegram from the collector at Port Townsend, advising that the shipment be permitted. In the meantime the master of the vessel had unloaded the lead, which delayed the ship until 9 a. m. on the morning of October 31st, when he sailed without it. The petitioner was not notified of the delay in the transshipment of the lead until November 5, 1894. The lead went forward on a later vessel, but in consequence of the delay the purchaser refused to receive the shipment, and in consequence the petitioner was obliged to sell it in the open market, and thereby suffered a loss of \$26,704.02.

The petitioner contends that the original contract for through transportation was within the scope of Fitch's authority as general eastern agent of the receivers under the order of court; that it was adopted and ratified by the receivers; and that the failure to perform was due to their negligence, and was not excused by the refusal of the deputy collector to clear the ship. Counsel for the receivers contend that there was no agreement that the receivers should assume responsibility except over their line of railway; that the receivers had no power to make such a contract; that if Fitch made any such contract it was for the steamship company, and not for the receivers; that he had no authority to make any contract on behalf of the receivers for the carriage of goods beyond Tacoma; that the original agreement was merged in the bill of lading; that failure to perform was excused by impossibility of performance.

The receivers, under the order of court, were authorized to continue the business of the railroad system of said company; that is, to conduct the business of a common carrier. And receivers, acting within the scope of their authority, are clothed with substantially the same powers, and are subject to substantially the same liabilities, as such receivers as those applicable to the corporation. *Farlow v. Kelly*, 108 U. S. 288, 2 Sup. Ct. 555, 27 L. Ed. 726, 11 Am. & Eng. R. Cas. 104; *Beers v. Wabash, St. L. & P. Ry. Co.* (C. C.) 34 Fed.

Farmers' Loan & Trust Co. v. Northern Pac. R. Co

244, 247, 35 Am. & Eng. R. Cas. 646; Elliott on Railroads, §§ 567, 576, and cases cited; Hutchinson on Carriers, § 67; Beach on Receivers, § 371; Central Trust Co. v. N. Y. C. & H. R. R. Co., 110 N. Y. 250, 257, 18 N. E. 92, 1 L. R. A. 260, 35 Am. & Eng. R. Cas. 9; Little, Recr., v. Dusenberry, Adm., 46 N. J. Law, 614, 50 Am. Rep. 445; Wall v. Platt, 169 Mass. 398, 400, 48 N. E. 270. A carrier may contract for transportation beyond its own route and assume liability for the entire distance over connecting lines to the same extent as over its own line. *R. R. v. Pratt*, 22 Wall. 123, 22 L. Ed. 827; *R. R. v. McCarthy*, 96 U. S. 258, 24 L. Ed. 693. No reason is apparent why receivers have not the same power, and the authorities so far as cited are to that effect. *Kansas Pacific Ry. Co. v. Bayles*, 19 Colo. 348, 35 Pac. 744; Elliott on Railways, *supra*.

Under the order of court authorizing them to conduct the business of common carriers, it was their right to so manage the property as would in their judgment secure the best results, consistently with the proper discharge of their duties. Under this authority they could and did issue through bills of lading beyond their route, and by the steamers of the steamship company.

In *Myrick v. Michigan Central R. R. Co.*, 107 U. S. 102, 1 Sup. Ct. 425, 27 L. Ed. 325, the court says:

"Any one of the companies may agree that over the whole route its liability shall extend. In the absence of a special agreement to that effect, such liability will not attach, and the agreement will not be inferred from doubtful expressions of loose language, but only from clear and satisfactory evidence."

If Fitch had the authority to make the agreement undertaken by him, its terms are sufficiently clear and certain to meet this rule. Fitch was the general eastern freight agent of the receivers. It has been held that it is within the power of a general freight agent to contract for the carrying of goods beyonds the limit of the carrier's line (*White v. M. P. R. Co.*, 19 Mo. App. 400; *Grover & Baker Sewing-Machine Co. v. Mo. Pacific R. R. Co.*, 70 Mo. 672, 35 Am. Rep. 444), and to stipulate for forwarding goods by a certain vessel and for carrying within a specified time (*Goddard v. Mallory*, 52 Barb. 87, 95; *Goodrich v. Thompson*, 44 N. Y. 324; *Strohn v. Detroit, etc., R. R.*, 23 Wis. 126, 99 Am. Dec. 114).

It is elemental that, as to third parties dealing with such a general agent, thus representing a corporation in the management of its business, and acting within the scope of his apparent authority, the principal is bound to the same extent as though it had directly conducted the business itself. *Isaacson v. N. Y. C. & H. R. R. Co.*, 94 N. Y. 278, 16 Am. & Eng. R. Cas. 188, 46 Am. Rep. 142; *Pechner v. Phoenix Insurance Co.*, 65 N. Y. 195. And so far as appeared from said course of dealing and from said bills, and so far as

Farmers' Loan & Trust Co. v. Northern Pac. R. Co

this petitioner knew or had reason to know, said steamers were owned and operated by said receivers. In any event the receivers, having first expressly authorized Fitch to accept a certain rate for this shipment to Yokohama, and having afterwards attempted to cancel said quotation, upon notice of the petitioner's refusal to ship, and of their claim under a written contract already given, without further inquiry as to the terms of said contract, except as to the number of pounds and route, authorized Fitch to accept the lead already contracted, and suggested to Fitch, but did not instruct him, that the receipt for lead should be subject to delay. That the receivers knew that the contract provided for shipment per steamship Tacoma on October 30th may, perhaps, be inferred from their telegram to Fitch on September 25th, asking for such information. Thus having all the knowledge of the facts which they desired, they authorized the shipment, and under said authority the "shipment was made under the contract," in bond. It sufficiently appears that the contract was made by Fitch on behalf of, and was ratified by, the receivers, and that it provided for shipping the goods by steamer sailing October 30th.

But counsel for the receivers claims that said written contract was merged in the bill of lading. That the mere receipt of a bill of lading does not affect or alter a prior contract under which goods have been actually shipped and are in course of transit without actual consent to such a change is well settled. *Missouri Pacific Railway Co. v. Beeson*, 30 Kan. 298, 2 Pac. 496, 12 Am. & Eng. R. Cas. 52; *Swift v. Pacific Mail Steamship Co.*, 106 N. Y. 206, 12 N. E. 583; *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318, 21 L. Ed. 297; *Gaines v. Union Transp. & Ins. Co.*, 28 Ohio St. 418. In *Bostwick v. B. & O., etc.*, 45 N. Y. 712, goods were shipped under the same conditions as herein shown, namely, a through freight contract by an agent beyond the route of the defendant railroad, and with a later receipt of bills of lading. A loss having occurred, defendant claimed exemption under the conditions of bills of lading. But the court said: "The rule that prior negotiations are merged in a subsequent written contract does not apply to such a case as this." Before the issuance of the bill of lading the petitioner, relying upon said prior contract, had made its engagement to deliver at Yokohama at a fixed date, had bought the lead, paid the through freight, and had surrendered possession and control of it. The shipment was made in bond for exportation at Tacoma, and was secured upon the cars by government locks and "customs seals." Receivers could not oblige it to consent to a change in the contract.

But counsel for the receivers contends that the subsequent negotiation by petitioner of said bill conclusively shows that the petitioner adopted it and assented to all of its terms. In support of this proposition he cites *Rubens v. Ludgate Hill*

Farmers' Loan & Trust Co. v. Northern Pac. R. Co

Steamship Company (Sup.) 20 N. Y. Supp. 481, and *The Henry B. Hyde* (D. C.) 82 Fed. 681. But in neither of said cases was there any agreement with the shipper prior to the receipt of the bill of lading. In *The Henry B. Hyde* the court expressly says that it is the acceptance of the bill of lading "at the time of the delivery of the goods for shipment" which binds the shipper. The decisive answer to this contention of counsel for receivers is that such acquiescence in or adoption of said bill of lading by petitioner only affects the rights and obligations toward the parties with whom said bill was negotiated. As to them the petitioner is estopped to deny the conditions of the bill, upon the familiar principle that one who has thus negotiated such an instrument thereby ratifies its terms and conditions. But we know of no rule by which such ratification can be extended to or taken advantage of by a carrier, in order to annul a prior valid contract under which rights have vested and obligations have accrued. This can only be done by the consent of both parties. As to the carrier the transaction is *res inter alios acta*.

Counsel for the receivers contend, and the court below held, that, the shipment having become impossible temporarily through the act of the deputy collector, the receivers were not bound to provide for a clearance of the vessel, and that, therefore, they are not liable for the delay. We cannot assent to this proposition, in view of the situation of the parties as shown by the submission on facts. The traffic agreement between the Northern Pacific Railroad Company and the Northern Pacific Steamship Company shows that said steamship company was expressly organized in order to establish a close alliance with said Northern Pacific Railroad Company to control freight traffic between the United States and Japan; that the steamship company was bound to supply steamships according to the exigencies of Northern Pacific traffic; and that the steamship company and railroad company were to conjointly arrange for the receipt of goods at Tacoma and assumption of liability thereon. Before this contract was made, Fitch had expressed some doubt as to whether, in view of the existing war between China and Japan, such shipment would be permitted. After the contract was made he had attempted to withdraw therefrom, but upon being notified that petitioner would hold the receivers liable for resulting damages, they secured from the steamship company a contract to accept the lead, and authorized him to carry out the contract. In these circumstances it was incumbent upon the receivers at least to show that they used all reasonable means to guard against damage resulting from delay by reason of the very risks foreseen and assumed by them. There is nothing in the stipulated facts to show that they took any precautions or exercised any care in advance, other than Fitch's letter of September 29th to the agent of the steamship company, or that, when the contemplated exigency arose, they made any

Macon, D. & S. R. Co. v. Graham & Ward

effort to meet it. They assumed the obligation with knowledge of the risks incident to its discharge and the damages likely to result from delay; they reaffirmed it with knowledge that if they did not choose to assume said risks the petitioner would ship by another route and charge the difference in rates; they failed to guard against the happening of said risks, and it does not appear that, after the actual interference with the shipment from Tacoma, they made any attempt to prevent the unloading of the lead for the brief time necessary to obtain instructions from the collector, or to arrange to have it reloaded in case of a favorable report, or to secure any delay in the sailing of the vessel, and they negligently failed to notify the petitioner of the delay for six days thereafter.

The fact stated in the agreed submission, that "neither Fitch nor the receivers knew until September 24th that any contract for the sale of lead in Japan had been concluded by the trading company," does not affect the measure of damages, because they arranged for said shipment after their knowledge that such a contract had been made, and their agent was informed, before any contract for shipment was made, that such shipment was contemplated in order to fulfill a proposed agreement, which would require its delivery in Japan at a fixed time. In these circumstances the measure of damages is the difference between the contract price and actual market value of the goods at the time of delivery. *New York, Lake Erie & Western Railroad Company v. Estill and v. Leonard*, 147 U. S. 591, 616, 13 Sup. Ct. 444, 37 L. Ed. 292; *Messmore v. New York Shot & Lead Company*, 40 N. Y. 422; *Booth v. Spuyten Duyvil Rolling Mill Company*, 60 N. Y. 489.

Let an order be entered reversing the decree and directing the payment to the intervener of \$26,704.02, with interest thereon from the 4th day of January, 1895, and costs.

MACON, D. & S. R. Co. *et al.* v. GRAHAM & WARD.

(*Supreme Court of Georgia, April 8, 1903.*)

[43 S. E. Rep. 1000.]

Carriers — Discrimination — Connecting Carriers — Competing Boat Lines.

A common carrier cannot, in this state, lawfully discriminate against one of two or more connecting carriers as to the facilities afforded or the charges made touching an interchange of freight. See *Logan v. Central Railroad*, 74 Ga. 684. So, where a railway company extends its line of road to the bank of a navigable stream, and there constructs a wharf and steam "hoist," with a view to facilitating the handling of freight received from or consigned to the proprietors of steamboats plying such stream, the railway company is bound to afford the owners of competing boat lines equal privileges with respect to the use of its wharf and the appliances it provides for the loading and unloading of freight.

Mandatory Injunction.

"While under the Code an injunction which is purely mandatory in

McCormick v. Louisiana & N. W. R. Co

its nature cannot be granted, the court may grant an order, the essential nature of which is to restrain, although in yielding obedience to the restraint the defendant may incidentally be compelled to perform some act." *Goodrich v. Georgia Railroad & Co.*, 115 Ga. 340, 41 S. E. 659.

Same—Sufficiency of Evidence.

In view of the evidence adduced on the hearing of the present case, there was no abuse of discretion in granting an injunction of the persuasive nature just indicated; and, though the order passed by the chancellor is open to the criticism that it is in some respects of a purely mandatory character, the attack made upon it on this ground has been met by an appropriate direction from this court looking to an elimination from the order of all its objectionable features.

(Syllabus by the Court.)

Error from Superior Court, Laurens County; F. C. Foster, Judge.

Action by Graham & Ward against the Macon, Dublin & Savannah Railroad Company and others. Judgment for plaintiffs. Defendants bring error. Affirmed.

Jno. M. Stubbs, Minter Wimberly, Alex Akerman, and Akerman & Akerman, for plaintiffs in error.

Davis & Sturgis, for defendants in error.

SIMMONS, C. J. Judgment affirmed, with direction. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

McCORMICK *et al.* v. LOUISIANA & N. W. R. Co. *et al.*

(*Supreme Court of Louisiana, Feb. 16, 1903.*)

[33 So. Rep. 762.]

Construction of Depot—Contract between Railroads.

Defendant constructed, in accordance with agreement, a depot building on plaintiff's land for the joint use of both.

Same—Same.

The volume of business having greatly increased, the depot is not adequate to the business.

Same—Same—Resumption of Possession.

Plaintiff, because of the agreement, has the right to resume possession, and defendant ample time to remove its building.

Expropriation.

Defendant's right to bring suit for expropriating land for its depot is reserved.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Bienville; Ben P. Edwards, Judge.

Action by J. H. McCormick, receiver, and others, against the Louisiana & Northwestern Railroad Company and others. Judgment for defendants, and plaintiffs appeal. Reversed.

Stubbs & Russell, for appellants.

John A. Richardson, for appellees.

Statement of the Case.

BREAUX, J. Plaintiff brought this action to compel the defendant to remove its passenger station, occupied as a depot

McCormick v. Louisiana & N. W. R. Co

and as offices, in the town of Gibbsland, and to have its right recognized as owner of a right of way in the town of Gibbsland.

Plaintiff avers its right to property described in its petition.

The contention on the part of plaintiff is that the depot it seeks to have removed is not well situated; that it is not well suited to the purpose for which license was given to locate it within the town limits, and near its (plaintiff's) track; that it is unsafe, and a nuisance; that it obstructs the view of approaching trains, and there is, in consequence, danger of trains colliding.

The civil engineer of plaintiff's road testified substantially that the depot obstructed the view so that the engineer of one road could not very well see the trains of the other road approaching; that the building is not in good repair. The local agent, in substance, corroborated this statement, and said that there had been accidents.

The vice president of plaintiff's road testified that the depot is not suitable for the purpose of what is commonly known as a passenger station; that it is not usual for the general officers of railroad companies to occupy such stations as offices, and that it was not contemplated that the general office should be there; and, in the main, this officer corroborates the other witnesses. The defendant's general manager alone, by his testimony, sought to disprove the statements of these three witnesses.

Plaintiff asks to have itself recognized as owner of the land, and that the defendant be condemned to take away the building. Defendant, averring that it holds right, under a purchase from a corporation named by it as its predecessor, sets up in opposition to plaintiff's demand that application was made to the plaintiff company, through its general manager, for permission and right of way to construct a depot at the intersection of the two roads at Gibbsland, which was granted by him; that under his permission its depot was constructed at an expense of about \$3,000; and that—to quote from defendant's answer—it "bought said depot in good faith."

Defendant further sets forth that it is using this depot since its purchase, that it is necessary to its business, and that the public convenience requires that the station remain where it is.

Defendant depends particularly upon the correspondence which it had with plaintiff. In the first letter the general manager of the defendant road informs the general manager of the plaintiff company, to whom we have before referred, that he incloses to him a sketch showing the place at which his road crosses, and at which he proposed to locate a depot for both roads—plaintiff's and defendant's—at the intersection of the two roads.

He also informed this general manager that the crossing had been constructed, and the grades of its road extended

south of the plaintiff's road, and that the lumber was on the ground for the depot. He requested to be informed by this general manager whether his (plaintiff's) trains would stop at the depot to receive and deliver passengers. He also said that defendant road met with difficulty. It has been compelled to discharge passengers, with their baggage, in a muddy field, at some distance, where there was no shelter. This, it seems, was creating complaints, which defendant's general manager desired to remedy.

To copy an extract from his letter: "Each train can use its own road at the same time, and both trains can be at the depot at the same time without being in each other's way."

To this the general manager of plaintiff's road answered that there could be no objection to constructing the depot as proposed; that he was informed that the location is all such a location should be. The general manager of the defendant road acknowledged receipt, and informed the general manager of the plaintiff road that he had commenced work upon the building, and that he intended to build a depot that would be well adapted to the business of both companies, and that he understood that, at all events, plaintiff's trains would receive and discharge passengers and baggage at this depot.

Originally, the dispute between plaintiff and defendant involved, in addition, right of way of a switch or switches of defendant road. That part of the dispute between these parties has been settled and compromised. The depot question, however, was left to the decision of the courts.

Opinion.

There is no question of any right acquired by defendant from the corporation by which it was preceded as owner. Defendant pleaded a right which it had acquired from its vendor. Its learned counsel meets the issue in his brief without reference to any acquired right; for the good reason, doubtless, that defendant had not acquired any right from its vendor which can be of any avail in this suit. If the permission regarding this depot was obtained by the vendor, it passed to the vendee, the defendant in the present suit, with all the advantages or disadvantages it may have.

This brings us to the question whether the owner can force removal after the defendant had erected a depot, and whether defendant is protected by the prescription pleaded.

The right is necessarily dependent upon the facts of the case.

Here no attempt was made by defendant to expropriate the land, or to enter upon particular land with the view of acquiring possession and ownership for its railroad.

In order to enable railroads, in the interest of the public, to extend their tracks to the different parts of the country, they have been given the right of expropriating lands upon which to construct their depots, as well as for their right of way.

This is said here only to add that depots and railroads are on the same footing in this respect.

Further, in the same line of right of railroad companies, acquiescence in a company's taking possession and constructing a depot, as with a railroad track, will be treated as a waiver depriving the owner of the right to dispossess the company, although it is not a waiver of payment.

This was the rule laid down in *St. Julien v. Railroad Company*, 35 La. Ann. 926, which has since always been followed.

But there is considerable difference here. The two powerful corporations, through their respective officers, came together and agreed upon a *modus vivendi* at this particular depot, as would any ordinary persons regarding their rights. It was constructed at the expense of defendant for joint use. These strong companies, in view of this fact, must be judged as in the case of the average person who obtains the right of occupying the land of another. If A. gives the right to B. to build upon his land, and the building no longer serves the purpose for which it was constructed, B. may be condemned to move it away. He is not presumed to have given the land, or to have given a servitude upon the land, upon which the building is constructed. The right of property is constitutional in the sense that it is inviolable. It cannot be taken, save for public use, under legal form. An owner also may, by the effect of his waiver, as before held, commute his title to land for its value.

We have seen that the land has not been expropriated; that the owner has not waived its title; but that these parties entered into an agreement, the effect of which we would not be justified in changing. The land was not acquired by any of the modes required. It is true that it is occupied by defendant, and that occupation is one of the modes of acquiring. But defendant does not come within the requirements in order to acquire by occupation. He holds under a license, which precludes the acquisition or right claimed by him.

The right, whatever it may be under the license, is not a servitude, for the form required has not been followed for the acquisition of a servitude. The right is immovable, and subject to the laws regarding immovable property and its transfer.

The general manager of the plaintiff company had no right to grant a servitude had he undertaken to grant such a right. Rev. Civ. Code, arts. 471, 729, 734, 2440.

The license was granted for a particular purpose, but it happens that the building is not equal to the increasing business. It is not used as plaintiff contemplated it would be used. It is not in good repair. It is in the way, as it obscures needed range of view at this stop. The licensor, we think, can insist upon its removal. The agreement was in some respect commutative. As the building does not come up to the condition expected under the terms of the license, the defend-

Missouri Pac. Ry. Co. v. United States

ant will have to remove it. Even if defendant had acquired a servitude, the owner of the land upon which it has been acquired may change it from one place to another. Rev. Civ. Code, art. 703 et seq.

We think, under the circumstances, it should have ample time, and to that end ample time will be provided in our decree. And, furthermore, in our view, the right should be reserved to defendant of expropriating land of plaintiff for its depot under the terms of the law, and in accordance with rights of all parties.

It is therefore ordered, adjudged, and decreed that the judgment appealed from is annulled, avoided, and reversed.

It is further ordered, adjudged, and decreed that plaintiff is the owner of the property on which defendant's depot was constructed.

It is further ordered, adjudged, and decreed that defendant is condemned to remove the passenger station constructed and occupied by it on plaintiff's property in Gibbsland within seven months from the date of this decree, and that, in default of this removal within that time, the same be demolished by lawful authority. Defendant's rights to expropriate needful land for its depot, and all legal remedies it may have in that connection, are reserved.

Defendant is condemned to pay costs of both courts.

**MISSOURI PACIFIC RAILWAY COMPANY, Appt., v.
UNITED STATES.**

(Argued January 23, 26, 1903. Decided March 9, 1903.)

[23 Sup. Ct. Rep. 507.]

Interstate Commerce—Discrimination by Carrier—Right of Federal Law Officers to Maintain Suit to Restrain.

A suit to enjoin a common carrier from discriminating between localities in violation of the Act to Regulate Commerce could not be brought on behalf of the United States by its law officers at the request of the Interstate Commerce Commission prior to the passage of the act of Congress of February 19, 1903, the 3d section of which expressly authorizes the prosecution of such suits.

Same—Same—Same.

The new remedies to compel compliance with the Act to Regulate Commerce, given by the act of Congress of February 19, 1903, § 3, are so far made applicable to prior pending proceedings to enforce the former act by the provision of § 4, that pending causes shall not be affected by the repeal of conflicting laws provided for therein, but shall be prosecuted to a conclusion in the manner theretofore provided "and as modified by the provisions of this act," that a decree granting the relief prayed for in a suit brought on behalf of the United States by its law officers to enjoin discrimination between localities, which suit was unauthorized because brought before the passage of the later act, must be reversed and the cause remanded for further proceedings consistent with the Act to Regulate Commerce as originally enacted and subsequently amended.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree

Missouri Pac. Ry. Co. v. United States

of the Circuit Court for the Second Division of the District of Kansas enjoining a common carrier from discriminating between localities in violation of the Act to Regulate Commerce. Reversed and remanded to the Circuit Court for further proceedings.

Statement by MR. JUSTICE WHITE:

The original bill of complaint in this cause was filed on behalf of the United States against the present appellant in the circuit court of the United States for the second division of the district of Kansas on July 26, 1893. To the bill a demurrer was filed and overruled. 5 Inters. Com. Rep. 106, 65 Fed. 903. Subsequently, exceptions were sustained to an answer, and thereafter an amended answer and a replication were filed. The questions now presented for decision, however, were raised by an amended bill filed on July 19, 1897. In such amended bill it was alleged that the suit was brought on behalf of the United States by the United States attorney for the district of Kansas, by the authority of and under the direction of the Attorney General of the United States, and that such authority and direction had been given in pursuance of a request of the Interstate Commerce Commission of the United States "that the United States attorney for the district of Kansas be authorized and directed to institute and prosecute all necessary proceedings, legal or equitable, for the enforcement of the provisions of the Interstate Commerce Law against the defendant in relation to the matters herein complained of." It was further averred, in substance, that the respondent was subject to the terms and provisions of the Act to Regulate Commerce, and operated lines of railway between the city of St. Louis, in the state of Missouri, and the city of Omaha, in the state of Nebraska, a distance of 501 miles, and between the city of St. Louis and the city of Wichita, in the state of Kansas, a distance of 458 miles. It was charged that in the transportation of freight between St. Louis and said cities of Omaha and Wichita the service was substantially of a like, contemporaneous character, and was made under substantially similar circumstances and conditions, but that, notwithstanding such fact, the rates exacted upon shipments of freight between St. Louis and Wichita very much exceeded the rates charged on freight shipped between St. Louis and Omaha. It was averred that the collection of such alleged excessive freight rates or any rate of freight on shipments between St. Louis and Wichita in excess of the rate charged for shipments of freight of a similar character and classification between St. Louis and Omaha, operated an unjust and unreasonable prejudice and disadvantage against the city of Wichita and the localities tributary thereto, and against the shippers of freight between St. Louis and the city of Wichita. Averring that the wrongs complained of "are remediless in the premises under the ordinary forms and proceedings at law, and are relievable only in a court of

Missouri Pac. Ry. Co. v. United States

equity and in this form of procedure," the ultimate relief asked was the grant of a perpetual injunction restraining the respondent from continuing to exact a greater rate for transportation of freight of like classification between the city of Wichita and the city of St. Louis than was asked between the city of St. Louis and the city of Omaha. A demurrer was filed to the amended bill upon various grounds, one of which denied the right of the United States to institute the suit.

On hearing, the demurrer was overruled, exception was reserved, and, the defendant electing to stand on its demurrer, a final decree was entered granting a perpetual injunction as prayed, and, on appeal, the circuit court of appeals affirmed the decree, but filed no opinion. An appeal was thereupon allowed.

Messrs. John F. Dillon, J. H. Richards, C. E. Benton, B. P. Waggener, and Alexander G. Cochran for appellant.

Messrs. W. C. Perry and Assistant Attorney General Beck for appellee.

MR. JUSTICE WHITE, after making the foregoing statement, delivered the opinion of the court:

The violation of the Act to Regulate Commerce, complained of in the amended bill, was an asserted discrimination between localities by a common carrier subject to the act, averred to operate an unjust preference or advantage to one locality over another. The right to bring the suit was expressly rested upon a request made by the Interstate Commerce Commission to do so, in order to compel compliance with the provisions of the Act to Regulate Commerce relating to the matters complained of in the bill.

Bearing in mind that, prior to the request of the Commission upon which the suit was brought, no hearing was had before the Commission concerning the matters of fact complained of, and therefore no finding of fact whatever was made by the Commission, and it had issued no order to the carrier to desist from any violation of the law found to exist, after opportunity afforded to it to defend, the question for decision is whether, under such circumstances, the law officers of the United States at the request of the Commission were authorized to institute this suit.

Testing this question by the law which was in force at the time when the suit was begun and when it was decided below, we are of the opinion that the authority to bring the suit did not exist.

But this is not the case under the law as it now exists, since power to prosecute a suit like the one now under consideration is expressly conferred by an act of Congress adopted since this cause was argued at bar, that is, the act "to Further Regulate Commerce with Foreign Nations and among the States," approved February 19, 1903. By § 3 of that act it is provided:

Missouri Pac. Ry. Co. v. United States

“That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discrimination forbidden by law, a petition may be presented alleging such facts to the circuit court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or is being committed in part in more than one judicial district or state, it may be dealt with, inquired of, tried, and determined in either such judicial district or state, whereupon it shall be the duty of the court summarily to inquire into the circumstances upon such notice and in such manner as the court shall direct, and without the formal pleadings and proceedings applicable to ordinary suits in equity. . . .”

And the same section, moreover, provides as follows:

“It shall be the duty of the several district attorneys of the United States, whenever the Attorney General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided by this act shall not preclude the bringing of suit for the recovery of damages by any party injured or any other action provided by said act approved February 4, 1887, entitled ‘An Act to Regulate Commerce,’ and the acts amendatory thereof.”

Although by the 4th section of the act conflicting laws are repealed, it is provided, “but such repeal shall not affect causes now pending, nor rights which have already accrued, but such causes shall be prosecuted to a conclusion and such rights enforced in a manner heretofore provided by law [*italics ours*] *and as modified by the provisions of this act.*” We think the purpose of the latter provision was to cause the new remedies which the statute created to be applicable as far as possible to pending and undetermined proceedings brought, prior to the passage of the act, to enforce the provisions of the Act to Regulate Commerce. In the nature of things, it cannot be ascertained from the record whether the railroad company now exacts the rates complained of as being discriminatory and which it was the purpose of the suit to correct; but if it does, of course the power to question the legality of such rates by a suit in equity, brought like the one now here, clearly exists. Under these conditions we think the ends of justice will best be served by reversing the decrees below and remanding the cause to the circuit court for such further proceedings as may be consistent with the Act to Regulate Commerce as originally enacted and as subsequently amended,—especially with reference to the powers conferred and duties imposed by the act of Congress approved February 19, 1903, heretofore referred to.

The decree of the Circuit Court of Appeals is reversed; the

Missouri Pac. Ry. Co. v. United States

decree of the Circuit Court is also reversed, and the cause is remanded to the Circuit Court for further proceedings in conformity with this opinion.

MR. JUSTICE BROWN concurs in the result.

MR. JUSTICE BREWER, dissenting:

I am unable to concur in either the opinion or the judgment in this case.

I think there was no final decree in the circuit court, and that, therefore, the court of appeals should have dismissed the appeal. After the cause had been once put in issue by bill, answer, and replication, a stipulation was filed as follows:

Whereas, after joining issue upon the pleadings heretofore filed in the above-entitled suit, to wit, the original bill of complaint, the demurrer thereto, the original answer, the amended answer, and the replication thereto, it has been determined by all of the parties to, and all of the parties interested in, said suit, that it is desirable and best that the questions of law arising upon the bill of complaint as amended and a demurrer thereto be first finally adjudicated and put at rest by the circuit court of appeals of the United States and the Supreme Court of the United States;

Now, therefore, it is hereby agreed and stipulated by and between the above-named complainants, by their solicitors, W. C. Perry and M. Cliggitt, and the above-named defendant, by its solicitors, J. H. Richards and C. E. Benton, that said complainants shall file an amended bill of complaint in said suit, to which said defendant shall file a demurrer, and that, if the court before which said cause is now pending shall overrule said demurrer and allow the relief prayed for in said amended bill of complaint, then said defendant shall proceed to appeal said cause in due course, and that the party, complainants or defendant, against which said circuit court of appeals shall decide adversely, shall, if said party so desires, in due course appeal said cause for final determination to the Supreme Court of the United States.

And it is further hereby agreed and stipulated that pending said appeal and all the procedure incident thereto the decree and order of said courts, whether it be said circuit court of the United States for the district of Kansas, or said circuit court of appeals, or said Supreme Court of the United States, if adverse to said defendant, allowing and decreeing the reliefs and remedies prayed for in said amended bill of complaint, shall be suspended and not enforced against said defendant the Missouri Pacific Railway Company, and when a decision has been rendered in said suit by said circuit court of appeals, or by the Supreme Court of the United States, if the cause is taken to that court, then it is further hereby agreed and stipulated that the decision and judgment of either or both of said courts, if adverse to said defendant the Missouri Pacific Railway Company, shall be vacated, set aside, and annulled, and shall not be regarded as of any force or effect

Missouri Pac. Ry. Co. v. United States

against said defendant the Missouri Pacific Railway Company except so far as holding the amended bill to be sufficient, but that said the Missouri Pacific Railway Company shall have the right and shall be permitted to file an answer in said suit, to which said complainants the United States of America shall in due course file a replication thereto, and the issues shall be duly joined and the cause proceed to hearing and determination upon its merits in due course, the intention of this agreement being that the proceedings had upon the demurrer to said amended bill of complaint and the proposed appeal of said suit to a higher court shall in no manner prejudice the right of said defendant to a trial of said suit upon its merits.

Dated this 16th day of July, 1897.

W. C. Perry,
Morris C. Cliggitt,
Solicitors for Complainant.

On an application made by the complainant, supported by the affidavit of its solicitor, stating that the defendant consented thereto, an order was entered giving the complainant leave to file an amended bill, and also to the defendant, with consent of the complainant, like leave to file a demurrer. An amended bill of complaint and a demurrer thereto were filed, the demurrer was sustained, and, the defendant electing to stand on its demurrer, a decree was entered in behalf of the complainant. A transcript before us shows that all this, from the filing of the stipulation to the entering of the decree, took place on the same day, to wit, July 19. Obviously, all subsequently thereto was done in pursuance of the stipulation. That the stipulation was not signed by the solicitors for the defendant is immaterial, as it was for its benefit alone. In the brief for the government in this court, after a statement of preliminary proceedings, it is said:

“It being manifest that the great volume of testimony would have to be taken, and as the defendant had raised the serious question whether the United States could maintain the suit, or had the right, in its own name, and without a preliminary hearing before the Interstate Commerce Commission, to enforce, by injunction, the provisions of the Interstate Commerce Act which forbids discrimination, it was thought best to finally settle that question. Therefore, the stipulation on pages 53, 54 was entered into. That stipulation provides for the filing of an amended bill, the leveling of a demurrer thereat, and an appeal or appeals to the United States circuit court of appeals and to this court. The amended bill was filed (pp. 55-60); the defendant demurred (p. 61); the court overruled the demurrer, and the defendant, electing to stand on its demurrer, final decree was entered in favor of the complainant. (pp. 62-73.)”

And in the brief for the defendant and appellant it is in like manner said:

Missouri Pac. Ry. Co. v. United States

“After all this, the parties made the stipulation found on page 53, to the effect that ‘it is desirable and best that the questions of law arising upon the bill of complaint as amended and a demurrer thereto be first; finally adjudicated and put at rest by the circuit court of appeals of the United States and the Supreme Court of the United States,’ which it was stipulated might be done without prejudice to the right of the defendant if it were held that the bill was maintainable to a trial of the suit upon its merits.

“The amended bill was accordingly filed (Record, pp. 55–60); demurrer thereto was filed (p. 61), and a decree rendered in favor of the complainant.”

Now, although it may be that the stipulation was not brought into the record by means of a bill of exceptions, and, although it does not affirmatively appear that the trial court was made aware of this stipulation, or acted in pursuance thereof, yet as the railway company brings here a record containing the stipulation, and as it is admitted by counsel for both parties that it was entered into, and that subsequent proceedings were had in pursuance of its agreements, I think notice should be taken of it by this court. Indeed, if nothing appeared of record, and counsel should admit before us that a stipulation had been entered into between the parties in respect to the finality of the decree, ought we not to act on such admission? Can parties stipulate that questions of law shall alone be presented to this court, and that if our decision be one way the case shall thereafter proceed in the trial court for an inquiry and decree upon the facts? I know that the statutes of some states permit the taking of a case to the appellate court upon a ruling made on a demurrer, but we have always held that the decree or judgment must be final before we are called upon to review it. When a case has once been decided by this court no further proceedings can be had in the trial court except upon our direction, whereas here the parties have stipulated that without such direction a new trial may be had. In other words, our decision is not to be final although we affirm the decree. It seems to me that the decree of the court of appeals should be reversed, and the case remanded to that court with directions to dismiss the appeal.

Upon the merits, also, I dissent. The bill is an original bill in behalf of the United States, filed under the direction of the Attorney General, and the fact that the Interstate Commerce Commission requested him to cause this suit to be instituted in no manner adds to or affects the question of the government’s right to maintain it. The Commission was not asking the Department of Justice to enforce any of its orders, in which case, as we held in *East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission*, 181 U. S. 1, 45 L. Ed. 719, 21 Sup. Ct. Rep. 516, 20 Am. & Eng. R. Cas., N. S., 729, it would become our duty to examine the proceedings had

Missouri Pac. Ry. Co. v. United States

before the Commission. This is an independent suit instituted by the government, not to carry into effect any orders of the Commission, but to enforce a duty cast upon carriers of interstate commerce, and the right of the government to maintain such a suit does not depend upon the request of any individual or board. The 22d section of the Act to Regulate Commerce provides that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of the act are in addition to such remedies." Every remedy, therefore, that the government or any individual had to compel the performance by carriers of interstate commerce of their legal obligations remains unaffected by that act.

We held in *Re Debs*, 158 U. S. 564, 39 L. Ed. 1092, 15 Sup. Ct. Rep. 900, that the United States had a right, even in the absence of a statute specially authorizing such action, to come into the Federal courts by an original bill to restrain parties from obstructing and interfering with interstate commerce. It seems to me singular that the government can maintain a bill to prevent others from obstructing and interfering with interstate commerce, and yet cannot maintain a bill to compel carriers to fully discharge their duties in respect to such commerce. Can it be that the government has power to protect the carriers of interstate commerce, and not power to compel them to discharge their duties?

It is said that this is a suit to compel the carrier to refrain from discriminating between places; that there was no common-law duty to abstain from such discrimination; that it is forbidden only by statute. But, confessedly, it was a common-law duty of a carrier to make no unreasonable charges. It is distinctly averred in the amended bill (Rec. 57, 59):

"And your orators further aver and show unto your honors that said defendant has established, and for a long time has maintained, and still maintains, in force on the line of its railroad between the city of St. Louis and the city of Wichita rates, rules, and regulations governing all freight traffic between said cities over the said railroad which are unjust and unreasonable, in this, that said charges for services rendered by said company in the transportation of property and freight of each and every classification between the said city of St. Louis and the city of Wichita is excessive, exorbitant, unreasonable, and unjust to the extent and amount that such rates and charges exceed the rates and charges on the line of said defendant's railroad between the cities of St. Louis and Omaha, all of which is to the great detriment and hindrance of commerce and trade between the said cities of St. Louis and Wichita, and between the localities to which said cities contribute as a supply point, and to the irreparable injury of the public and to the people of the United States.

"And your orators further aver and show unto your honors

Missouri Pac. Ry. Co. v. United States

that any schedule rates and freight charges for the various shipments and classifications, hereinbefore set forth between the said cities of St. Louis and Wichita, that are in excess of the tariff schedules and freight charges for shipments of the like kind and class of property between the cities of St. Louis and Omaha, are unreasonable, excessive, exorbitant, and unjust in and of themselves, and constitute an unreasonable discrimination against Wichita and the localities tributary thereto and the people living therein and against persons shipping freight between the cities of Wichita and St. Louis, and subject such persons and localities to an unjust and unreasonable prejudice and disadvantage."

The truth of these allegations is admitted by the demurrer. The charges for shipments for freight between St. Louis and Wichita are "unreasonable, excessive, exorbitant, and unjust in and of themselves." Surely, here is a disregard of what was at common law a plain and recognized duty of the carrier.

Further, while at common law a mere difference in the prices charged by the carrier to two shippers respectively might not have been forbidden, yet it may well be doubted whether, if the difference was so great as to amount to an unreasonable discrimination, the rule would not have been otherwise. In *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, 275, 36 L. Ed. 699, 703, 4 Inters. Com. Rep. 92, 96, 12 Sup. Ct. Rep. 844, 847, we said:

"Prior to the enactment of the act of February 4, 1887, to Regulate Commerce, commonly known as the Interstate Commerce Act (24 Stat. at L. 379, chap. 104), railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service. *Fitchburg R. Co. v. Gage*, 12 Gray, 393; *Baxendale v. Eastern Counties R. Co.*, 4 C. B. N. S. 63; *Great Western R. Co. v. Sutton*, L. R. 4 H. L. 226, 237; *Ex parte Benson*, 18 S. E. 38, 44 Am. Rep. 564; *Johnson v. Pensacola & P. R. Co.*, 16 Fla. 623, 26 Am. Rep. 731, though the weight of authority in this country was in favor of an equality of charge to all persons for similar service."

But beyond this, the Interstate Commerce Act itself forbids unjust discrimination, and such discrimination is also clearly and fully set forth in the bill. Can it be that the government is powerless to compel the carriers to discharge their statutory duties? It is nowhere said in the Interstate Commerce Act that this duty or any other duty prescribed by statute is to be enforced only through the action of the Commission. On the contrary, as we have seen, it expressly pro-

Interstate Commerce Commission v. Nashville, etc., Ry. Co

vides that all other remedies are left unaffected by the act, and a duty cast by statute equally with a common-law duty may by the very language of the act be enforced in any manner known to the law.

Further, the Act to Regulate Commerce, as originally passed, in § 16, required the district attorneys of the United States, under the direction of the Attorney General, to prosecute suits to compel carriers to obey the orders of the Commission. If all remedies were to be secured only through action in the first instance by the commission that provision was all that was necessary, but in the amendatory act of 1889 (25 Stat. at L. 855, chap. 382), there was added in § 12 this clause: "The Commission is hereby authorized and required to execute and enforce the provisions of this act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute, under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this act, and for the punishment of all violations thereof." Clearly, that contemplates just such a case as the present, and when, in the judgment of the Commission, it is better that the proceeding should be had primarily in the courts, it may call upon the legal officers of the United States to bring the proper actions.

For these reasons, I am compelled to dissent, and I am authorized to say that MR. JUSTICE HARLAN concurs in this opinion.

INTERSTATE COMMERCE COMMISSION v. NASHVILLE, C. & ST. L. RY. CO. *et al.*

(Circuit Court of Appeals, Fifth Circuit, February 24, 1903.)

[120 Fed. Rep. 934.]

Carriers—Unreasonable Rates—Evidence to Establish.

A finding that the rates charged by railroads for shipments to a particular point are unreasonable in themselves, and in violation of section 1 of the interstate commerce act (24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), cannot properly be based on evidence which only tends to show that they are too high as compared with the rates charged between the initial points and one or two other points.

Same—Preference between Localities.

The same evidence which warrants a finding that dissimilar circumstances and conditions exist which justify a lower rate for a longer haul to one point than for a shorter haul to another also establishes that the charging of such rates does not give one point an undue preference and advantage over the other, in violation of section 3 of the interstate commerce act (24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]).

Appeal from the Circuit Court of the United States for the Southern District of Florida.

J. N. Stripling and L. A. Shaver, for appellant.
Ed. Baxter, for appellees.

Interstate Commerce Commission *v.* Nashville, etc., Ry. Co

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. The Interstate Commerce Commission found that, on account of dissimilar circumstances and conditions, the appellees were justified in charging more for the short haul from St. Louis, Nashville, and Chattanooga, and over the Georgia Southern & Florida Railway Company, to Hampton, Fla., than for the longer haul from the same initial points over the same lines to Palatka, Fla. This conclusion of the commission seems to be warranted by the evidence before the commission, and there is nothing in the additional evidence taken in the Circuit Court to justify finding a different result. This leaves it clear that in the matters complained of the appellees are not violating the fourth section of the interstate commerce act (24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]).

The bill in this case charges that the rates charged by the appellees on goods shipped from St. Louis and Tennessee points to Hampton, Fla., are unreasonably high in themselves, in violation of section 1 of the act to regulate commerce (24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]). As we read the opinion of the commission, filed as an exhibit to the bill, the commission did not find that the Hampton rates were in and of themselves unreasonable, but found argumentatively that they were too high, not as based upon the matters to be considered in determining such questions, as pointed out in *United States v. Freight Association*, 166 U. S. 331, 17 Sup. Ct. 540, 41 L. Ed. 1007, and *Smyth et al. v. Ames et al.*, 169 U. S. 546, 547, 18 Sup. Ct. 418, 42 L. Ed. 819, but largely upon a consideration of rates and charges between St. Louis, Nashville, and Chattanooga, and Jacksonville and Palatka, Fla. The evidence submitted to the commission, supplemented by evidence taken in the Circuit Court, is not sufficient for us to find affirmatively that the Hampton rates were in and of themselves unreasonable. The commission furnishes the authority for the proposition that with regard to the exaction of unreasonable rates the burden of proof is on the complainant. See *Harding v. C., St. P., M. & O. R. Co.*, 1 I. C. Rep. 104; *Brewer v. L. & N. R. R. Co.*, 7 I. C. Rep. 234. Certainly, the complainant has failed in this instance to prove that the Hampton rates were in violation of the first section of the interstate commerce act.

The bill also charges that the Hampton rates are in violation of section 3 of the commerce act (24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]), in that said rates, taken in connection with the rates of the appellees from the same Northern points to Palatka, Fla., give said Palatka an undue preference and advantage over said Hampton, and subjects said Hampton to an undue prejudice through this advantage. The basis of this complaint is that goods shipped from St. Louis and Tennessee points to Palatka can be thereafter shipped by Palatka

Avery v. Vermont Electric Co

merchants to Hampton, and there sold on an equal footing with the same goods shipped from St. Louis and Tennessee points direct to Hampton, thus enabling the Palatka merchants to compete in Hampton with the Hampton merchants; while the rates as charged will not allow the Hampton merchants to ship goods from St. Louis and Tennessee points to Hampton, and from there to Palatka, to compete in Palatka on the same footing with Palatka merchants. In other words, it is charged as a duty of the Georgia, Florida & Southern Railway Company, the terminal carrier, to make such rates to Hampton and Palatka as will enable the Hampton merchants to compete in Palatka with Palatka merchants dealing in Western goods; but it must not be forgotten that the rates to Palatka, which is a competitive point, are made by other carriers with through lines which are not parties to this suit. The fallacy involved is that Hampton, which is an inland place with no natural advantages, shall be put upon the same footing as Palatka, which is situated upon a stream navigable all the year round, and has, in addition, several through railroad connections. It seems to be clear that the same reasons, in which we concur, which justify the commission in finding that the defendant carriers can lawfully charge more for the short haul to Hampton than the long haul to Palatka over the same line, sufficiently answer this charge of discrimination.

The decree of the Circuit Court is affirmed.

AVERY v. VERMONT ELECTRIC CO. *et al.*

(*Supreme Court of Vermont, Chittenden, March 6, 1903.*)

[54 Atl. Rep. 179.]

Eminent Domain—Flowing Lands—Erection of Dam—Generation of Electricity—Power for Public Use.

V. S. c. 159, enacts that one who desires to erect or raise a dam to obtain water therefor, and thereby flow the lands of another, may secure the right to do so if commissioners or the court shall find that the flowing of the lands will be of "public benefit." A petition for the appointment of commissioners, etc., showed that petitioner owned a dam, which he desired to raise in order to generate electricity for the operation of a railroad: *held*, that the power of eminent domain could not be invoked on the ground of public use, since, while the railroad must serve the public, there was nothing binding petitioner to serve the railroad or to give equal advantages to all.

Interest of Petitioner.

The power of eminent domain could not be invoked on the theory that, if petitioner should fail to serve the railroad or give equal advantages to all, a forfeiture would be worked, since the condition, which make a use public must exist at the time of the taking.

Riparian Owners—Rights of Flowage.

A right to flow the land of others cannot be secured, under the statute, in the absence of any showing of a public use, on the theory that the provision is not a right of eminent domain, but merely a statutory regulation of rights common to the riparian owners.

Avery v. Vermont Electric Co

Exceptions from Chittenden county court; Start, Judge.

Petition by Robt. Avery, as trustee, against the Vermont Electric Company and others, for the appointment of commissioners in eminent domain proceedings under V. S. c. 159. From a judgment dismissing the petition, petitioner brings exceptions. Affirmed.

Argued before ROWELL, C. J., and TYLER, MUNSON, and STAFFORD, JJ.

Edmund C. Mower, for petitioner.

W. L. Burnap and A. G. Whittemore, for defendants.

MUNSON, J. The petition alleges that the petitioner is the owner in trust of a certain mill property on the Winooski river, and that he desires to raise to the height of 50 feet a dam now existing on said property, and proposes to use the water power so provided in generating electricity for the operation of the Burlington & Hinesburgh railroad; shows further that the raising of this dam will flow the lands of other owners, and that the petitioner is unable to agree with them as to the damages they will sustain; and prays that he may be permitted to raise said dam, and for the appointment of commissioners to ascertain the damages caused thereby. It was moved that the petition be dismissed because it did not appear from the allegations that the flowage would be a public benefit, or such a public benefit as would warrant the taking under the constitution. The county court sustained the motion. No objection is taken as to the manner in which the question is raised. It is provided in chapter 159 of the Vermont Statutes that one who desires to set up or continue a mill or manufactory on his land, and to erect or continue or raise a dam to obtain water therefor, and thereby flow the lands of another person, may secure the right to do so in the manner there provided, if commissioners appointed for that purpose, or the court itself, shall find "that the flowing of the land as proposed will be of public benefit." For the purpose of this discussion, it will be assumed, without consideration, that a plant for the generation of electricity is a manufactory, within the meaning of the statute.

The first question for consideration, as stated by the petitioner, is whether the application of water power to the generation of electricity for use in the operation of a railroad is such a public benefit as will justify an exercise of the right of eminent domain under the provisions of this chapter. But this statement of the inquiry is hardly broad enough for our purpose, for this assumes that the statute names a constitutional ground of condemnation, and proposes to test the petitioner's right by inquiring whether his case is within its terms. A more accurate statement of the question would be whether this is a public use, within the meaning of the constitution, for no finding of public benefit under the statute

Avery v. Vermont Electric Co

can avail unless the statute and the constitutional provision are brought together by construction. The argument of the petitioner is an earnest plea for a liberal construction of the term "public use." It is evidently considered that the term "public benefit" is a better expression of what is meant, and cases are cited where it is said that "public use" is synonymous with that term. We are also referred to the utterance of this court in *Re Barre Water Company*, 62 Vt. 27, 20 Atl. 109, 9 L. R. A. 195, where it is said that the power of condemnation "must have some degree of elasticity, that it may be exercised to meet the demands of new conditions and improvements, and the ever-varying and constantly increasing necessities of an advancing civilization." It is urged that the use of electricity has become so important to the prosperity and development of the state that the utilization of our water powers for its production ought to be regarded as a public necessity. We have in the petitioner's brief an extended presentation of the views expressed by other courts in dealing with the question of public use. In considering these opinions, it must be remembered that some states have constitutional provisions much broader than ours, and that even a slight variation of expression may be influential in determining the line of decision. It is true, nevertheless, that some of the cases cited proceed upon grounds that afford support to the petitioner's contention. In fact, the reasoning of some of them comes dangerously near the argument that it is for the public benefit to have property of this character in the hands of those who will put it to the best use, and that the refusal of an obstinate or grasping owner to part with his property ought not to be allowed to block the wheels of progress. It is needless to say that arguments of this character can have no weight in the determination of cases arising under the constitution of this state. Our only decision upon the flowage law is found in *Tyler v. Beacher*, 44 Vt. 648, 8 Am. Rep. 398. It was there held that the owner of a gristmill, who was under no obligation to grind for the public, could not flow the lands of another to increase his power, for the reason that the use was private. It is said by the petitioner that that case is opposed to the decisions of most of the states which have passed upon the question, and this is true. But we find nothing in the arguments of other courts that leads us to question its soundness, and have no disposition to recede from it. A review of the adverse line of decision will be found in *Lewis on Eminent Domain*, sections 178-181. This author considers that mills which are not required by law to serve the public, while they may be a public benefit, are not a public use, within the meaning of the constitution, and says that the circumstances under which the contrary decisions were made may explain, but do not justify, them. But it is said that the purpose of this condemnation is to provide motive

Avery v. Vermont Electric Co

power for a railroad, and that the railroad is unquestionably a public servant. Treating the case as if the application were by the railroad company itself, the reasoning of this court in *Eldridge v. Smith*, 34 Vt. 484, is decidedly against the right. The distinction between taking the land necessary for the road, and the taking of property for use in the production of the means to be employed in carrying it on, is there clearly pointed out. But it is not necessary to resort to an application of this doctrine, for the reason of the decision in *Tyler v. Beacher* is controlling here. If the petitioner's purpose were found to be as alleged, this would not meet the requirement. It is true that the railroad must serve the public, but there is nothing that binds the petitioner to serve the railroad. And if we look to some direct service of the general public, there is nothing that binds the petitioner to give equal advantages to all. The suggestion that a failure in this respect would work a forfeiture does not remove the difficulty. The conditions which make the use public must exist at the time of the taking.

We have thus far considered the statute upon the theory that it was designed to give the right of eminent domain to every riparian owner for the maintenance of a mill or manufactory of public benefit. This was the view formerly taken of the mill act of Massachusetts, but the more recent doctrine of that state is that the provision is not an exercise of the right of eminent domain, but a statutory regulation of rights common to the riparian owners. It is insisted that the petition can be sustained on this ground. The doctrine referred to is claimed to be analogous to that upon which provision is made for the partition of land held by several tenants in common. The different owners of the bed and banks of the stream are treated as having a common interest in the reasonable use of the flowing water. It is said that one reasonable use of the water is the use of the power inherent in the fall of the stream, that this power cannot be used without damming the water and causing it to flow back, and that one man may own the fall, and another the land which it is necessary to flow. The courts of Massachusetts hold that the Legislature may secure the full value of the stream to the different owners by combining these two interests for use, and compelling the owner of the flooded land to take his share in money. This doctrine is apparently approved by Judge Redfield in his note to *Allen v. Inhabitants of Jay* (in the American Law Register for August, 1873) 12 Am. Law Reg. (N. S.) 481, and sanctioned by the Supreme Court of the United States in *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9, 5 Sup. Ct. 441, 28 L. Ed. 889. We cannot adopt this view. It seems to assume that the land goes with the stream, instead of the stream with the land, and to give the riparian owners a joint interest in the land because of their peculiar rights to the water. But the owners of the various properties are the several and inde-

Yazoo & M. V. R. Co. v. Watson

pendent owners of their respective parcels of land, and their only right to the water is such as this ownership gives them. To say that one's holding of the land is subservient to such use as the lower owner may desire to make of the water is to reverse all our theories regarding the use of streams. It is true that in *Johns v. Stevens*, 3 Vt. 308, Judge Prentiss seems to assume that it would be within the power of the Legislature to encourage the building of mills by a statute of this character. But in *Adams v. Barney*, 25 Vt. 225, where the right of the owner of one side of the stream to maintain a dam across it was involved, Judge Redfield said that the land on the opposite side was the defendant's, and that the plaintiff had no right to use it, and that no court or legislature had the power to give him the right. This certainly excluded the idea of an acquirement of mill privileges through a statutory regulation of riparian rights. It should be noticed, also, that the argument advanced in support of the statute as thus classified is not coextensive with the right given. The argument is based upon the existence of a common interest in the stream, while the statute applies to all flowable lands. A dam of moderate elevation may flood the land of one whose premises are not contiguous to the stream, and who consequently has no interest in it. The maintenance of the petition upon the ground last urged would amount to a holding that all private lands in the state that can be flowed by the highest practicable dams are held subject to the full utilization of the streams upon which they lie. The Massachusetts court supports its position by holding that the mere flowing of land is not a taking of the property—a conclusion which we are not ready to adopt. We think Mr. Lewis is right in saying that appropriations of this character cannot be sustained without virtually expunging the words "public use" from the constitution.

Judgment affirmed.

YAZOO & M. V. R. CO. v. WATSON.

(*Supreme Court of Mississippi, March 14, 1903.*)

[33 So. Rep. 942.]

Railroad Crossing—Defective Condition—Injury to Traveler—Liability of Company—Private Road.

Where a railroad company, knowing of the public use of a road which crossed its track, built approaches thereto, but left them in a condition dangerous for travel by teams managed with ordinary care, and one using such care was injured on account of such condition, the company was liable whether the road was technically a public or a private one.

Appeal from Circuit Court, Yazoo County; Robt. Powell, Judge.

Action by Lonny Watson against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The action was brought to recover for injuries sustained by

plaintiff while driving along a road which crossed defendant's track, owing to the dangerous condition of the approaches thereto.

Mayes & Harris, for appellant.

Henry & Barber, for appellee.

CALHOON, J. There was evidence in support of the following facts: There was a road over the line adopted by the defendant below, appellant here, for its track. When rebuilt, it recrossed this road. It determined, for its own convenience, to move the line of its track higher up and on the side of a hill, to establish a better uniform grade, which it wanted. It did so; but, in rebuilding, it fixed the approaches so that on one side was a steep descent with two prongs, one, the left, leading into a plantation, and the other, the right, being a connection between two public roads, and for use by anybody and everybody who wished, as the old road was.

The right prong prepared by the railroad company was not only quite steep, as the old way, without prongs, was, but quite narrow, and had a sharp turn, and with a precipice on the side of eight feet, making it dangerous, and liable to cause accident to wagons and teams without great care. Plaintiff, who had never been over the crossing, undertook to make it over the right-hand prong, with a wagon and two mules, between daylight and sunrise, but when he could see everything distinctly. He could have selected the left prong, which was somewhat better, but he took the right, as it led directly to his destination, and, in making the turn on it, his mules, his wagon, and himself turned the precipice in a tragic heap. His leg was broken, and continues painful, and will always be crooked. His companion jumped out and was safe.

Plaintiff suffered much and long, and will suffer his lifetime from the injury, and so, if he was entitled to recover at all, the verdict of the jury was reasonable. The old way was a steep descent, but was one broad way to and across the track, then in the valley below.

The appellant below had every charge that could be desired to the effect that no recovery could be had if the accident resulted from careless driving or the lack of ordinary prudence. We accept the finding of the jury on this.

On the contention that this was a private plantation road and crossing, and the company, therefore, was under no obligation to maintain it, it is sufficient to say that the question of permanent maintenance is not involved. It knew the road was used by the public, and, whether technically a public or private road, it undertook to build the approaches to its track, knowing the public use of it, and should not have made them so as to be dangerous for travel by teams and vehicles managed with ordinary care.

We are satisfied to rest on the authorities cited by counsel for appellee. Affirmed.

OREGON & CALIFORNIA RAILROAD COMPANY, Appt., v.
UNITED STATES.

(Argued March 4, 1903. Decided April 6, 1903.)

[23 Sup. Ct. Rep. 615.]

Railroad Land Grants—Withdrawal of Indemnity Lands in Advance of Selection.

The Secretary of the Interior was not authorized, upon the mere acceptance of the map of definite location, to withdraw from the operation of the settlement laws any lands within the indemnity limits of the grant made to the California & Oregon Railroad Company by the act of July 25, 1866, chap. 242 (14 Stat. at L. 239), which provided for the selection of lands within such limits in lieu of any within the place limits which should be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, and empowered the Secretary of the Interior, upon the filing of the map of the survey, to withdraw from sale "public lands herein granted on each side of said railroad, so far as located and within the limits before specified."

Same—Same.

No interest in any specific sections of land within the indemnity limits of the grant made by the act of July 25, 1866, chap. 242, to the California & Oregon Railroad Company, could be acquired by that company in advance of their actual and approved selection to supply deficiencies in the place limits.

Same—Occupancy in Good Faith by Settlers.

The selection of lands within the indemnity limits of the grant made by the act of July 25, 1866, chap. 242, to the California & Oregon Railroad Company to supply deficiencies in the place limits, cannot defeat or destroy the rights of a settler under that act arising from a previous bona fide occupancy with the intention of perfecting title under the homestead laws as soon as the land should be surveyed.

Same—Same.

The rights of one who has settled in good faith on an odd-numbered section within the indemnity limits of the grant by the act of July 25, 1866, chap. 242, to the California & Oregon Railroad Company prior to their selection by that company to supply deficiencies in the place limits, cannot be affected by the fact, subsequently appearing, that all the odd-numbered sections within such indemnity limits were needed to supply deficiencies in the place limits.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Oregon canceling a patent issued to the Oregon & California Railroad Company. Affirmed.

See same case below, 48 C. C. A. 520, 109 Fed. 514.

The facts are stated in the opinion.

Mr. Maxwell Evarts for appellant.

Mr. Charles W. Russell for appellee.

MR. JUSTICE HARLAN delivered the opinion of the court:

By the act of Congress of March 3d, 1887, chap. 376, it was provided that if, at the completion of the adjustments of land grants thereby directed to be made, or sooner, it appeared that lands had been from any cause erroneously certified or patented to or for any company claiming by, through, or under

Oregon & California R. Co. v. United States

grant from the United States to aid in the construction of a railroad, it should be the duty of the Secretary of the Interior to thereupon demand from such company a relinquishment or reconveyance to the United States of all such lands, whether within granted or indemnity limits; and, if the company did not reconvey within ninety days after demand made, it should thereupon be the duty of the Attorney General to commence and prosecute in the proper courts the necessary proceedings to cancel the patents, certification, or other evidence of title theretofore issued for the lands, and to restore the title thereof to the United States. 24 Stat. at L. 556 (U. S. Comp. Stat. 1901, p. 1595).

In *United States v. Missouri, K. & T. R. Co.*, 141 U. S. 360, 380, 382, 35 L. Ed. 766, 773, 774, 12 Sup. Ct. Rep. 13, 21, 51 Am. & Eng. R. Cas. 305, which was an action brought by the United States after the passage of the above statute to have certain patents for land canceled, this court, after observing that as to some of the lands the United States appeared to have a direct interest in them, said: "As to others, it is under an obligation to claimants under the homestead and pre-emption laws to undo the wrong alleged to have been done by its officers, in violation of law, by removing the cloud cast upon its title by the patents in question, and thereby enable it to properly administer these lands, and to give clear title to those whose rights, under those laws, may be superior to those of the railway company. A suit, therefore, to obtain a decree annulling the patents in question, so far as it is proper to do so, was required by the duty the government owed, as well to the public as to the individuals who acquired rights which the patents, if allowed to stand, may defeat or embarrass." Reference was made in that case to *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 286, 31 L. Ed. 747, 752, 8 Sup. Ct. Rep. 850, in which it was held that the United States could sue to set aside a patent improperly issued, where it appeared that there was an obligation on the part of the United States to the public, or to any individual, or where it had any interest of its own; also, to *United States v. Beebe*, 127 U. S. 338, 342, 32 L. Ed. 121, 123, 8 Sup. Ct. Rep. 1083, in which it was held that patents procured by fraud could be canceled at the suit of the United States, where that was necessary to be done in order that it might fulfill its obligations to others. The court then observed: "These principles equally apply where patents have been issued by mistake, and they are specially applicable where, as in the present case, a multiplicity of suits, each one depending upon the same facts and upon the same questions of law, can be avoided, and where a comprehensive decree, covering all contested rights, would accomplish the substantial ends of justice." See also *United States v. Oregon & C. R. Co.*, 176 U. S. 28, 44 L. Ed. 358, 20 Sup. Ct. Rep. 261.

In this state of the law, the present suit was brought by the

Oregon & California R. Co. v. United States

United States against the Oregon & California Railroad Company in order to obtain a decree canceling certain patents for lands which, it was alleged, had been illegally, and by mistake, issued in the name of the United States to that company, which succeeded to the rights of the Oregon Central Railroad Company.

The case was heard upon a stipulation as to evidence, from which the following facts appear:

By the act of Congress of July 25th, 1866, chap. 242, 14 Stat. at L. 239, the California & Oregon Railroad Company, and such company organized under the laws of Oregon as the legislature of the latter state designated, were authorized to locate, construct, and maintain a railroad and telegraph line between Portland, Oregon, and the Central Pacific Railroad Company in California.

For the purpose of aiding in the construction of that line, Congress granted to those companies, their successors and assigns, every alternate odd-numbered section of public lands, not mineral, to the amount of twenty sections per mile (ten on each side) of the railroad line. But the act provided that when any of the alternate sections or parts of sections should be found "to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers, as aforesaid, nearest to, and not more than 10 miles beyond the limits of, said first-named alternate sections; and as soon as the said companies, or either of them, shall file in the office of the Secretary of the Interior a map of the survey of said railroad, or any portion thereof, not less than 60 continuous miles from either terminus, the Secretary of the Interior shall withdraw from sale public lands herein granted on each side of said railroad, so far as located and within the limits before specified. . . . Settlers under the provisions of the homestead act who comply with the terms and requirements of said act shall be entitled, within the limits of said grant, to patents for an amount not exceeding 80 acres of the land so reserved by the United States, anything in this act to the contrary notwithstanding."

The Oregon Central Railroad Company was designated by the Oregon legislature as the company organized under the laws of Oregon, entitled to receive the granted lands in Oregon, and the benefits and privileges of the above act of 1866.

Prior to October, 1869, that company definitely fixed on the ground and surveyed the first section of the railroad in Oregon. That section extended from Portland to Jefferson, and comprised not less than 60 continuous miles from the northern terminus of the road; and on October 25th, 1869, the company filed in the office of the Secretary of the Interior, and on

Oregon & California R. Co. v. United States

January 29th, 1870, the Secretary duly accepted and approved, a map of the survey and definite location of that section.

During the year 1869 and the months of January and February, 1870, the company definitely fixed on the ground and surveyed the second section of its road, which section comprised not less than 124 continuous miles from Jefferson; and on March 26th, 1870, filed in the office of the Secretary, and on March 29th, 1870, that officer accepted and approved, a map of the survey and definite location of that section.

On the 7th of April, 1870, the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, withdrew all the odd-numbered sections of land lying within 30 miles on each side of the railroad (as shown on the map of survey and definite location, filed with the Secretary on March 26th, 1870) from sale or location, pre-emption or homestead entry; and that withdrawal remained continuously thereafter in force, except so far as, if at all, it was affected by an order of the Secretary made August 15th, 1887, revoking the order of April 7th, 1870, as to the odd-numbered sections lying within the indemnity limits of the grant made in 1866, and declaring the odd-numbered sections lying within such indemnity limits to be restored to the public domain, subject to pre-emption and homestead entry, as well as to the provisions of the above grant. The lands so withdrawn April 7th, 1870, were within the jurisdiction of the district local land office at Roseburg, and notice of such withdrawal was received at that office on April 25th, 1870.

During the years 1868 and 1869, and prior to December the 25th, 1869, the Oregon Central Railroad Company constructed and fully equipped the first 20 miles of the railroad contemplated by the act of 1866, commencing at Portland and extending along the line shown upon the map filed in the office of the Secretary of the Interior on October the 29th, 1869. And in the years 1869 and 1870, and prior to September the 1st, 1870, the above two companies fully equipped the second 20 miles of the railroad, commencing at the end of the first constructed 20 miles and extending along the line shown on the map to a point distant 40 miles from the commencement of the railroad at Portland,—a portion of the second 20 miles having been constructed by the Oregon Central Railroad Company, the remainder by the defendant.

The whole line of railroad contemplated by the act of 1866, commencing at the end of the second constructed 20 miles, was constructed by the defendant company during the years 1870, 1871, and 1872; and prior to December the 4th, 1872, the entire line from Portland to Roseburg was continuously operated for all the purposes contemplated by Congress.

Commissioners were appointed by the President to examine the railroad as constructed from Portland to Roseburg. That duty was performed, and they reported to the President, under oath, that the railroad between those points had been

Oregon & California R. Co. v. United States

completed and equipped in all respects as required, and was ready for the service contemplated by the act of 1866. Those reports were duly accepted and approved by the President. The report as to the seventh, eighth, and ninth sections, including the last 78 miles of the road from Portland to Roseburg, was made on July 10th, 1878, and the next day was accepted and approved.

The remaining part of the road in Oregon, extending from Roseburg to the southern boundary of that state, was constructed, fully equipped, and made ready by the defendant company during the years 1878 to 1889, inclusive, and all prior to the year 1900. It was duly examined by commissioners, who reported thereon, and their reports were accepted and approved.

All the lands described in the bill of complaint are distant more than 20 miles from, but lie within 30 miles on one side of, the road extending from Jefferson to Roseburg, shown on the map filed March 26th, 1870; and they were all included and embraced by the withdrawal made by the Secretary on the 7th of April, 1870.

No part or portion of the lands described in the bill of complaint are mineral lands, nor are they included by any exception or reservation from the indemnity land grant in Oregon, made by the act of 1866, except so far as, if at all, they were excepted or reserved therefrom by reason of the settlements and facts hereinafter to be referred to.

On August 16th, 1892, all the lands described in the bill were free and clear for selection by the defendant company as part and parcel of the indemnity lands granted by the act of Congress, except so far as, if at all, they were excepted or reserved by those settlements and facts.

On the 16th of August, 1892, and the 19th of October, 1892, the defendant company filed with the register and receiver of the United States land office at Roseburg its several lists selecting the lands in question as indemnity lands in lieu of lands of equal area, parts of odd-numbered sections within the primary limits of the grant made in 1866 and otherwise disposed of by the United States prior to the passage of that act. Those lists were accompanied by the fees, costs, and charges required by law, and in all respects conformed to the directions, rules, regulations, and requirements of the Secretary of the Interior and of the Commissioner of the General Land Office. They were severally approved and certified by the register and receiver, and the defendant company had not then, nor has it subsequently, selected or received lands in lieu of those therein described as the basis of selections by it made, other than the lands so selected by said lists.

In the following years the following persons, each being a duly qualified entryman under the homestead laws of the United States, settled upon the lands respectively claimed for them in this suit, to wit: 1869, Louis [Charles] Heller; 1878,

Oregon & California R. Co. v. United States

J. R. Peters; 1878, John Sapp; 1882, George C. Peck; 1883, Uriah W. Wren; 1885, Baxter W. Jenkins, 1885, Charles E. Barton; 1888, Joseph A. Cox; 1889, Charles W. Seeley; 1889, John W. Carey; 1890, F. W. Huddleston; 1890, Alfred R. Young; 1890, Abraham M. Peck. Each person made his settlement with the intention of making a homestead entry of the lands, whenever that could be done under the acts of Congress. After the date of settlement each settler continuously resided and made improvements upon his land in the way of a dwelling house, barn, outhouses, fencing, clearing, and planting of trees. And on October 27th, 1892, within ninety days after the official plat of the survey of the lands was filed in the United States land office at Roseburg, each settler, in good faith, filed a formal application in the land office for a homestead entry of and for the lands upon which he settled and improved and upon which he continuously resided after the date of his first occupancy.

On the 20th of February, 1893, the Commissioner of the Land Office and the Secretary of the Interior having approved the selections made by the railroad company, a patent was issued, conveying to it all the lands in dispute. But when the company's lists were approved, neither the Commissioner nor the Secretary had any knowledge of the adverse claims of the above settlers to the lands upon which they respectively resided, and which the United States now claims for them.

On the 27th day of October, 1893, the land grant made by the act of 1866 being still unadjusted, the Commissioner of the Land Office demanded of the railroad company a reconveyance of the lands covered by the patent of 1893, upon the ground that the patent to it had been erroneously issued. The company refused to reconvey, and claims to be the owner of such lands. Hence the present suit to have that patent canceled.

The circuit court, upon final hearing, found the equities of the case to be with the United States, and a decree was entered, canceling the patent issued to the Oregon & California Railroad Company. That decree was affirmed by the circuit court of appeals.

1. Some of the questions referred to in argument as bearing upon the issues presented by the record have been determined by decisions of this court rendered since this litigation commenced.

In *Hewitt v. Schultz*, 180 U. S. 139, 45 L. Ed. 463, 21 Sup. Ct. Rep. 309, which related to the grant of lands made to the Northern Pacific Railroad Company by the act of July 2d, 1864, chap. 217 (13 Stat. at L. 365), this court accepted the construction of that act as adopted and adhered to by the Land Department, and held that the Secretary of the Interior had no power, simply upon the definite location of the Northern Pacific Railroad, to withdraw from the operation of

Oregon & California R. Co. v. United States

the pre-emption and homestead laws lands within the indemnity limits of the road as defined by Congress. *Northern P. R. Co. v. Miller*, 7 Land Dec. 100, 125; *Northern P. R. Co. v. Davis*, 19 Land Dec. 87, 90. In the present case, the line of the railroad, opposite to which are the lands here in dispute, was definitely located in 1870, while (with the exception of one tract, about which the railroad company makes no question) the lands in dispute were not settled upon until after that year. We have seen that, upon acceptance of the map of definite location, the Secretary of the Interior, according to the stipulated facts, made an order (which was duly received at the local land office) withdrawing all the odd-numbered sections within 30 miles on each side of the road shown on the map of survey and definite location, from sale or location, pre-emption or homestead entry. That withdrawal included the odd-numbered sections in the indemnity limits, within which the lands in dispute were situated. We hold on the authority of *Hewitt v. Schultz* that it was beyond the power of the Secretary to make such an order in respect of lands within the indemnity limits of the grant made by the act of 1866. The reasoning in that case, touching this proposition, applies to the case now before us. In 1887 the Secretary, as if to remove the apparent obstacle placed in the way of pre-emption and homestead settlers created by the order of 1870, made an order revoking the previous one of withdrawal so far as it related to indemnity limits, and declaring the odd-numbered sections lying within the entire indemnity limits of the grant restored to the public domain and subject to pre-emption and homestead entry, as well as to the provisions of the act of 1866. We need not discuss here the question of the power of the Secretary of the Interior to revoke an order of withdrawal once legally made and notice thereof given at the local land office. It is sufficient to say that the railroad company did not, by the order of 1870, relating to lands within the indemnity limits, acquire an interest in any particular odd-numbered sections within those limits; nor did that order prevent the bona fide occupancy by settlers of odd-numbered sections within such limits up to the time of the approval of selections made by the railroad company of lieu lands to supply any deficit in the place limits.

In *Nelson v. Northern P. R. Co.*, decided at the present term of the court [188 U. S. 108, ante, p. 302, 23 Sup. Ct. Rep. 302], it was held that the act of 1864, making a land grant to the Northern Pacific Railroad Company, and the act of May 14th, 1880, chap. 89, for the relief of settlers on the public lands, recognized the right at any time prior to definite location to settle upon the unsurveyed public lands embraced by the grant of 1864, notwithstanding there was, at the time, in existence an order of withdrawal, based only upon a map of general route not issued pursuant to any express direction of Congress; provided such settlement was

accompanied by residence on the land, in good faith, with the intention on the part of the settler to avail himself of the benefits of the homestead law as soon as the lands were surveyed. This decision rested mainly on the ground that Congress intended by the act of 1864 to protect the rights of bona fide settlers acquired before the railroad company had, by an accepted map of definite location, obtained a vested interest in particular odd-numbered sections granted.

These principles are applicable to the present case if, as contended by the United States, the railroad company did not acquire, and could not have acquired, an interest in specific sections of lands within the indemnity limits before their actual and approved selection, under the direction of the Secretary, prior to the date of occupancy by the respective settlers.

2. We have seen, from the stipulated facts, that it was not until 1892 that the railroad company made its selection of lands within the indemnity limits, to supply deficiencies in its place or granted limits. But this occurred after each one of the entrymen whose rights the government is now seeking to protect had made his settlement with the intention to follow it up by a bona fide entry under the homestead laws. In other words, the lands were "occupied by homestead settlers" (to use the words of the granting act of 1866) at the time they were selected by the railroad company. Now, it has long been settled that while a railroad company, after its definite location, acquires an interest in the odd-numbered sections within its place of granted limits,—which interest relates back to the date of the granting act,—the rule is otherwise as to lands within indemnity limits. As to lands of the latter class, the company acquires no interest in any specific sections until a selection is made with the approval of the Land Department; and then its right relates to the date of the selection. And nothing stands in the way of a disposition of indemnity lands, prior to selection, as Congress may choose to make. In *Ryan v. Central P. R. Co.*, 99 U. S. 382, 25 L. Ed. 305, which was a contest as to lands within the indemnity limits, this court said: "It was within the secondary or indemnity territory where that deficiency was to be supplied. The railroad company had not and could not have any claim to it until specially selected, as it was, for that purpose." And the reason given was that "when the road was located and the maps were made, the right of the company to the odd sections first named became ipso facto fixed and absolute. With respect to the 'lieu lands,' as they are called, the right was only a float, and attached to no specific tracts until the selection was actually made in the manner prescribed." In *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.*, 112 U. S. 720, 731, 28 L. Ed. 872, 876, 5 Sup. Ct. Rep. 334, 340, the court, referring to this principle, said: "The reason of this is that, as no vested right can attach to the lands in place—the odd-

Oregon & California R. Co. v. United States

numbered sections within 6 miles on each side of the road—until these sections are ascertained and identified by a legal location of the line of the road, so, in regard to the lands to be selected within a still larger limit, their identification cannot be known until the selection is made. It may be a long time after the line of the road is located before it is ascertained how many sections or parts of sections within the primary limits have been lost by sale or pre-emption. It may be still longer before a selection is made to supply this loss.” After observing that twenty years expired in that case after the location of the road before any selection of lieu lands was made, the court added: “Was there a vested right in this company, during all this time, to have, not only these lands, but all the other odd sections within the 20-mile limits on each side of the line of the road, await its pleasure? Had the settlers in that populous region no right to buy of the government because the company might choose to take them, or might, after all this delay, find out that they were necessary to make up deficiencies in other quarters? How long were such lands to be withheld from market, and withdrawn from taxation, or forbidden to cultivation?” To the same effect are the following cases: *Grinnell v. Chicago, R. I. & P. R. Co.*, 103 U. S. 739, 26 L. Ed. 456, 5 Am. & Eng. R. Cas. 447; *Cedar Rapids & M. River R. Co. v. Herring*, 110 U. S. 27, 28 L. Ed. 56, 3 Sup. Ct. Rep. 485, 14 Am. & Eng. R. Cas. 537; *Kansas P. R. Co. v. Atchison, T. & S. F. R. Co.*, 112 U. S. 414, 421, 28 L. Ed. 794, 797, 5 Sup. Ct. Rep. 208, 26 Am. & Eng. R. Cas. 506; *Sioux City & St. P. R. Co. v. Chicago, M. & St. P. R. Co.*, 117 U. S. 406, 408, 29 L. Ed. 928, 929, 6 Sup. Ct. Rep. 790, 24 Am. & Eng. R. Cas. 100; *Barney v. Winona & St. P. R. Co.*, 117 U. S. 228, 232, 29 L. Ed. 858, 860, 6 Sup. Ct. Rep. 654, 26 Am. & Eng. R. Cas. 522; *Wisconsin C. R. Co. v. Price County*, 133 U. S. 496, 508, 513, 33 L. Ed. 687, 693, 10 Sup. Ct. Rep. 341, 41 Am. & Eng. R. Cas. 660; *Nelson v. Northern P. R. Co.*, 188 U. S. 108, ante, 302, 23 Sup. Ct. Rep. 302. Having regard to the adjudged cases, it is to be taken as established that, unless otherwise expressly declared by Congress, no right of the railroad company attaches or can attach to specific lands within indemnity limits until there is a selection under the direction, or with the approval, of the Secretary.

3. But it is contended that, as the selection by the company (except as to the tract which was occupied in 1869, before any selection by the company of lieu lands) was prior to the application by the respective settlers for entry under the homestead laws, its right to the lands in question was superior to that asserted by the settlers. This view is completely met by the fact that the settler, by prior occupancy in good faith, could avail himself of the homestead acts whenever, by an official survey, the way is opened by the government for him to do so, and by the fact that, within ninety days after these

Oregon & California R. Co. v. United States

lands were surveyed, he filed in the proper office his application to enter them under the homestead laws of the United States. He moved with due diligence to protect and perfect the right acquired by his occupancy of the land with the intention to avail himself of the benefit of those laws. That right was not to be affected or impaired by the fact that the land were not surveyed at the date of occupancy. *Nelson v. Northern P. R. Co.*, 188 U. S. 108, ante, p. 302, 23 Sup. Ct. Rep. 302; *Ard v. Brandon*, 156 U. S. 537, 543, 39 L. Ed. 524, 526, 15 Sup. Ct. Rep. 406, 409; *Tarpey v. Madsen*, 178 U. S. 215, 219, 44 L. Ed. 1042, 1044, 20 Sup. Ct. Rep. 849, 850. In the *Ard Case* the court said: "The law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereon. If he does all that the statute prescribes as the condition of acquiring rights the law protects him in those rights, and does not make their continued existence depend alone upon the question whether or no he takes an appeal from an adverse decision of the officers charged with the duty of acting upon the application." In the *Tarpey Case* it was said that "the right of one who has actually occupied [public lands], with an intent to make a homestead or pre-emption entry, cannot be defeated by the mere lack of a place in which to make a record of his intent;" that if a settler was in possession before definite location, "with a view of entering it as a homestead or pre-emption claim, and was simply deprived of his ability to make his entry or declaratory statement by the lack of a local land office, he could, undoubtedly, when such office was established, have made his entry or declaratory statement in such way as to protect his rights." So, if the condition of the lands, being unsurveyed, prevents the making, by a bona fide occupant, of a proper application of record to enter them under the homestead laws, his rights will not be lost, if, after the lands are surveyed, he applied in due time to enter the lands under those laws. And such has been held to be the object and effect of the act of May 14th, 1880, chap. 89, 21 Stat. at L. 140 (U. S. Comp. Stat. 1901, p. 1392). We could not otherwise adjudge in this case without holding that the mere selection of the lands by the railroad company displaced or destroyed the rights of a bona fide settler arising from previous occupancy with the intention of making the required homestead entry whenever he was permitted to do so. We cannot so hold. We adjudge that the rights which bona fide occupancy gave to the settlers under the act of 1866 are not defeated by a mere selection afterwards of the lands by the railroad company,—the settler having, after the lands were surveyed, promptly taken the necessary steps to protect his rights under the homestead laws. And in such case, the entry made under those laws relates back to the date of settlement on the lands. It was so substantially held in *Nelson v.*

City of Lincoln v. Lincoln St. Ry. Co

Northern P. R. Co., 188 U. S. 108, ante, p. 302, 23 Sup. Ct. Rep. 302.

4. It is also said that all the lands within the indemnity limits were required to supply the deficit in place limits arising from the disposition, prior to definite location, by sale and otherwise, of lands within the granted limits. But the extent to which lieu lands could be required to supply such deficit in place lands could not be properly or legally determined until there was an adjustment of the grant of lands in respect of place limits. In any event, no such adjustment having taken place prior to the date of the settler's bona fide occupancy, his rights, based upon such occupancy, would not be affected by the fact, subsequently appearing, in whatever way, that all the odd-numbered sections within the indemnity limits were needed to supply deficiencies in place limits. At the time the settler went upon the land, in good faith, to make it his home and to perfect his title under the homestead laws, there was nothing of record that stood in the way of his right to occupy the lands and to remain thereon until he could perfect his title by formal entry under the homestead laws.

Other points were made in the argument of the case, but they need not be specially noticed, as what we have said requires, independently of those points, an affirmance of the decree of the Circuit Court and the Circuit Court of Appeals.

The decree is affirmed.

MR. JUSTICE BREWER and MR. JUSTICE McKENNA took no part in the decision of this case.

CITY OF LINCOLN v. LINCOLN ST. RY. CO. *et al.*

(*Supreme Court of Nebraska, Feb. 4, 1903.*)

[93 N. W. Rep. 766.]

Contract—Mistake—Remedies.

, One party to a stipulation or an agreement cannot be released from a part of it on the ground of a mistake, and still leave the other party bound thereby. His remedy is not by motion to withdraw from a part of the stipulation, but by a proceeding to reform the agreement, or to set it aside altogether.

Appeal—Review—Stipulation of Fact.

Where a party waits until near the close of a second trial before asking to withdraw from a stipulation of facts used by both parties on both trials, the court may, in its discretion, refuse such request.

Street Railways—Power to Purchase Line Already Constructed—Power to Borrow Money—Mortgages.

A street railway company authorized to construct, equip, and operate lines of electric street railway may purchase lines already constructed, and fit and suitable for the extension and completion of its system, as well as construct the same; and a recital contained in a mortgage executed by such company that it has power to borrow any sum or sums of money which may be necessary for the purchase, construction, and equipment of its electric street railway will not render the mortgage void upon its face.

City of Lincoln v. Lincoln St. Ry. Co

Same—Powers—Application of Statute.

The charters of all street railway companies in this state are created by general law. Cities have no power to grant such charters or impose any limitations thereon; and the act of 1889, authorizing street railway companies to borrow money for certain purposes, and secure the payment of the same by mortgaging their property and franchises, applies to all street railway companies in this state, whether chartered before or after the passage of that act.

Same—Excessive Indebtedness—Appeal—Review.

Where it is claimed that a mortgage executed by a street railway company is for an amount in excess of that permitted by law and its charter, such alleged fact must be proven, so that an examination of the record will disclose it. Otherwise it will be presumed that the mortgage was not for an excessive amount.

Same—Mortgages—Indebtedness.

Where a street railway company mortgaged its property and franchises to secure the sum of \$600,000 for the purpose of purchasing, constructing, and equipping its lines of electric street railway, and it is shown that it expended for that purpose about \$900,000, it cannot be said that the mortgage was given to create a fictitious indebtedness.

Same—Bonds.

A series of bonds secured by a mortgage or trust deed on the property of a street railway company are negotiable, and, as between bona fide purchasers thereof for value, are equal in priority; the lien of each bond dating from the recording of the mortgage that secured it, and not from the time it was issued.

Same—Same—Liens.

Such a mortgage is a first lien upon the property of the street railway described therein, as against all special assessments for paving taxes, except such as were assessed for paving already done, or as were in contemplation at the time it was recorded.

Same—Liens—Special Assessments.

Section 77 of chapter 11 of the Laws of 1887, which creates a lien for paving taxes against the lines of street railway companies, does not make such special taxes a lien on their personal property.

Same—Special Assessments—Interest.

Under the statutes the taxes levied as special assessments in cities of the first class draw interest at the rate of 12 per cent. per annum from the time of delinquency, and a decree enforcing a tax lien arising thereon will draw interest at the same rate. A computation of the amount due on special assessments upon that basis will be sustained. *Lincoln Street Railway Co. v. The City of Lincoln*, 84 N. W. 802, 61 Neb. 109.

Application of Payments.

A creditor cannot divert a payment by his debtor from the appropriation made by him upon mere equitable considerations, that do not amount to an agreement between the parties giving the creditor a right to appropriate the payment otherwise than directed by the debtor, though mere equitable considerations may control where the payment is made without designating its application.

Same.

The direction given by defendant to the city treasurer, as shown by the evidence in this case, was specific enough to require him to credit the payment of the \$5,000 deposited with him on the taxes which were a first lien upon the defendant's line of street railway.

Decrees—Estoppel to Challenge Validity.

One purchasing property and retaining title to it under a decree of foreclosure will not be permitted to challenge the validity of such decree.

Effect of Foreclosure Proceedings.

The sale and purchase of property under a decree of foreclosure divests the property of the lien of the decree; but, where the decree is

City of Lincoln v. Lincoln St. Ry. Co

also a third lien upon other property, such proceedings do not operate to cancel the lien thereon for the amount of the deficiency arising upon such sale.

Street Railways—Local Assessments—Effect of Consolidation.

“Where street improvements are made, and the cost of paving that portion of the same occupied by street railway companies is levied as special assessments against the property of the several street railways as separate properties, and the different street railways are afterwards consolidated and merged into one property, and operated as one street railway system, the old companies losing their individuality and identity, and the new company assuming the burdens and obligations of the constituent companies, *held* that, as between the consolidated company and the municipal authorities levying such special assessments, the liens arising by reason of the several assessments against the different constituent companies and properties attach to the new property owned and operated by the substituted company as one property in its entirety.” *Lincoln Street Railway Co. v. The City of Lincoln*, *supra*.

Same—Same—Liens—Consolidation.

“Where, however, a mortgage was placed upon a street railway property, and afterwards another company, against which certain liens for taxes levied as special assessments existed, was consolidated with the mortgagor company, *held*, that the lien of the mortgage on the property covered thereby, without the consent of the mortgagee, could not be impaired by the agreements and acts of consolidation, and that the tax lien on property consolidated and merged into the new company, and with the property mortgaged, could not be made prior to the mortgage lien on all the property after consolidation; that the tax and mortgage liens attached to the specific properties embraced in the levy and the mortgage, respectively,” in accordance with their original priorities. *Lincoln Street Railway Co. v. The City of Lincoln*, *supra*.

Same—Same—Same—Mortgages.

Where the trial court finds, on sufficient evidence, that certain assessments for paving taxes were in contemplation at the time of the execution of a mortgage by the street railway upon its property, it follows, as a matter of law, that the lien of such taxes is superior to the lien of the mortgage.

Same—Same—Street Paving.

Assessments for paving one foot outside of the rails of street car lines will not be held void where such paving was done while the statutes were in force providing that street railway companies should be required to pave between their tracks and one foot outside of the rails thereof.

Same—Same—Judgments.

The district court, in its discretion, may refuse to render a personal judgment against defendants at the time of the rendition of its decree in a suit to foreclose tax liens, and may defer such action until after the execution thereof.

(Syllabus by the Court.)

Commissioners' opinion. Department No. 2. Error to district court, Lancaster county; Cornish, Judge.

Action by the city of Lincoln against the Lincoln Street Railway Company and others. Judgment for defendants, and plaintiff brings error. Affirmed.

E. C. Strode and D. J. Flaherty, for plaintiff in error.

Clark & Allen, J. W. Deweese, and F. E. Bishop, for defendants in error.

BARNES, C. This is an action brought by the city of Lincoln to foreclose a lien for certain special assessments or

City of Lincoln v. Lincoln St. Ry. Co

paving taxes against the Lincoln Street Railway Company, the New York Security & Trust Company, the New York Guaranty & Indemnity Company, Brad D. Slaughter, receiver, and the Lincoln Traction Company. At the former trial in the district court of Lancaster county, a decree was rendered in favor of the city for about \$108,000, and it was awarded a first lien for that sum on all of the property of the street railway owned by the consolidated company, and afterwards purchased by the persons who formed the Lincoln Traction Company. From that decree the defendants prosecuted error to this court, and on the hearing the decree of the trial court was reversed, and the cause was remanded for a new trial. Counsel for the city thereupon obtained leave to file an amended and supplemental petition in the district court. To this petition the defendants filed an answer, and the city, by its reply, for the first time, raised the question of the validity of the mortgages involved in this controversy. Counsel for the city also attempted to withdraw from a part of the stipulation of facts on which the former trial was had, but the court refused to allow them to do so. These questions were litigated on the second trial, together with the same issues on which the former trial in the district court was conducted. The trial resulted in a series of findings, which we will not quote in full, but will refer to them as occasion requires, and a decree in favor of the plaintiff for a first lien, amounting to \$48,180.25, in effect a second lien for \$6,855.83, and a third lien for \$37,352.63 on all of the property of the consolidated company, except the lines acquired and constructed after the consolidation took place, and a foreclosure of said liens as prayed. The court found and decreed that the plaintiff was not entitled to a lien on the personal property of the company. From this decree the city prosecutes error, and the defendants appeal to this court. Thus the case is before us a second time.

Most of the questions presented herein were decided in our former opinion, which is reported in 61 Neb. 109, 84 N. W. 802. It appears that prior to the year 1891 several corporations, under different names, had acquired franchises for the purpose of constructing and operating lines of street railway in the city of Lincoln; that all but one of them had constructed a portion of their lines, and were operating them with horse cars; that early in that year one F. W. Little, acting for a company or syndicate known as F. W. Little & Co., purchased all of said franchises and lines of street railway which had been constructed by the several companies, and merged them into one corporation, called the Lincoln Street Railway Company, with the single exception of the lines owned by a corporation called the Rapid Transit Company; that said lines were reconstructed, extended, connected, and equipped with electric motive power, as a system of electric street railway for the whole city; that on the 20th day of July,

City of Lincoln v. Lincoln St. Ry. Co

1891, the said consolidated company executed and delivered to the New York Security & Trust Company a mortgage for \$600,000, which is one of the mortgages in question herein; that on the 16th day of November, 1891, the Rapid Transit Company's lines were taken over by the said consolidated company, and a final consolidation was effected, the company being thereafter known as the Lincoln Street Railway Company; that meanwhile the said company became indebted to the city on account of certain special taxes for paving between the rails of its tracks in the several paving districts of the city, which taxes, and the liens thereof, are the principal matters in controversy in this suit; that after the final consolidation was effected a mortgage was executed and delivered to the New York Security & Indemnity Company, which is the second mortgage in question herein; that shortly thereafter the New York Security & Trust Company commenced an action to foreclose its mortgage in the United States Circuit Court for the district of Nebraska; that a receiver was appointed, who took charge of the property; that the New York Security & Indemnity Company filed its cross-bill, and the mortgages were foreclosed; that the property was sold under the decree, and was purchased by the persons who now own and operate the lines under the name of the Lincoln Traction Company; that in the decree of foreclosure the rights of the city were duly protected; and that about that time the city commenced this suit to foreclose its paving tax lien. It further appears that, after the consolidated company absorbed the Rapid Transit Company and its property, a large part of the Rapid Transit Company's lines were sold to a corporation called the Home Street Railway Company; that a suit was afterwards commenced in the federal court for the district of Nebraska by a party who had furnished the money to reconstruct and equip the Rapid Transit Company's lines, to foreclose a lien thereon, and that the city, in order to save and preserve its lien, filed a cross-bill in said suit, and obtained a decree giving it a first lien on the property for and on account of the separate paving taxes assessed against it; that the property was sold under the decree, and was purchased by the city; that it did not sell for enough to satisfy the decree, and a large part thereof was, and is still, due to the plaintiff herein. This was the situation in which matters stood at the time of the second trial in the district court, which resulted in the decree now before us for review.

Counsel for the city contend that the court erred in refusing to allow plaintiff to withdraw from a portion of a written stipulation made by the parties herein, and upon which the former trial was had. We take up this question a little out of its regular order, because many of the other assignments presented herein will be settled by the determination of this one. The record shows that counsel for the city, before the case was called for trial, filed an application to be permitted

City of Lincoln v. Lincoln St. Ry. Co

to withdraw from paragraphs 15 and 16 of the stipulation. The court overruled and denied the application. The city excepted, and now strenuously urges that such ruling was reversible error. An examination of the bill of exceptions discloses that the stipulation contained 38 paragraphs, and covered 213 pages of record; that by its use the city was saved the trouble and expense of proving its ordinances and resolutions, the engineer's estimates, the assessments in question, the time and manner of making them, and the amount due thereon. In fact, it appears that the city obtained such substantial benefits and concessions thereby that the trial court must have deemed it unjust and inequitable to allow it to withdraw from the two paragraphs in question, and retain the benefits accruing to it by the other portions thereof. In *Gertzen v. Cockrell*, 52 Neb. 930, — N. W. —, the court held that one party to a stipulation or an agreement could not be released therefrom on the ground of a mistake, and still leave the other party bound thereby; that his remedy was not by motion to withdraw from it, but by a proceeding to reform the agreement. In the case of *Welsh v. Noyes*, 10 Colo. 133, 14 Pac. 317, it was held "that a stipulation in a case by both parties, made for convenience and expedition, but by which counsel inadvertently admitted facts not in accord with the premises, and injurious to their clients, might be relieved against, but to strike out a portion of the stipulation on the suggestion of one party is error, if such part be material; that the entire stipulation should be canceled." Counsel for the city made no formal application to be allowed to withdraw from and cancel the whole stipulation, and have it set aside, and no application was made to have it reformed. The rule that one party cannot withdraw from a part of a stipulation of facts made for the purpose of expediting the hearing of a case, and leave his opponent bound thereby, is one founded in reason and justice, and is so well settled that it is no longer an open question. Therefore the trial court did not err in denying the application. Counsel for the city claim, however, that they asked to be allowed to withdraw from the whole stipulation, and to have the same wholly set aside, and that the court erred in not permitting them to do so. It appears in the bill of exceptions that during the trial, and while the defendants were introducing evidence, they offered paragraphs, 15, 16, and 17, and a portion of paragraph 8, of the stipulation of facts (being that part of it which had not been put in evidence by the city); that thereupon the following objection was made: "Counsel for the plaintiff object to paragraphs 15 and 16, for the reason that the same purport to stipulate facts which are not the facts, but which are untrue, and for the reason that counsel for the city did not know at the time the original stipulation was entered into that such facts were not true, but assumed they were, on the representation of counsel for the defendants, whereby plaintiff was

City of Lincoln v. Lincoln St. Ry. Co

misled; and counsel for plaintiff asks leave to withdraw from the stipulation, and particularly from paragraphs 15 and 16, because the alleged facts therein stated are not true." The court overruled the objection and denied the request. We think the request was insufficient in form. It was for leave on the part of the plaintiff to withdraw from the entire stipulation, but no request was made to wholly set it aside. If this request had been granted, it would still have left the defendants bound by the agreement. It would also seem that the application came too late to be entertained by the court. The plaintiff had made its case and rested. It had put in evidence all of the stipulation, except that portion of it which defendants were then attempting to introduce, and it would have been unjust at that stage of the proceedings to deny the defendants the benefit of these paragraphs. Yet counsel insist that the court, in the exercise of its discretion, ought to have sustained the objection and granted their request. We cannot assent to this proposition. Paragraph 15 fixed the time when the bonds and mortgage in question were delivered to the New York Security & Trust Company, and stipulated that they were sold to bona fide purchasers for value, without knowledge or notice of any of the matters mentioned in the stipulation, except such constructive notice, if any, as was imparted by the corporate records of the street railway company, and of the city of Lincoln, and the laws of this state. Paragraph 16 contained practically the same statements as to the bonds and mortgage executed and delivered to the New York Guaranty & Indemnity Company. These paragraphs had been disregarded by the plaintiff, and it had been permitted to introduce other evidence by which it sought to establish the fact that the lien of the mortgages attached at a time subsequent to that fixed by the agreement. It is certain that the trial court found that the evidence so introduced was insufficient to establish the fact sought to be proven, and such finding will not be set aside. If the court had sustained the objection and granted the request, the result would have been a mistrial. It would have rendered it necessary to retry the whole case, and to require this to be done would have been an abuse of discretion. Stipulations and agreements like the one in question should be encouraged and sustained by the court. *Palmer v. People*, 4 Neb. 76; *Rich v. Nat'l Bank*, 7 Neb. 205, 29 Am. Rep. 382; *State Bank v. Green*, 8 Neb. 307, 1 N. W. 210. In *Van Horn v. B., C. R. & N. Ry. Co.*, 69 Iowa, 239, 28 N. W. 547, we find the following: "Where a party to a suit has entered into a written stipulation admitting that a town ordinance was valid and in full effect at the time of an accident, he cannot be relieved from it simply on the ground that he was ignorant when he entered into it, and that the ordinance was invalid for want of publication." In *Ryan v. Mayor*, 154 N. Y. 331, 48 N. E. 512, the court held that, "under a stipulation that upon a

City of Lincoln v. Lincoln St. Ry. Co

second trial of an action the evidence taken upon the previous trial be read at the trial term as the evidence in this action, either party is entitled to the benefit of whatever the record of the previous trial presented as evidence, and letters put in evidence at the previous trial by the plaintiff without objection may be read by the defendant as a part of his case, without reference to their competency." The court in that case sustained the stipulation and agreement absolutely, although it was sought by one of the parties to be relieved therefrom. For these reasons, we hold that the court was not guilty of an abuse of discretion in overruling the plaintiff's objection and denying its request.

The city now claims that the mortgage to the New York Security & Trust Company is void for illegality. No such claim was made upon the first trial in the district court, or upon the former hearing before us; but, after the case was remanded to the district court for a new trial, counsel for the city filed a supplemental petition, to which the defendants filed an answer, and in reply to this answer it was alleged that the mortgage was void. This question was thereupon litigated in the trial court, and resulted in a finding against the city.

Defendants contend that this question could not be raised for the first time by the reply, and, technically speaking, this may be true; but, as long as the question is before us, we may as well determine it upon its merits.

The first point made by the city is that it appears upon the face of the mortgage that it was given for an unauthorized and illegal purpose. This contention is based on the fact that the mortgage recited "that the company is authorized by law to borrow any sum or sums of money which may be necessary for the purchase, construction, and equipment of its lines of electric street railway," while the statute which authorizes a street railway company to borrow money provides "that it is authorized to take mortgages and execute deeds of trust upon its railway and property, in whole or in part, including its real and personal property and franchises, to secure money borrowed for the construction and equipment of its road." It is strenuously contended that, the word "purchase" not being a part of the statute, its appearance in the recitals of the mortgage renders it void on its face. No authorities are cited by the city which directly sustain this point, and, even if the city is in a position to raise this question, we think the construction of the statute contended for is entirely too narrow. A similar question was before the New York Court of Appeals in *Gamble v. Queens County Waterworks Co.*, 25 N. E. 201, 9 L. R. A. 527. In that case a shareholder in the waterworks company, at his own expense and for his own personal benefit, had built a system of pipes suitable for an extension of the company's plant. He sold this property to the company, and received in payment therefor its stock

City of Lincoln v. Lincoln St. Ry. Co

and bonds. The point was made that the purchase was void, and the bonds issued in payment therefor were also void, because the company was not authorized to issue them for that purpose. The statute under which they were issued provided that the company might borrow money for the purpose of constructing its waterworks, and issue bonds for the payment thereof. The court disposed of the question as follows: "It is altogether too narrow a construction of the statutes to hold that the company itself must construct the works, and may not purchase works already constructed, and fit and suitable for its purposes." A like question was before the Supreme Court of the United States in the case of *Branch v. Jesup*, 106 U. S. 468, 27 L. Ed. 279. It was held that, where a railroad company had power to construct a particular line of road, it might purchase from another company a railroad constructed upon that line. In the case at bar the Lincoln Street Railway Company had power to construct and operate lines of street railway throughout the city of Lincoln, it had power to mortgage its property and franchises to construct and equip such lines. No good reason can be suggested why it could not, under such power, purchase a line of street railway constructed in whole or in part, if suitable for its purposes, complete, equip, and construct extensions thereto, and connect it with its other lines, so as to form a complete system of street railways for the whole city. We therefore hold that the finding of the trial court that the mortgage was not void upon its face was right, and should be affirmed.

The second consideration urged upon our attention as a reason for holding the mortgage void is that the property and franchises were inalienable. This contention is based on the following premises: That the ordinance under which the electors of the city of Lincoln voted to authorize the street railway companies to construct their lines upon the streets of the city, together with its adoption by the popular vote, in effect created the charters of the street railway companies, and was the source of their franchises; that the ordinance contained no privilege of alienation; that these matters amounted to a contract between the city and the street railway companies; that the franchises and privileges were personal to the companies to which they were granted, and therefore could not be alienated or transferred; and that the legislature, by a subsequent act, authorizing street railway companies to alienate or mortgage their property and franchises, could not confer such a right upon the companies, or those who purchased their franchises so acquired. This question was settled by our former decision. In 61 Neb. 125, 84 N. W. 807, Mr. Justice Holcomb, speaking for the court, said: "Counsel for defendants insist that the ordinance establishes a contract with respect to its franchise, defines its terms, and grants property rights which are infringed upon

City of Lincoln v. Lincoln St. Ry. Co

by statutes afterwards enacted requiring the company to pave the part of the streets occupied by its tracks. We observe no authority in the statute giving the city the right to grant charters to street railway companies, and, as all such authority must be derived from the statute, we must conclude that, unless it is found there, it does not exist. By the constitutional provisions quoted, special charters are prohibited, and corporations receive their franchises only by general law, and subject to all legal rules and statutes as to the reserved right of the lawmaking power of alteration and amendment. The laws of the state and the articles of incorporation are considered in the nature of a grant, and constitute the charter of the company. *Abbott v. Omaha Smelting Co.*, 4 Neb. 416; *Lincoln Shoe Mfg. Co. v. Sheldon*, 44 Neb. 279, 62 N. W. 480. In the case of a street railway corporation, the grant of the legislature, under general law, is, by the constitution, ineffectual, without such company first obtain the consent of a majority of the electors to the construction and operation of a proposed street railway over the streets where such railway is to be constructed. The statute provides how such consent may be secured. Comp. St. 1887, p. 562, c. 72, art. 7. It is therein provided how the question shall be submitted. No authority is given the city, except to submit to the proposition. It is not authorized to grant a charter upon any terms whatever. There is, we think, a marked distinction between a provision enacted for the purpose of securing the consent of a majority of the electors of a city for a street railway corporation chartered under the general laws to construct and operate a street railway over the streets of such city, and authority to the city, as a municipal corporation, to grant to such corporation a charter to construct its railway over the streets under the terms and stipulations entered into by such city. While it is essential that the consent of a majority of the electors be secured before any charter or franchise rights can accrue to a street railway company, the provisions of the constitution and the statutes requiring such consent cannot be made the basis of a contract respecting corporate rights and privileges between the city and such company. The charter rights are derived from the general law. The consent of a majority of the electors can only be regarded as a condition precedent, on the happening of which is dependent the right to construct and maintain on the streets a railway, and does not enlarge or restrict the grant arising by virtue of the general laws, or in other respects affect the legislature in the exercise of its lawful authority. The property rights of the defendant company, its right of an easement in the streets for the purpose of its creation, and its corporate franchise derived under the law, are all recognized and respected. If contention of counsel be correct, and the ordinance and its acceptance constitute a contract between the city and defendant with respect to its franchise, then it is

City of Lincoln v. Lincoln St. Ry. Co

in the power of the authorities of the different towns and cities to enter into contract relations with respect to such franchise, which in effect creates special charters, nullifies the constitutional provisions referred to, and renders impotent the legislature as to all future legislation in regard to such matters. This, clearly, is not the law." The charter or franchise of the company having been created by the legislature under general laws, that body could at any time change, amend, enlarge, or restrict any of the rights and privileges conferred thereunder. And the act of 1889 authorizing street railway companies to borrow money for certain purposes, and to mortgage their property and franchises to secure the payment of the same, is valid, and applies to the defendants and all other street railway companies in this state.

The third contention is that the mortgage was given to secure a fictitious increase of corporate indebtedness, within the prohibition of the Constitution. Section 5, art. 11, of the Constitution, provides that "no railroad corporation shall issue any stock or bonds, except for money, labor or property actually received and applied to the purposes for which such corporation was created, and all stock, dividends, and other fictitious increase of capital stock or indebtedness of any such corporation shall be void. The capital stock of railroad corporations shall not be increased for any purpose except after public notice for sixty days, in such manner as may be provided by law." This provision is an important one. It was intended to prevent overcapitalization of railroads, and prohibit the issuance of what is commonly known as "watered stock," upon which exorbitant charges for transportation of passengers and commodities might be based; thus creating an apparent necessity for such charges, in order to earn and pay dividends thereon. It is a wise and beneficent measure, and we should enforce it strictly whenever occasion requires or opportunity permits us to do so. It is doubtful if this provision applies to street railway companies. It appears, however, that the money borrowed upon the mortgage in question was used to pay for some of the constituent properties purchased by the defendant, which became parts of the property of the consolidated company; that some of it was used for the construction and extension of the several lines of street railway so purchased, and a large part of it was used to electrically equip the whole system; that the amount of money expended for these purposes was about \$900,000, so that no fictitious indebtedness was created by the mortgage in question; and it appears that the company, in effect, received property, money, or labor for the amount, and to the extent of a much greater sum than the total amount of bonds secured by the mortgage.

It is further contended that the mortgage is void because it was for an amount in excess of that authorized by law. The evidence does not sustain this claim, so

City of Lincoln v. Lincoln St. Ry. Co

far as we can ascertain from the bill of exceptions. Therefore this contention must fail. The finding of the trial court upon that question is sustained by the evidence, and should be affirmed. It follows that the mortgage was valid, and created a lien upon the property described therein. Having held that the mortgage is valid, it is unnecessary to discuss or determine the question of its negotiability. The question of the negotiability of the bonds secured thereby was disposed of in *Kendall v. Sebly* (Neb.) 92 N. W. 178, and in *Garnett v. Meyers* (Neb.) 91 N. W. 400, where it was held that such bonds were negotiable. It may be further stated that the finding of the court that the bonds were executed and signed in substantial compliance with the statutes is also sustained by the evidence, and is affirmed.

It is contended by the city that the lien of the mortgage did not attach to the property of the defendant until some time subsequent to the 20th day of July, 1891; that the court erred in its finding that it became a lien thereon at that date. By the terms of the stipulation, the court was required to fix that date as the time when the mortgage of the New York Security & Trust Company became a lien on the property. Having upheld the stipulation, the finding of the trial court upon that question must be sustained. But waiving the stipulation, we are satisfied that the city failed in its attempt to show that it did not become a lien until a later date. The evidence discloses that the mortgage was delivered to the trust company on July 20, 1891, and that the bonds secured by it were sold to the purchasers thereof for value. The dates of said sales are not shown. It follows that we must hold that the mortgage became a lien from the time it was delivered and recorded, which was July 20, 1891. *Jones on Mortgages*, sec. 374; *Omaha Coke Co. v. Suess*, 54 Neb. 379, 74 N. W. 620. In the case of *Pittsburg, C., C. & St. L. Ry. Co. v. Lynde*, 44 N. E. 596, the Supreme Court of Ohio held "That the bonds of an Ohio railroad corporation, payable in New York City to bearer, are negotiable, without indorsement, although sealed with the corporate seal, notwithstanding they were made in 1864, while section 1 of the act of 1820 (1 Swan & C. St. p. 862) in relation to negotiable papers was in force. Where such bonds are secured by a mortgage on the roadway and other property of the maker, executed to a trustee for that purpose, and are issued at different times, the liens of the bonds outstanding in the hands of bona fide holders for value are equal in priority; the lien of each bond dating from the recording of the mortgage that secured it, and not from the time it was issued." We therefore hold that the finding of the trial court that the mortgage in question became a lien on the property of the street railway company July 20, 1891, should be sustained.

The contention is made that the court erred in holding that the New York Security & Trust Company's mortgage takes

City of Lincoln v. Lincoln St. Ry. Co

precedence over the lien of the special assessments made subsequent to the execution and delivery thereof. This question is settled by our former decision. The language of Judge Holcomb on that branch of the case is as follows: "The statute on the subject is as follows: 'No mortgage, conveyance, pledge, transfer or incumbrance of any such property of any such company or person, or of any of its rolling stock or personal property, created or suffered by any such company, or party, after the time when any street or part thereof, upon which any such street railway shall have been laid, shall have been ordered paved, repaved, macadamized, or repaired, shall be made or suffered, except subject to the actual or prospective lien of such special taxes whether actually levied or not if such levy be in contemplation.' Comp. St. 1899, c. 13a, art. 1, § 79. The lien on the property assessed is only by virtue of the statute. The legislature has, for reasons, no doubt, appearing to it as sufficient and satisfactory, enacted that the tax lien should be prior, if the improvement is in contemplation, whether the taxes are actually levied or not. By the language used, it is contemplated that, if the improvement has been projected and is under way (that is, if the street 'shall have been ordered paved'), no lien shall be created, except subject to the prospective lien. The language of the statute excludes the idea that under all circumstances the lien for special assessments shall be superior to all other liens. If force and effect be given to the language of the statute, and the words used be taken in their ordinary and natural meaning, the conclusion is irresistible that an incumbrance placed on the property before street improvements are projected is prior to a lien for special assessments levied thereafter for such improvement. It is not for us to engage in judicial legislation, or trench on the clearly expressed meaning of the language used by the legislature in its enactment of law. The legislature having determined under what circumstances special assessments levied on property of street railway companies for street improvements should be a first lien on the property assessed, it follows, under any recognized rule of construction, that valid liens on the property before any improvements are made or contemplated, within the meaning of the section, cannot be subordinated to the statutory lien. We observe no escape from this conclusion. Counsel for the city insists that the general provisions as to assessments levied generally being liens on the property assessed, prior to all others, should likewise govern in the case at bar. We cannot so construe the law without ignoring entirely the language quoted, and this we are not at liberty to do. Were it not for such language, and relying only on the general provisions with reference to special assessments, we could readily agree with counsel in this regard. The principle of subordination of lien for taxes to liens created by contract has also been recognized by the legislature in the act providing that a gen-

City of Lincoln v. Lincoln St. Ry. Co

cial lien for taxes shall exist in favor of the state on all the personal property of the tax debtor from and after the time the assessments books are placed in the hands of the county treasurer or tax collector for collection, and yet it is held that a mortgage in good faith executed on such property prior thereto is a superior lien to that of the lien for taxes. Reynolds v. Fisher, 43 Neb. 173, 61 N. W. 695; Farmers' Loan & Trust Co. v. Memminger, 48 Neb. 17, 66 N. W. 1014; Chamberlain Banking House v. Woolsey, 60 Neb. 516, 83 N. W. 729." The foregoing is the law of this case, and this question is no longer an open one in this court.

Complaint is made because the court found that the paving taxes were not a lien on the personal property of the street railway company. Section 77 of chapter 11 of the Laws of 1887, which creates the lien, reads as follows: "Special taxes for the purpose of paying the costs of any such paving, repaving, macadamizing or repairing of any such street railway may be levied upon the track, including the ties, iron, road-bed, and right of way, side tracks, and appurtenances, including buildings, and real estate belonging to any such company or person, and used for the purpose of such street railway business, all as one property, or upon such part of said track, appurtenances and property as may be within the district paved, repaved, macadamized or repaired, or any part thereof, and shall be a lien upon the property upon which levied from the time of the levy until satisfied." And it is claimed that the word "appurtenances," used therein, shall be construed to mean the personal property, including the rolling stock, of the defendant company. It must be conceded that the word, in its ordinary sense, does not mean personal property. The term "appurtenances" signifies something pertaining to another thing as principal, and which passes as incident to the principal thing, which is different, but of a congruous nature. Thus a deed conveying land and its appurtenances conveys only such things in the nature of fixtures as are appurtenant to the land itself. It does not convey the personal property or effects of the grantor, although they are situated upon the land at the time the conveyance takes effect. It is insisted that the word "appurtenances," as used in the statute in this case, means personal property, because in the same act, speaking of a mortgage given by a street railway company, the language of the statute is "that no mortgage, conveyance, pledge, transfer or incumbrance of any such property, of any such company or person, or of any of its rolling stock, or personal property created or suffered by any such company or party after the time when any street or part thereof upon which any such street railway shall have been laid, shall have been ordered paved, repaved, macadamized, or repaired shall be made or suffered except subject to the actual or prospective liens of such special taxes whether actually levied or not, if such levy be in contemplation." We

City of Lincoln v. Lincoln St. Ry. Co

do not understand that this in any way extends the lien of the special taxes as defined and described in the statute, or that the legislature intended that it should have that effect. The same section provides that the treasurer shall have the power and authority to seize any personal property belonging to the street railway company for the satisfaction of such taxes, when delinquent, and to advertise and sell the same in the same manner as constables are authorized to sell property upon execution. The evident intention was to permit such seizure and sale, notwithstanding the personal property was mortgaged, unless the mortgage became a lien thereon before the assessments were actually made or were in contemplation by the city authorities. It has often been held that the words "with the appurtenances" cannot enlarge the rights of the parties or enlarge the scope of the deed. *Huttemeier v. Albro*, 18 N. Y. 48; *Frey v. Drahos*, 6 Neb. 5, 29 Am. Rep. 353. Again, a lien upon personal property would be ineffectual. Such property is transitory in its nature, and is subject to change. In fact, the evidence contained in the bill of exceptions in this case discloses that many of the cars which were owned by the street railway company at the time the special assessments were made have been abandoned, and but very few of them are in use in any form at this time. It is therefore obvious to us that the legislature never intended that the lien for special assessments for paving taxes should extend to and cover the personal property of the street railway company. The trial court was therefore right in the construction it placed upon the statute in question.

The plaintiff in error contends that the court erred in his findings of the amount due the city. It appears that the trial court took as a basis for computation the amounts of the original assessments, and computed the interest thereon at the rate of 1 per cent. per month from the date they became delinquent, plus a penalty of 5 per cent. on all of such delinquent installments. It is contended by counsel for the city that the court should have determined the amount due by computing interest at 6 per cent. per annum from the date of levy until the taxes were delinquent, and thereafter a penalty of 1 per cent. the first month, 2 per cent. the second month, and so on, to wit, at the rate of 24 per cent. per annum up to the time of the trial, and, as authority for such contention, cites us to section 69, c. 13a, Comp. St. 1891. An examination convinces us that the statute is incomplete. In other words, something is left out of the closing part thereof. In its present condition it is impossible to determine its meaning with any degree of certainty. In section 62 of the same chapter we find the following: "Special taxes and assessments shall, except deferred yearly installments for paving purposes, be deemed delinquent if not paid in fifty days after the passage and approval of the ordinance levying the same, and a penalty of five per cent., together with interest, at the

City of Lincoln v. Lincoln St. Ry. Co

rate of one per cent. a month shall be paid on all special taxes and assessments from the time the same shall become delinquent." If the plaintiff's theory is accepted, it is impossible to harmonize these two sections, and we believe that portion of section 62, above quoted should be adopted as the rule of computation in this case. In fact, that matter was before us upon the former hearing of this case, and in considering it we held "that, under the statutes, taxes levied as special assessments in cities of the first class draw interest at the rate of twelve per cent. per annum from the time of the delinquency, and a decree enforcing a tax lien arising therefrom will draw interest at the same rate after rendition." *Lincoln Street Railway Co. v. City of Lincoln*, 61 Neb. 109, 84 N. W. 802, 6 Am. & Eng. R. Cas., N. S., 788. Mr. Justice Holcomb, in the body of the opinion, says: "Complaint is made because interest was computed on the different levies for special assessments at the rate of twelve per cent. per annum, and the judgment rendered decreed to draw interest at the same rate. We think this action was in strict accordance with the provisions of the statutes, and in conformity with the well-settled rule of this and other jurisdictions with reference to the rate of interest charged on delinquent taxes levied for either general revenue purposes or as special assessments. Again, in cities of the class that plaintiff belongs to, the statutory provision is that all delinquent taxes, both general and special, shall draw interest at the rate of twelve per centum per annum from the time they become delinquent." We think this is a correct solution of the question, and the same is hereby approved and followed. The trial court, in making the computation, having followed this rule, his finding of the amount due is approved and affirmed.

It is next contended by the city that the finding by the court which gives the defendant the Lincoln Street Railway Company credit for \$5,000 on account of a payment on the taxes which are a first lien on its lines is erroneous, and is not sustained by the evidence. It appears that an attempt was made to compromise all of the matters in controversy in this suit; that it was agreed that the defendant the Lincoln Street Railway Company should pay the city \$65,000 in installments, and the whole claim for special assessments upon the receipt of that amount should be cancelled. On this agreement, \$5,000 was paid into the city treasury. The city was then enjoined by a taxpayer from carrying out the agreement. Under this condition of affairs the defendant had the right either to withdraw this payment, or have it applied in satisfaction of the debt, as it might see fit to direct. It chose to have it applied in payment of a part of the special assessments, which this court had declared to be a lien on its property prior to the mortgage of the New York Security & Trust Company, and directed the treasurer to so credit it. The direction, as shown by the evidence, was as follows: (Testi-

City of Lincoln v. Lincoln St. Ry. Co

mony of Mr. Humpe): "Q. Mr. Humpe, do you remember whether or not any tender or deposit of money has been made by any of the defendants on any of the taxes involved in this litigation? A. Yes, sir. Q. What amount? A. \$5,000 paid. Q. Paid to whom? A. Paid to Mr. Aitken, city treasurer. Q. I will ask you if you remember about when the decision of the supreme court was rendered in this case; the record of it being January 4, 1901? Do you remember that decision was made? A. Yes, sir; I remember the fact. Q. Well, what, if anything, did you do or say with reference to this command—with reference to this \$5,000 payment to the city treasurer of Lincoln? A. After the decision of the supreme court had been rendered, I asked to have the \$5,000 applied on these districts which were covered by the decision of the supreme court, as being against the property owned by the Lincoln Traction Company. Q. Prior to the giving of the mortgage? A. Yes, sir. Q. That is, the lien for taxes that existed prior to the giving of the mortgage that was foreclosed, and the Lincoln Traction Company made its purchase under? A. Yes, sir." "A debtor may, at or before the time of payment, prescribe the application of such payment, and it is the duty of the creditor to so apply it." Am. & Eng. Ency. of Law, vol. 18, p. 234. "If the creditor receives money with the direction from the debtor to appropriate it to a particular debt, it must go to that debt, no matter what the creditor may say at the time, and an appropriation made by the debtor cannot be changed by the creditor without the debtor's consent." Am. & Eng. Ency. of Law, vol. 18, p. 235; *Mayor of Alexandria v. Patten*, 4 Cranch, 317, 2 L. Ed. 633; *Tayloe v. Sandiford*, 7 Wheat. 13, 5 L. Ed. 384. The Supreme Court of Ohio, in the case of *Stewart v. Hopkins*, 30 Ohio St. 502, passing upon this question, says: "The creditor cannot divert a payment made by his debtor from the appropriation made by him, upon mere equitable considerations, that do not amount to an agreement between the parties, giving the creditor a right to appropriate the payment otherwise than directed by the debtor, though mere equitable consideration may control where the payment is made without designating its application." This rule is recognized and followed in this state in the case of *Life Ins. Co. v. Altschuler*, 55 Neb. 341, 75 N. W. 862. The direction to the city treasurer, as shown by the evidence above quoted, was specific enough to require the city to credit the payment on the assessments which had been declared by this court to be a first lien on the defendant's lines of street railway. We are unable to say that the finding of the court that this money should be so applied was clearly wrong, and therefore it should be sustained.

The trial court found that the balance due on the assessments against the Rapid Transit Company was \$37,352.63, and gave the city a third lien on the property of the Lincoln Street Railway Company, acquired by the traction company,

City of Lincoln v. Lincoln St. Ry. Co

by the foreclosure proceedings in the federal court. Both parties complain of this part of the decree. The city excepts because it was not given a first lien on the property described in the first finding of facts, and in the first conclusion of law, and the traction company complains because the balance due on account of said special taxes was not canceled by the decree. It appears that the city, by a cross-bill filed in an action pending in the federal court against the Home Street Railway Company, which owned a portion of the original Rapid Transit lines of street railway, obtained a decree giving it a first lien on the Rapid Transit lines for the paving taxes assessed against that company, and a decree of foreclosure thereon; that said property was sold under the decree, and was purchased by the city, and that it obtained title thereto by a master's deed, and upon a confirmation of the sale; that the amount bid at the sale left a deficiency of the amount due as established by the decree herein. The city is certainly bound by the decree under which it obtained title to the property purchased. *Pope v. Benster*, 42 Neb. 304, 60 N. W. 561, 47 Am. St. Rep. 703; *Denver City v. Middaugh*, 12 Colo. 434, 21 Pac. 565, 13 Am. St. Rep. 234; *Bank v. Legardi*, 21 La. 290. And for that reason it is contended by the defendant that, the city having obtained title to the former Rapid Transit lines, such proceedings operated to completely extinguish its claim and lien for the balance of the Rapid Transit paving assessments. We cannot assent to this proposition. The sale extinguished the lien on the property purchased by the city under the decree, but the city was still entitled to recover the amount of the deficiency. In the first instance it was entitled to a first lien upon the Rapid Transit property. The lien having been extinguished by the sale and purchase thereof, it was entitled to a third lien on the other lines of the consolidated company, obtained by its purchase at the master's sale. It was not entitled to a personal judgment against the old Lincoln Street Railway Company or the Traction Company, the present owners of the consolidated lines, therefor. In our former opinion in this case, Mr. Justice Holcomb, in determining this question, used the following language: "Can the lien of the city for special assessments levied on the property of the Rapid Transit Company extend to all the property of the new company after consolidation, prior to and in disregard of the lien theretofore created on the property of the original company by virtue of the said mortgage? By section 8, art. 7, c. 72, Comp. St. 1899, it is specially provided, with respect to street railway corporations being merged into a new corporation by consolidation, 'that all the rights of creditors and all liens upon the property of either of said corporations shall be and hereby are preserved unimpaired, and the respective corporations shall continue to exist so far as may be necessary to enforce the same.' At the time of the consolidation the trust company possessed a lien

City of Lincoln v. Lincoln St. Ry. Co

on the property of the defendant company to the extent of the sum due on the bonds sold, and secured by the mortgage held by it as trustee. The city held a lien against the same property for special assessments levied, and also a similar lien on the property of the Rapid Transit Company consolidated with it. The liens were conflicting, and to retain each unimpaired necessitated a finding of the several sums due against the respective properties, and the priority of each. We do not understand upon what principle of law the lien existing against the property of the Rapid Transit Company can be made a prior lien upon the property mortgaged to the defendant trust company. This, it seems to us, would be an impairment of the lien to that extent, in violation of the statutory provisions quoted, as well as the fundamental principle against the impairment of the obligations of a contract without the consent of the parties thereto. We do not think it a sufficient answer to say that the value of the property acquired by consolidation from the Rapid Transit Company exceeded the tax lien with which it was burdened, and which, therefore, might be spread over the entire property without prejudice to the interest of the mortgagee. Of the value of each of the properties we are not fully informed by the record. We are, however, satisfied that the defendant trust company may rightfully insist that the property on which it holds a lien shall not be charged, beyond the terms of its contract, with a lien not existing when its rights thereto attach. As between conflicting equities and lienholders, the rule is settled and well grounded in principles of equity that liens follow the property into the consolidated company, and one cannot take precedence, by reason of such consolidation, over other liens already existing. The lien of the defendant trust company on all the property of the street railway company before consolidation cannot be subordinated to the lien of the levy for special assessments on other property afterwards acquired by consolidation." It follows that the lien for the Rapid Transit taxes attached to the other lines owned by the consolidated company when the consolidation with the Rapid Transit lines took place, which was at a time subsequent to the giving of the mortgages to the New York Security & Trust Company and the New York Security & Indemnity Company. The amount still due on the Rapid Transit paving taxes is therefore a third lien on the lines of the consolidated company. This was the holding of the trial court, and was strictly in accordance with our former views on this question, to which we still adhere.

It is contended by the defendant companies, on their appeal herein, that the court erred in giving the city a first lien for the paving taxes in paving districts 21 and 22. The trial court found that these assessments were in contemplation when the mortgage was given to the New York Security & Trust Company. The statute creating the lien, as above

Northern Pac. Ry. Co. v. Soderberg

stated, expressly makes it superior to that of the mortgage, and the court did not err in so holding.

It is further claimed by defendants that a part of the tax is void because it includes the cost of paving one foot outside of the rails of its street car lines. It is sufficient to say that an examination of the question discloses that at the time this paving was done the statute, in express terms, provided that the company should pave one foot outside of its rails. Laws 1887, c. 11, § 76. Therefore it cannot be claimed that the assessment objected to was void.

It is contended on the part of the city that the court erred in not giving it a personal judgment for a certain part of the taxes. It is sufficient to say that no such judgment was asked for in the pleadings. Again, the Traction Company, by its purchase of the property under the decree foreclosing the mortgages, did not personally assume the debt. Therefore no personal judgment can be rendered against it. No judgment is asked for against the old Lincoln Street Railway Company, and it does not appear that, if one was rendered, it could be enforced or collected. Again, it was within the discretion of the court to defer any action looking to the rendition of a personal judgment until after the execution of the decree by sale of the property, when the amount of the deficiency, if any, as shown by the return can be determined, and upon a proper showing a judgment can be rendered against those personally liable therefor. The city, therefore, was not injured by the refusal of the court to render a personal judgment, and has no cause of complaint so far as that question is concerned.

After a laborious reading of the record and bill of exceptions, and a careful examination of all of the matters involved herein, we find that the trial was fairly conducted; that the findings and the decree of the trial court are sustained by the evidence, and are in substantial accord with the law of the case as set forth in our former opinion. We therefore recommend that the decree of the district court be in all things affirmed.

OLDHAM and POUND, CC., concur.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and decree of the district court is affirmed.

NORTHERN PACIFIC RAILWAY COMPANY, Appt., v.
JOHN A. SODERBERG.

(Argued October 31, 1902. Ordered for reargument November 17, 1902.
Leave to United States to intervene December 8, 1902. Reargued
December 12, 1902. Decided February 23, 1903.)

[23 Sup. Ct. Rep. 365.]

Appeal from Circuit Court of Appeals—Finality of Decision.

The judgment of the circuit court of appeals is not final under the circuit court of appeals act of 1891, § 6 (26 Stat. at L. 828, chap. 517, U. S.

Northern Pac. Ry. Co. v. Soderberg

Comp. Stat. 1901, p. 549), unless the original jurisdiction of the circuit court was dependent "entirely" upon diverse citizenship.

Jurisdiction of Circuit Court—Case Arising under Laws of the United States.

A suit over the ownership of real property, in which plaintiff's title rests upon a proper interpretation of the exception of mineral lands in the Northern Pacific Railroad land grant act of July 2, 1864 (13 Stat. at L. 365, chap. 217), is one arising under the laws of the United States, of which a circuit court has jurisdiction wholly independent of citizenship.

Railway Land Grant—What Are Mineral Lands.

Lands valuable solely or chiefly for granite quarries are "mineral lands" within the meaning of the exception of such lands, in the act of July 2, 1864 (13 Stat. at L. 365, chap. 217), from the grant made therein to the Northern Pacific Railroad Company.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Washington, dismissing a bill to enjoin the removal or disposal of granite from land held under a mineral location, and quieting the title of defendant to such land. Affirmed.

See same case below, 43 C. C. A. 620, 104 Fed. 425.

Statement by MR. JUSTICE BROWN:

This was a bill filed by the railway company in the circuit court for the district of Washington to enjoin the defendant Soderberg from taking, removing, or disposing of granite from a quarter section of land of which he had taken possession under a mineral location, and for an account of the granite quarried or removed.

The bill alleged the incorporation of the Northern Pacific Railroad Company under an act of Congress of July 2, 1864 (13 Stat. at L. 365, chap. 217), with power to construct a railroad from Lake Superior to Puget sound, with a branch line via Columbia river to Portland; the grant of every alternate odd-numbered section of public land, not mineral, to the amount of twenty alternate sections per mile, on each side of the line when passing through the territories; acceptance of the act by the railroad company; a joint resolution of Congress approved May 31, 1870, authorizing the company to issue bonds for the construction of the road, with a privilege to the company of building its main road by the valley of the Columbia river, with a branch across the Cascade mountains to Puget sound; the definite location on March 26, 1884, of the Cascade branch of the road; the completion and acceptance of the road coterminus with its public lands; the conveyance on August 3, 1896, of all its property to the Northern Pacific Railway Company, which has since continuously operated such road.

The bill further alleged that the quarter section in dispute was rough, mountainous land, the principal value of which consisted in the existence of a ledge of granite of good merchantable quality, and valuable for building stone; that the defendant in 1898 entered upon this quarter section and began

Northern Pac. Ry. Co. v. Soderberg

to quarry, remove, and dispose of such granite under a mineral location of the land in question, contending that such land is excepted from the general land grant, and that the question whether this land is mineral or nonmineral has not yet been determined by the department. Wherefore an injunction was prayed.

The answer raised no issue of fact, but averred that the lands were mineral in character and as such excepted from the grant, and that defendant having complied with the rules and regulations of the Land Department and made the proper proof, it was assumed and decided that the defendant was entitled to a patent. That he paid the proper fees to the receiver, who forwarded the proofs and records to the Land Department with a recommendation that a patent issue. The patent, however, does not seem to have been actually issued until after the beginning of this suit.

The court heard the case upon a stipulation of facts, and entered a decree dismissing the bill, and quieting the title of the defendant to the lands in question. 99 Fed. 506. On appeal to the circuit court of appeals this decree was affirmed. 43 C. C. A. 620, 104 Fed. 425.

Messrs. C. W. Bunn and James B. Kerr for appellant.

Mr. J. T. Ronald for appellee on original argument.

Mr. R. A. Ballinger for appellee on reargument.

Assistant Attorney General Van Devanter and Mr. Arthur B. Pugh for United States.

MR. JUSTICE BROWN delivered the opinion of the court:

Motion was made to dismiss this appeal for the reason that, as the jurisdiction of the circuit court was invoked upon the ground of diverse citizenship, the decree of the circuit court of appeals is final, under § 6 of the court of appeals act of 1891 (26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 549), as interpreted by the decisions of this court in *Colorado Cent. Consol. Co. v. Turck*, 150 U. S. 138, 37 L. Ed. 1030, 14 Sup. Ct. Rep. 35; *Borgmeyer v. Idler*, 159 U. S. 408, 40 L. Ed. 199, 16 Sup. Ct. Rep. 34; and *Press Pub. Co. v. Monroe*, 164 U. S. 105, 41 L. Ed. 367, 17 Sup. Ct. Rep. 40. But, to impress the attribute of finality upon a judgment of the circuit court of appeals, it must appear that the original jurisdiction of the circuit court was dependent "entirely" upon diverse citizenship. That is not the case here. Plaintiff's bill does, indeed, set up a diversity of citizenship as one ground of jurisdiction, but, as it appears that its title rests upon a proper interpretation of the land grant act of 1864 as to the exception of nonmineral lands, there is another ground wholly independent of citizenship under that clause of § 1 of the act of 1888 (25 Stat. at L. 433, chap. 866) clothing the circuit court with jurisdiction of all civil suits involving over \$2,000, "and arising under the Constitution or laws of the

Northern Pac. Ry. Co. v. Soderberg

United States.” If the case made by the plaintiff be one which depends upon the proper construction of an act of Congress, with the contingency of being sustained by one construction and defeated by another, it is one arising under the laws of the United States. *Doolan v. Carr*, 125 U. S. 618, 31 L. Ed. 844, 8 Sup. Ct. Rep. 1228; *Cooke v. Avery*, 147 U. S. 375, 37 L. Ed. 209, 13 Sup. Ct. Rep. 340. Under the allegations of the bill, the fact that the Land Department had not determined whether the land in question was mineral or nonmineral does not involve a question of fact, as the facts are admitted, but solely a question of law whether land valuable for its granite is mineral or nonmineral under the terms of the grant. *Morton v. Nebraska*, 21 Wall. 660, 22 L. Ed. 639. The fact that a patent issued pending suit is neither set up in the pleadings nor noticed in the opinion of either court. The motion to dismiss must therefore be denied.

2. We are thus brought to the main question in the case, viz.: Whether lands valuable solely or chiefly for granite quarries are mineral lands within the exception of the grant of 1864? The 3d section of the act containing the granting clause of land “not mineral” also contains the following provisos: “Provided further, That all mineral lands be, and the same are hereby, excluded from the operations of this act. . . . And provided, further, That the word ‘mineral’ when it occurs in this act shall not be held to include iron or coal.” [13 Stat. at L. 365, chap. 217.] The inference from this proviso is that in the absence of a special provision both iron and coal would be considered as minerals, and thus to repel the idea that only metals were included in the word “mineral.” This inference is strengthened by the fact that the day before this act was passed, July 1, 1864 (13 Stat. at L. 343, chap. 205), another act was approved authorizing the public sale to the highest bidder of “any tracts embracing coal beds or coal fields,” and providing that any lands not thus disposed of shall thereafter be liable to private entry. Relying largely upon this act as a “legislative declaration” this court held, in *Mullan v. United States*, 118 U. S. 271, 30 L. Ed. 170, 6 Sup. Ct. Rep. 1041, that coal lands are mineral lands within the meaning of that term as used in the statutes regulating the disposition of the public domain. This effectually disposes of the argument that the word “mineral” must be construed as synonymous with metalliferous.

Upon the other hand, § 2 declares that “the right, power, and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, etc., for the construction thereof.” There is a possible inference from this that stone was not to be regarded as mineral, although it is more likely that a grant was intended of all material serviceable in the construction of the road, even though it might otherwise be excepted from it as a mineral. Taking these two sections together,

Northern Pac. Ry. Co. v. Soderberg

it would seem that the reason for providing in the 3d section that iron and coal lands should not be deemed mineral was the same as the liberty given by the 2d section to take materials of earth, stone, and timber; namely, to facilitate the construction and operation of the railroad, in which large quantities of coal and iron would be required.

The word "mineral" is used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its signification in a given case. Thus, the scientific division of all matter into the animal, vegetable, or mineral kingdom would be absurd as applied to a grant of lands, since all lands belong to the mineral kingdom, and therefore could not be excepted from the grant without being destructive of it. Upon the other hand, a definition which would confine it to the precious metals—gold and silver—would so limit its application as to destroy at once half the value of the exception. Equally subversive of the grant would be the definition of minerals found in the Century Dictionary; as "any constituent of the earth's crust;" and that of Bainbridge on Mines: "All the substances that now form, or which once formed, a part of the solid body of the earth." Nor do we approximate much more closely to the meaning of the word by treating minerals as substances which are "mined," as distinguished from those which are "quarried," since many valuable deposits of gold, copper, iron, and coal lie upon or near the surface of the earth, and some of the most valuable building stone, such, for instance, as the Caen stone in France, is excavated from mines running far beneath the surface. This distinction between underground mines and open workings was expressly repudiated in *Midland R. Co. v. Haunchwood Brick & Tile Co.*, L. R. 20 Ch. Div. 552, and in *Hext v. Gill*, L. R. 7 Ch. 699.

The ordinance of May 20, 1785, authorizing the sale of lands in the western territory, with a reservation of "one third part of all gold, silver, lead, and copper mines, to be sold or otherwise disposed of, as Congress shall hereafter direct," was evidently intended as an assertion of the right of the government to a royalty upon the more valuable metals—a prerogative which had belonged to the English Crown for centuries, though there confined to gold and silver, which were only considered as royal metals, and having its origin in the King's prerogative of coinage. 1 Bl. Com. 394. While intrinsically the precious metals are the more valuable, in the aggregate, the nonprecious metals have probably contributed as much or more to the general wealth of the country.

A division of lands into agricultural and mineral would also be a most uncertain guide to a proper construction of the word "mineral," since most of the lands included in the limits of this grant are neither one nor the other, but desert or rocky land, of no present value for agriculture, and of little value for their mineral deposits. So, too, the general reser-

ventions in the earlier acts of Congress of lead mines and saline springs seem to have been dictated by the fact that those were the only valuable minerals known to exist in the states to which the acts were applied, while in Michigan and Wisconsin there was a similar reservation of copper, lead, and other valuable ores, which were just then being discovered and made available. In the earlier grants of Congress in aid of railroads there was generally no reservation of mineral lands, but in the grants subsequent to 1860, to the Lake Superior and Pacific roads, through unsurveyed and almost unknown territories, a reservation was invariably made of lands suspected of being rich in metals. It is quite true that, had it not been for the actual or suspected presence of these metals, Congress might not have deemed it worth while to reserve the nonmetallic mineral lands; but when its attention was called to the fact that valuable mines might exist along the line of these roads, as it appears to have been about 1860, its policy was changed, and not only metalliferous, but all mineral lands were reserved. Subsequent to that, it was only in states which had already received grants without reservation, or in known agricultural states, that such grants continued to be made.

Considerable light is thrown upon the congressional definition of the word "minerals" by the acts subsequent to the Northern Pacific grant of 1864, and prior to the definite location of the line in 1884. The first of these acts, that of July 26, 1866 (14 Stat. at L. 251, chap. 262), declares that the "mineral lands" of the public domain shall be free and open to exploration and occupation, subject to such rules as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts. The 2d section provides that whenever any person or association of persons claim a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, or copper, he shall be entitled to enter such tract and receive a patent therefor, upon complying with certain preliminaries, and with a right to follow such vein, etc, into adjoining lands. The argument made in this connection by the railway company would confine the term "mineral lands" to lands bearing gold, silver, cinnabar, or copper, which would exclude all other metalliferous lands, such as contain iron, lead, tin, nickel, platinum, aluminum, etc.,—a limitation wholly inconsistent with the use of the word "mineral" in the 1st section.

This act was amended July 9, 1870 (16 Stat. at L. 217, chap. 235), to allow the entry of "placer" claims, "including all forms of deposits, excepting veins of quartz, or other rock in place," and declaring that they shall be subject to patent under the same provisions as vein or lode claims. As placers are merely superficial deposits, occupying the beds of ancient rivers or valleys, washed down from some vein or lode (*United States v. Iron Silver Min. Co.*, 128 U. S. 673, 32 L. Ed. 571,

Northern Pac. Ry. Co. v. Soderberg

9, Sup. Ct. Rep. 195), this act has little bearing upon the present case, though in *Freezer v. Sweeney*, 8 Mont. 508, 21 Pac. 20, it was held by the supreme court of Montana to authorize the locating and patenting of a stone quarry.

Another act having a more important bearing is that of May 10, 1872 (17 Stat. at L. 91, chap. 152), "to promote the development of the mining resources of the United States," and providing in the 1st section that "all valuable mineral deposits" in public lands should be open to exploration and purchase, according to the local customs or rules of miners. This section is an obvious extension of § 1 of the act of 1866, above cited, by substituting the words "valuable mineral deposits in lands" for the words "mineral lands," as used in the prior act. The 2d section is also in line with the 2d section of the act of 1866, and provides that "mining claims upon veins or lodes of quartz, or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location." This section, like § 2 of the act of 1866, is susceptible of two interpretations: either that the words "valuable mineral deposits" of the 1st section are limited to the particular metals described in the 2d section, or that those metals stood in particular need of regulation as to the length and breadth of vein, and power to pursue such veins downward vertically, and even beyond the vertical side lines of the locations. This appears to us the more reasonable interpretation. The fact that no such limits were imposed on veins of coal or other minerals or metals indicates, not that the act was intended to be confined to the minerals enumerated in § 2, since that would be a clear restriction upon the words "valuable mineral deposits" in the 1st section, but that these particular metals stood in special need of limitation and protection.

Equally pregnant with meaning is the act of June 3, 1878 (20 Stat. at L. 89, chap. 151, U. S. Comp. Stat. 1901, p. 1545), for the sale of timber lands in California, Oregon, Nevada, and Washington, which provides that lands "valuable chiefly for timber, but unfit for cultivation," as well as lands "valuable chiefly for stone," may be sold in quantities not exceeding 160 acres, with a proviso excluding mining claims, or lands containing gold, silver, cinnabar, or coal. This was followed by another act, August 4, 1892 (27 Stat. at L. 348, chap. 375, U. S. Comp. Stat. 1901, p. 1434), authorizing the entry of lands "chiefly valuable for building stone," under the placer mining laws, and extending the previous act to all public land states. This act was passed after the line of the road had been definitely located, and consequently has no direct bearing upon the case, and can only be regarded as explaining to some extent the previous reservation of all lands valuable for mineral deposits.

Conceding that in 1864 Congress may not have had a definite

Northern Pac. Ry. Co. v. Soderberg

idea with respect to the scope of the word "mineral," it is clear that in 1884, when the line of this road was definitely located, it had come to be understood as including all lands containing "valuable mineral deposits," as well as lands "chiefly valuable for stone," and that when the grant of 1864 first attached to particular lands by the definite location of the road in 1884, the railway found itself confronted with the fact that the word "mineral" had by successive declarations of Congress been extended to include all valuable mineral deposits. As no vested rights had been acquired by the railway company, prior to the definite location of its line, it took the lands in question encumbered by such definitions as Congress had seen fit to impose upon the word "mineral," subsequent to 1864.

Indeed, by the very terms of the granting act of July 2, 1864, not only are mineral lands excluded, but the grant is limited to those lands to which "the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office." It results from this that if, before the definite location of the road, Congress had withdrawn certain of these lands from the grant, the company was bound by such withdrawal and compelled to accept other lands in lieu thereof within the indemnity limits of the grant.

In construing this grant we must not overlook the general principle announced in many cases in this court, that grants from the sovereign should receive a strict construction,—a construction which shall support the claim of the government rather than that of the individual. Nothing passes by implication, and unless the language of the grant be clear and explicit as to the property conveyed, that construction will be adopted which favors the sovereign rather than the grantee.

The rulings of the Land Department, to which we are to look for the contemporaneous construction of these statutes, have been subject to very little fluctuation, and almost uniformly, particularly of late years, have lent strong support to the theory of the patentee, that the words "valuable mineral deposits" should be construed as including all lands chiefly valuable for other than agricultural purposes, and particularly as including nonmetallic substances, among which are held to be alum, asphaltum, borax, guano, diamonds, gypsum, reslin, marble, mica, slate, amber, petroleum, limestone, building stone, and coal. The cases are far too numerous for citation, and there is practically no conflict in them.

The decisions of the state courts have also favored the same interpretation. Thus, in *Gibson v. Tyson*, 5 Watts. 34, chromate of iron was held to be included in a reservation of all minerals. In *Hartwell v. Camman*, 10 N. J. Eq. 128, 64

Northern Pac. Ry. Co. v. Soderberg

Am. Dec. 448, a grant of "all mines, minerals open or to be opened," was held to include paint stone, on the ground that it was valuable for its mineral properties,—the court distinctly repudiating the idea that the term should be confined to metals or metallic ores. In *Funk v. Haldeman*, 53 Pa. 229, and in *Gill v. Weston*, 110 Pa. 313, 1 Atl. 921, petroleum was held to be mineral, although the act authorizing the lease of mining lands was passed before petroleum was discovered. See also *Gird v. California Oil Co.*, 60 Fed. 531. The same principle was extended in *Westmoreland & C. Natural Gas Co. v. De Witt*, 30 Pa. 235, 5 L. R. A. 731, 18 Atl. 724, to natural gas, which was said to be a mineral *feræ naturæ*. In *Armstrong v. Lake Chaplain Granite Co.*, 147 N. Y. 495, 42 N. E. 186, a conveyance of "all minerals, and ores," was held to include granite subsequently discovered on the premises, though it would not pass under the name of "mineral ores." In *Johnston v. Harrington*, 5 Wash. 78, 31 Pac. 316, the supreme court of that state thought it would hardly be disputed that stone was a mineral, though it seems inconsistent with the subsequent case, in the same volume, of *Wheeler v. Smith*, 5 Wash. 704, 32 Pac. 784, holding that the term "mineral" was only intended to embrace deposits of ore.

The rulings of the English courts have, with a possible exception in some earlier cases, adopted the construction that valuable stone passed under the definition of minerals. Said Baron Parke in *Rosse v. Wainman*, 14 Mees. & W. 859, 872: The term "minerals" used in an act of Parliament, reserving to the lord all mines and minerals, though more frequently applied to substances containing metals, in its proper sense includes all fossil bodies or matters dug out of mines; and Dr. Johnson says that all metals are minerals, but all minerals are not metals; and mines, according to Jacob's Law Dictionary, are quarries or places where anything is dug; and in the year book, 17 Edw. III, chap. 7, *mineræ de pierre* and *de charbon* are spoken of. Beds of stone, which may be dug by winning or quarrying, are therefore properly minerals, and so we think they must be held to be in the clause in question, bearing in mind that the object of the act was to give the surface for cultivation to the commoners and to leave in the lord what it did not take away for that purpose. This case was followed in *Micklethwait v. Winter*, 6 Exch. 644; in which the same act of Parliament was held to include stone dug from quarries. In *Midland R. Co. v. Checkley*, L. R. 4 Eq. 19, stone for road making or paving was held to be a mineral, the Master of the Rolls observing: "Stone is, in my opinion, clearly a mineral, and in fact everything except the mere surface which is used for agricultural purposes. Anything beyond that, which is useful for any purpose whatever, whether it is gravel, marble, fire clay, or the like, comes within the word 'mineral' when there is a reservation of the mines and minerals from a grant of land." In *Midland R.*

Chattahoochee & G. R. Co. v. Behrman

Co. v. Haunchwood Brick & Tile Co., L. R. 20 Ch. Div. 552, brick clay was held to be a mineral; and in *Hext v. Gill*, L. R. 7 Ch. 699, the House of Lords held that china clay, and every substance which may be obtained "from underneath the surface of the earth for the purpose of profit," was a mineral, "unless there is something in the context or in the nature of the transaction to induce the court to give it a more limited meaning." The same rule was applied in several analogous cases of granite, sandstone, flintstone, and in other similar circumstances. *Atty. Gen. v. Welsh Granite Co.*, 35 Week. Rep. 617 (granite); *Bell v. Wilson*, 2 Drew. & S. 395 (sandstone); *Tucker v. Linger*, L. R. 8 App. Cas. 508 (flintstone), and a dozen other cases to the same effect.

We do not deem it necessary to attempt an exact definition of the words "mineral lands" as used in the act of July 2, 1864. With our present light upon the subject it might be difficult to do so. It is sufficient to say that we see nothing in that act, or in the legislation of Congress up to the time this road was definitely located, which can be construed as putting a different definition upon these words from that generally accepted by the text-writers upon the subject. Indeed, we are of opinion that this legislation consists with, rather than opposes, the overwhelming weight of authority to the effect that mineral lands include, not merely metalliferous lands, but all such as are chiefly valuable for their deposits of a mineral character, which are useful in the arts or valuable for purposes of manufacture.

The decree of the Court of Appeals is therefore affirmed.

MR. JUSTICE BREWER and MR. JUSTICE PECKHAM dissented.

CHATTAHOOCHEE & G. R. CO. v. BEHRMAN.

(*Supreme Court of Alabama, Jan. 22, 1903.*)

[33 So. Rep. 551.]

Torts—Independent Contractor—Liability of Employer.*

Where an independent contractor building a railroad erects in a street an embankment not necessary to the performance of his contract, nor called for by it, the railroad for which the road is being built is not liable for damages to abutting property.

Appeal from circuit court, Henry county; John P. Hubbard, Judge.

Action by Emma T. Behrman against the Chattahoochee & Gulf Railroad Company for damages to plaintiff's lot. From a judgment for plaintiff, defendant appeals. Reversed.

*As to whether a railroad company is liable for the acts of independent contractors, see *Louisville & N. R. Co. v. Tow* (Ky.), 21 Am. & Eng. R. Cas., N. S., 441; *Leavitt v. Bangor & A. R. Co.* (Me.), 7 Am. & Eng. R. Cas., N. S., 354; *Hasie v. Alabama & V. R. Co.* (Miss.), 20 Am. & Eng. R. Cas., N. S., 551; *Sanford v. Pawtucket Street Ry. Co.* (R. I.), 4 Am. & Eng. R. Cas., N. S., 318; *Dublin v. Taylor, B. & H. Ry. Co.* (Tex.), 13 Am. & Eng. R. Cas., N. S., 461.

Chattahoochee & G. R. Co. v. Behrman

The fourth plea to the complaint was as follows: "For further answer to the complaint, this defendant says that it did not build the railroad through the town of Dothan, mentioned in the complaint, and which crossed Oates street, and which crossed a lot adjoining plaintiff's lot, but that the Central of Georgia Railway Company graded, built, and constructed said railroad under a contract with this defendant, and that this defendant did not direct or control the manner of the grading, constructing, or erecting of said road, neither did it direct the manner in which said road should be graded or constructed, neither did it have under its control or under its authority any of the persons engaged in the grading or the construction of said road, nor did it have the authority to employ or discharge any of the persons so employed or engaged in the construction of said road, but that the Central of Georgia Railway Company was what is known as an 'independent contractor' in the grading or construction of said road; that the said Central of Georgia Railway Company erected the embankment in Oates street, in the town of Dothan, in front of plaintiff's house and lot, and that this defendant was in no wise connected therewith, and that it was not necessary, in the grading or construction of said road by the Central of Georgia Railway Company, to erect said embankment in said Oates street in front of the plaintiff's said house and lot." The other facts are sufficiently shown by the opinion.

Espy, Farmer & Espy, for appellant.

H. A. Pearce, for appellee.

DOWDELL, J. This is an action by the plaintiff (appellee here) against the Chattahoochee & Gulf Railroad Company to recover damages for an injury to plaintiff's realty. The wrong complained of consisted in the erection of an embankment several feet high, in and along Oates street, a public street in the city of Dothan, in front of plaintiff's residence and lot, which abutted on said street, whereby egress and ingress to said lot was impaired, and the plaintiff otherwise damaged in her property. The principal defense set up, and the one that presents the vital question in the case, was fully set forth in defendant's plea No. 4, which, however, was stricken from the file on the plaintiff's motion, though the matters therein pleaded were afterwards let in under the plea of the general issue. The question raised is one of liability *vel non* for the act of an independent contractor. The doctrine is well settled by adjudications of this court, supported by reason, and by authorities in other jurisdictions, as well as by text-writers, that the owner or proprietor is not liable for the negligent acts of an independent contractor. *Ala. Midland R. R. Co. v. Martin*, 100 Ala. 511, 14 South. 401; *Scarborough v. Ala. Midland R. R. Co.*, 94 Ala. 499, 10 South. 316; *Rome & Decatur R. R. Co. v. Chasteen*, 88 Ala. 591, 7 South. 94, 40 Am. & Eng. R. Cas. 559; *Meyer v. Hobbs*, 57 Ala. 175, 29 Am. Rep. 719; *Moody v. McClelland*, 39 Ala.

Chattahoochee & G. R. Co. v. Behrman

45, 84 Am. Dec. 770; *Harrison v. Kiser*, 79 Ga. 588, 4 S. E. 320; *Central of Ga. Ry. Co. v. Grant*, 46 Ga. 417; *Scammon v. City of Chicago*, 25 Ill. 424, 79 Am. Dec. 334; *Cunningham v. R. R. Co.*, 51 Tex. 503, 32 Am. Rep. 632. See, also, *Rapalje & Mack's Digest of Railway Cases*, vol. 5, pp. 1103-5-6. On this principle counsel for appellant in their argument seem to base their contention of error in the rulings and judgment of the trial court. If the wrong complained of was the result of the negligent act of the independent contractor, under the above authorities, the case would be one of easy solution. But such is not the case made by the complaint. There is no averment of injury growing out of any negligent act or conduct. The claim for damages is based upon the injury resulting to plaintiff's property by throwing up the embankment in the public street in front of plaintiff's residence and lot. The case made is wholly different in principle from those cases where damages followed from negligence. The question before us must be determined by other and different principles. The general rule is that all parties participating in a wrongful act, directly or indirectly, whether as principals or agents, or both, are jointly and severally liable in damages for the wrong done, where injury results. And it is upon this principle that the owner or proprietor is liable for the act of an independent contractor, where the contract itself calls for the doing of the act causing the injury and damage, and the act is done in pursuance of the contract, as in the case of the *Ala. Midland R. Co. v. Coskry*, 92 Ala. 254, 9 South. 202—an authority cited by counsel for appellee in support of their contention here—where this court held that the Alabama Midland Railway Company, the owner of the railroad, and the Terminal Company, an independent contractor that constructed the railroad, were jointly liable in damages for the injury to plaintiff's property caused by excavations and embankments in the construction of the road. The wrong complained of in that case, as here, was in making cuts and throwing up embankments in the public street of the city in front of plaintiff's lot. In that case, however, the evidence showed that the Terminal Company made the cuts, erected the embankments, and changed the grade of the public street in accordance with the survey made by the civil engineer of the Alabama Midland Company. Or in other words, the wrong complained of was one that the contract between the Alabama Midland Company and the Terminal Company called for in its performance, and was committed in the carrying out of the contract by the Terminal Company. The facts in the case at bar are different, and differentiate it from that case in the application of the principle there laid down. Here the undisputed facts are that the Central of Georgia Railway Company, the contracting company, through its own civil engineer, made the survey and fixed the grade, and, in the construction of the road, had the exclusive man-

Chorman v. Queen Anne's R. Co

agement and control of the work, and that the defendant company had nothing further to do with it than to inspect and pay for the work after the same was completed. It is further shown in evidence, without dispute, that the erection of the embankment in front of plaintiff's lot was not necessary in the construction of the said railroad. From this it is clear that the wrong complained of was not called for by the contract itself, nor necessary in its performance by the Central of Georgia Railway Company. We have, then, under the undisputed facts, the case of an independent contractor committing a wrong, not called for by the contract, nor necessary to its performance, and with which the owner had no other or further connection than to inspect and pay for the work, which caused the injury, after the same had been completed. It is our opinion and judgment that no liability attaches to the owner, but rests alone upon the contractor.

The case was tried by the court without the intervention of a jury, and a judgment was rendered for the plaintiff. From this judgment the appeal is taken. There were other questions reserved, besides the one discussed, but the view we have taken renders it unnecessary to notice them, and requires a reversal of the judgment of the lower court, and the rendition of a judgment here in favor of the defendant.

Reversed and rendered.

CHORMAN v. QUEEN ANNE'S R. CO.

(*Superior Court of Delaware, Sussex, Oct. 15, 1901.*)

[54 Atl. Rep. 687.]

Wife's Realty—Husband's Tenancy—Injury to Crop—Right to Sue.

A husband who takes possession of his wife's land with her consent, puts in a crop, furnishing the material therefor, and is to have the entire proceeds, may maintain action in his own name for a tortious injury to the unsevered crop, whether his contract with his wife is written or verbal, express or implied.

Injury to Property from Surface Water—Liability of Railroad.

A railroad company gains no right, through its duty to passengers or shippers to protect its roadbed, to cast surface water on the land of an adjacent owner, different from that which inheres in any private owner.

Same—Same.*

A railroad company which, by digging ditches alongside its track embankment, accumulates surface water and casts it on adjacent land in unnatural quantities, is liable for damages to crops caused thereby.

Action by Philip H. Chorman against the Queen Anne's Railroad Company. Verdict for plaintiff.

Action on the case for damages to the wheat crop of the plaintiff by reason of water being gathered along the embankment made by defendant road and discharged through trunks upon the lands whereon the plaintiff's wheat crop was growing.

*See foot-note appended to *Lion v. Baltimore City Pass. Ry. Co. (Md.)*, 23 Am. & Eng. R. Cas., N. S., 538.

Chorman v. Queen Anne's R. Co

The testimony of the plaintiff, in response to interrogatories by his counsel, Mr. White, concerning his ownership and possession of the wheat crop, was as follows: "Q. Were you farming in January or February, 1899? A. Yes, sir. Q. Did you have any crops pitched at that time? A. Yes, sir; I had a crop of wheat sowed at that time. Q. On whose land was it sowed? A. My wife's. Q. Whose crop of wheat was it? A. Mine. Q. In whose possession was the crop of wheat? A. Mine. Q. Who sowed it, supplied the manure, and all that sort of thing? A. I did; I found all. Q. It was your crop of wheat? A. Yes, sir; my crop of wheat. Q. By what right, and how, do you hold or possess the farm you now occupy, and occupied in 1899? A. Well, my wife heired it on the death of her grandfather. Q. Then how did you get it? A. I simply taken the farm and lived there and used it as my own. She had no voice in it. She gave up entirely to me. Q. Who stocked the farm? A. I did. Q. Who had the rents and profits from it? A. I did. Q. Did she have any part or share in it? A. No, sir. Q. Did that relate to the entire farm? A. That related to the entire farm."

Argued before LORE, C. J., and GRUBB and PENNEWILL, JJ.

Robert C. White, for plaintiff.

Charles W. Cullen and Charles M. Cullen, for defendant.

Defendant's counsel moved for a nonsuit on the grounds: First. That the plaintiff's proof failed to show that he was a tenant of the land and entitled to the possession or ownership of the said crop of wheat, for damages for which the action was brought; that the wheat crop was not goods and chattels, but was part of the realty growing upon the land, and there was no severance. Second. The allegation in the narr. is that the defendant designedly and maliciously caused the overflow of water upon the plaintiff's land, and the proof did not show such to be the fact; the proof being that the water was drained of necessity upon the low land where the plaintiff's wheat crop was growing, that being the only place where the water could go at that time out of that cut. There was a variance, therefore, between the allegation in the plaintiff's declaration and the proof. The plaintiff, furthermore, was not entitled to recover, as the great quantity of water arose from a phenomenal storm, and was the act of God. Third. That the alteration in the flow of mere surface water affords no cause for action to the person who may suffer loss or detriment therefor against one who does no act inconsistent with the due exercise of dominion over his own soil.

LORE, C. J. The motion for nonsuit is refused.

Plaintiff's Prayers.

First. That it is the duty of every owner of land, if he wishes to carry off the surface water from his own land to do so without material injury or detriment to the lands of his

Chorman v. Queen Anne's R. Co

neighbors, and, if he cannot, he must suffer the inconvenience arising from its presence, and cannot complain that others refuse to allow it passage over their lands.

Second. That, if an owner of land divert the natural course of surface water upon his own land, he must suffer the inconvenience himself, and cannot carry it off upon the land of his neighbors.

Third. That an owner of land has no right to gather the surface water upon his own land and discharge it by artificial means on the lands of his neighbor.

Fourth. Railroad companies, like individuals, cannot gather the surface water on their lands into ditches and drains, and discharge them in a body on other lands to their injury.

Fifth. That, if the defendant could have carried the water off without injury to the plaintiff, it was bound to do so.

Defendant's Prayers.

First. That a mere possession is not sufficient to show title to the crop of wheat alleged to have been destroyed, unless proof be adduced sufficient to show that the plaintiff was vested with a good title thereto.

Second. That, if the water caused to flow through the ditches on each side of the railroad tracks at Chorman's crossing, did not immediately flow upon said lands on which the crop of wheat was growing, as alleged in said declaration, but continued to flow on the defendant's lands for several hundred feet until the water reached the natural slope towards said wheat crop, then and in that case the plaintiff cannot recover any damages whatever.

Third. That the said defendant had a legal right, for the protection of its property and its passengers and freight, to use all proper means for the removal of any surface water caused by melting snow and rain occasioned by an extraordinary storm which endangered its roadbed.

Fourth. That if the said damages accrued by reason of an excessive rain and snowfall occasioned by an extraordinary or phenomenal storm, it being the act of God, the defendant is not liable.

Fifth. That if the cutting of the ditches was necessary by reason of the excessive rain and snow, all occasioned by an extraordinary or phenomenal storm, the defendant had the right to cut the same—any injury was the act of God.

LORE, C. J. (charging jury). Philip H. Chorman, the plaintiff, claims that in February, 1899, he was in possession of a tract of land situate in Broadkilm hundred, in this county, through which the roadbed and the track of the Queen Anne's Railroad Company, the defendant, passed. That on that land he had growing a crop of wheat on about nineteen acres. That on or about that date the defendant cut a ditch on each side of its railroad track, through a ridge or bank of earth called "Chorman's Crossing," from east to west. That through said ditches the defendant conducted and turned a

Chorman v. Queen Anne's R. Co

large quantity of surface water, which had accumulated from melted snow on the east side of the crossing, into and upon his wheat field, where it remained for a long time, until thereby the wheat crop was destroyed, and he was damaged to the extent of the value of the wheat so lost. That the water would not have flowed upon his wheat field if the said ditches had not been so cut. The defendant, on the other hand, claims that the plaintiff was not possessed of the wheat crop. That, even if he was so possessed, the wheat field was at the bottom of a large basin, and that the same and other water would have found its way there even if the ditches had not been cut. Moreover, that the company had a right to so cut the ditches and discharge the water, to protect its roadbed and assure the safety of passengers and freight. That the company is not liable, because the damage resulted from an extraordinary snowstorm. This action is founded upon tort; that is, upon the wrongful act of the defendant. In order to recover, therefore, the plaintiff must satisfy you by a preponderance of the evidence: (1) That he was in possession of the wheat crop; (2) that the crop of wheat so in his possession was destroyed by the water wrongfully discharged upon it through the ditches cut by the defendant, and not by water coming from any other source. If the plaintiff was not in possession of and entitled to the wheat, he cannot recover. If you believe from the evidence that the title to the land was in Chorman's wife; that with her consent and approval he was in possession of the land, and with the like consent and approval he furnished the manure, put the wheat crop in; that he was to have the rents and profits; that she was to have no part or share in it; that she gave it up entirely to him—in such case the relation so created, whether verbal or written, express or implied, would give to him such legal possession of the wheat as to support this action. In other words, if you conclude, from all the evidence in the case, that the husband was possessed of the wheat as his own, and the wife was to have no part thereof, then in such case he was in lawful possession. Whether he was so possessed or not is a question of fact for you to determine from the evidence. If you find he was, your next inquiry is, was the wheat destroyed by the water wrongfully turned upon it through the ditches cut by the defendant company?

For the purposes of this case, the plaintiff and the defendant company are private parties, and the rules of law governing the rights and duties of private owners of adjoining lands in respect to surface water are applicable. We know no public right or privilege belonging to the company to use or dispose of its surface water different from that of a private owner. Whatever may be its rights and duties to see to the safety and protection of its passengers and freight as a common carrier, they do not enter into its relation to the plaintiff as owner or possessor of adjoining lands. As to these adjoin-

Chorman v. Queen Anne's R. Co

ing lands, they are on an exact equality. The rule in respect to surface water is well expressed in *Pettigrew v. Evansville*, 25 Wis. 223, 3 Am. Rep. 50, decided in the Supreme Court of Wisconsin in 1870, in the following language: "It is the duty of every owner of land, if he wishes to carry off the surface water from his own land, to do so without material injury or detriment to the lands of his neighbor, and, if he cannot, he must suffer the inconvenience arising from its presence. We know of no adjudged case where it has been held that the waters of a natural pond or reservoir upon the land of one person may be drained by him directly upon the land of another, greatly to his injury; nor where one owner has been allowed, by means of a ditch, trench, sewer, or the like, to gather the surface water from his own land and throw it upon the land of another, so as materially to lessen its value and produce injury to the owner. Such a proceeding would be contrary to natural right and justice, and the law does not sanction it. If the owner of land has the right, by artificial means, to prevent the flowing thereon of surface water from the land of another which in a natural state would flow there, it follows a fortiori that no owner may, with impunity, turn the surface water from his land upon the land of another to the injury of the latter, when, without the employment of artificial means for that purpose, the same never would have flowed there at all."

The same doctrine is tersely expressed in *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519, cited by the defendant, where it says: "But it is to be observed that the law has always recognized a wide distinction between the right of an owner to deal with surface water flowing or collecting on his land, and his right in the water of a natural water course. In such water, before it leaves his land and becomes part of a definite water course, the owner of the land is deemed to have an absolute property, and he may appropriate it to his own use, or get rid of it in any way he can, provided only that he does not cast it, by drains or ditches, upon the land of his neighbor."

In the same case it is said: "There is a manifest distinction between casting water upon another's land and preventing the flow of surface water upon your own."

This distinction, we may say in passing, practically disposes of the cases cited by the defendant, viz.: 11 Exch. 380; *Ashley v. Wolcott*, 11 Cush. 195; *Goodale v. Tuttle*, 29 N. Y. 459; *Gannon v. Hargadon*, 10 Allen, 106, 87 Am. Dec. 625; *Flagg v. City of Worcester*, 13 Gray, 601—which were all cases of preventing the flow of surface water upon one's own land, and are clearly not applicable to this case, where the damage is claimed to result from casting water upon another's land.

In *Livingston v. McDonald*, 21 Iowa, 160, 89 Am. Dec. 563, a carefully considered case, it was held that if a ditch made

Chorman v. Queen Anne's R. Co

by the defendant for the purpose of draining his land, and which terminated within 60 feet of the line of the plaintiff, had the effect to increase the quantity of water on the plaintiff's land to his injury, or, without increasing it, threw the water upon the land in a different manner from what the same would naturally have flowed upon it, to his injury, the defendant would be liable for the injury, even though the ditch was constructed by the defendant in the course of ordinary use and improvement of his farm.

In *Whalley v. Lancashire, etc., Co.*, L. R. 13 Q. B. D. 131, it was held that, where an embankment was cut to let off accumulations of an unprecedented rainfall, and though it was reasonably necessary to save the embankment, and though the water would have percolated through it in time, it was held a wrong.

Cooley on Torts, star page 580, says: "These cases seem to confine the obligation of the owner of the lower estate to receive the water flowing from the upper estate to 'waters which flow naturally without the art of man; those which come from springs, or even by natural depressions of the place.' The conclusion seems to be that where the surface waters are collected and cast in a body upon the proprietor below, unless into a natural water course, the lower proprietor sustains a legal injury, and may have his action therefor."

Cases might be multiplied almost indefinitely in support of this doctrine. Indeed, we find no well-considered cases to the contrary.

It must be borne in mind that we are not considering cases where for purposes of improvement the owner of land is preventing the flow of surface water upon it from other lands. In this case we deal only with the principles of law which govern the throwing of surface water from the land of one owner into and upon the land of a neighboring owner. If, therefore, you find that, by digging the said ditches, the defendant caused surface water to flow upon the wheat field of the plaintiff, which destroyed the wheat crop in his possession there, and that the said water would not have found its way upon such wheat field if those ditches had not been cut, the plaintiff would be entitled to recover. If, on the other hand, you find from the evidence that the plaintiff was not possessed of said wheat crop, or that, being so possessed, the wheat was destroyed by water from some other source, or from the same water which would have run upon it by other courses even if the ditches had not been cut, then your verdict should be for the defendant. Should you find for the plaintiff, your verdict should be for such amount as, from the proof, the crop of wheat was reasonably worth.

Verdict for plaintiff for \$135.

STATE *ex rel.* TRIMBLE *et ux.* v. SUPERIOR COURT OF KING COUNTY.*(Supreme Court of Washington, March 30, 1903.)*

[72 Pac. Rep. 89.]

Eminent Domain—Right to Condemn Tide Land.

Under Ballinger's Ann. Codes & St. §§ 4333, 4334, providing that a railroad may appropriate "any land, real estate, or premises" for right of way, etc., such a corporation may appropriate the interest of parties in tide lands held under a contract from the state, and subject only to forfeiture for failure to pay the balance of the purchase price.

Same—Land Held under Contract from State—Parties—Jurisdiction.

Ballinger's Ann. Codes & St. § 5637, provides that a corporation authorized to appropriate land may present a petition setting forth the name of every owner, incumbrancer, or other person interested. Section 5658 provides that a notice shall be served on every person named therein as owner, etc., that want of service shall render subsequent proceeding void as to the person not served, but that all persons served shall be bound by such proceedings. Section 5640 provides that the court, on proof that all interested parties were served with notice, may make an order directing the summoning of a jury to determine the compensation to be paid to the parties entitled thereto: *held*, that in a proceeding by a railroad to condemn land held under a contract from the state, and over which a waterway company held a right of way, failure to make the state and the waterway company parties did not deprive the court of jurisdiction as to those holding under the contract.

Same—Right of Lessor Railroad.

The fact that a railroad has leased its property to another company, and owns no rolling stock of its own, does not preclude it from condemning and appropriating private property for corporate purposes.

Certiorari by the state, on the relation of William Pitt Trimble and wife, against the superior court of King county to review an order adjudging certain lands subject to condemnation for railroad purposes. Order affirmed.

Struve, Allen, Hughes & McMicken, Preston, Carr & Gilman, and George E. De Steiguer, for relators.

Burke, Shepard & McGilvra, for respondent.

ANDERS, J. The Seattle & Montana Railroad Company is a corporation organized under the laws of the state of Washington for the purpose of constructing, owning, and operating railroads and telegraph lines within the state. As such corporation it is vested by statute with the right to exercise the power of eminent domain. The lands and premises involved in this controversy are situated on the shore of Elliott Bay, in the harbor of Seattle, and are "tide and shore lands," bounded on the north by King street, on the east by Oriental avenue, on the south by Connecticut street, and on the west by Occidental avenue. The record title to the easterly 10 feet of the above-described tract is in William Pitt Trimble, but it seems to be conceded that that part is in fact the community property of Trimble and wife. The title to the remainder of said tract is still in the state of Washington, but possession thereof is held by the Trimbles under a contract made by the

State v. Superior Court of King County

state, through its duly constituted agent, the commissioner of public lands, on March 10, 1897, agreeing to convey the same by patent to one C. E. Remsberg in consideration of the sum of \$925.34, to be paid in ten equal annual installments, the first at the time of the execution of the agreement and the others annually thereafter, with interest thereon at 6 per cent. per annum, payable annually with each installment, on all unpaid installments. This contract is in the usual form of such contracts, and provides, among other things, that the conveyance shall be "subject, however, to any lien or liens that may arise or be created in consequence of, or pursuant to, the provisions of an act of the Legislature of the state of Washington entitled 'An act prescribing the ways in which waterways for the uses of navigation may be excavated by private contract, providing for liens upon tide and shore lands belonging to the state, granting rights of way across lands belonging to the state,' approved March 9, 1893"; that the vendee "will pay all taxes and assessments of every kind that may be levied or assessed on said land and premises"; that, if the said vendee "shall well and faithfully keep and perform all the covenants and agreements hereinbefore specified by him to be kept and performed in the manner and at or before the times above specified, he shall be entitled to a patent to said lands from the said state of Washington as provided by law upon surrender of said agreement and cancellation of the same"; and that "the terms of this contract shall be binding in favor of and against the said party of the second part, his heirs, executors, administrators and assigns, but no assignment of this contract shall in any way relieve the said party of the second part from the performance of the conditions hereof on his part, nor be recognized or admitted by the state of Washington, unless the same shall be indorsed hereon and executed, witnessed and acknowledged in the same manner as a conveyance of real estate is required by law to be, and said assignment shall be accepted by and entered on the records of the commissioner of public lands."

The railroad company, in pursuance of the provisions of the statute, filed a petition for condemnation in the superior court of King county, in which it substantially set forth the state's contract above mentioned, and annexed a copy thereof as an exhibit, and alleged that after the making of the said contract said Remsberg and his wife, for a valuable consideration, made and delivered to one C. F. Webb their warranty deed, which was duly recorded, conveying to her, the said Webb, all the tide lands embraced in the said contract, and wherein and whereby said Remsberg and wife authorized the commissioner of public lands of the state of Washington, or the board of state land commissioners, or their or either of their successors in office, to make, issue, and deliver to said grantee in her name any grant, contract, or conveyance of said lands, or any part thereof, or to any person or corpora-

State v. Superior Court of King County

tion to whom said grantee might convey the same, or any part thereof; that thereafter the said C. F. Webb, for a valuable consideration, made and delivered to said William Pitt Trimble her quitclaim deed, whereby she released, remised, and quitclaimed unto him all right, title, and interest which she then had in or to said tide lands, or any part thereof, and wherein and whereby she "authorized the commissioner of public lands and the board of state land commissioners, or either of them, or their successors in office, to execute and deliver to said William Pitt Trimble any contract or conveyance of the above-described land, or any part thereof, or to any person or corporation to whom he might convey the same"; that the said Remsberg, at or soon after the time of receiving from the state its contract for the conveyance of said tide lands to him, went into possession of the same, and upon executing and delivering said warranty deed to said Webb he delivered the possession of said lands to her, and upon executing and delivering said quitclaim deed to said William Pitt Trimble she delivered the possession of said lands to him, and he has ever since remained and now is in possession thereof, claiming under said contract of the state. Counsel for the petitioners state in their brief that Remsberg and wife, as well as Trimble and wife, were joined as respondents in the condemnation proceeding, on account of the informality of these assignments, under the provisions of the contract. The petition specifically describes the lands sought to be appropriated to the use of the railroad company, as required by law, and alleges, in substance, that the use to which the land is to be devoted is a public use; that the public interest requires the prosecution of the said enterprise; and that the land, real estate, and premises sought to be appropriated are required and necessary for the purposes of such enterprise. The petition also states that the petitioner seeks to appropriate the entire fee-simple estate of the respondents Trimble in the strip of land 10 feet in width which they hold by deed, and "to appropriate, condemn, and acquire the entire interest of said William Pitt Trimble and Connie Ford Trimble, his wife, in the remainder of said lots, tracts, and parcels of land, to wit, their said equitable ownership thereof, and their entire interest in said agreement with the state of Washington for the sale and conveyance thereof; and also the entire apparent interest of said C. E. Remsberg and Belle F. Remsberg, his wife, therein—all subject to the obligation imposed by the terms of said agreement upon the said C. E. Remsberg, the vendee therein named, and upon his assigns, to pay to the state of Washington the balance of the purchase price therein specified, with interest as therein required." It is further stated in the petition that the railroad company seeks to appropriate the aforesaid land and the aforesaid interest therein for the purpose of tracks and a site for terminal buildings and facilities.

State v. Superior Court of King County

The petition prayed that a jury be impaneled by the court to ascertain and determine the compensation to be made in money, irrespective of any benefit from any improvement proposed by the petitioner, to the respective owners, tenants, and incumbrances of, and other persons interested in, the said lands and the said interests therein, and in said agreement for the sale and conveyance of a part thereof, for the taking or injuriously affecting the same, or, if a jury be waived, that said compensation be ascertained by the court or a judge thereof.

It thus appears that the petition set forth all facts necessary under the statute to give the superior court jurisdiction of the subject-matter of the proceeding. Remsberg and wife and Trimble and wife were duly served with notice of the application for condemnation. The first-named parties failed to appear, but Trimble and wife appeared, and thereafter a hearing was had before one of the judges of the superior court of King county for the purpose of determining whether the alleged use for which the lands and property were sought to be appropriated was really a public use, and whether the same were required and necessary for the purposes of the petitioner, as set out in said petition. On this "preliminary hearing" the fact set out in the petition, as above noted, relative to the contract by the state for the sale of the tide lands in question, and the subsequent transfers of the vendee's interest therein, were clearly established by documentary evidence; and we think the petitioner also satisfactorily proved that the premises were required and necessary for the purposes specified, namely, a right of way for its tracks and a site for a passenger station and for platforms, warehouses, etc. But it was shown by the testimony of the petitioner's engineer that the petitioner is not the owner of any locomotives or cars, and that it does not operate its railroad, but the same is operated by the Great Northern Railway Company, under some kind of an agreement between them, the terms of which were not disclosed by the evidence. It further appeared that neither the state of Washington nor the Seattle & Lake Washington Waterway Company was made a party to or served with notice of the proceeding.

The respondents Trimble and wife objected to the proceeding on the grounds (1) that the lands and premises sought to be appropriated were not subject to condemnation under the law of this state, and (2) that there was a defect of parties, and the court had no right or authority to make any order in the premises without bringing in all parties interested in the lands in controversy. The court, however, made an order declaring that the contemplated use for which the said railroad company sought to appropriate said lands was really a public use, and that the public interest required the prosecution of the enterprise mentioned in the petition, and that the lands, real estate, and premises sought to be appropriated

State v. Superior Court of King County

were required and necessary for the purpose of said enterprise, and that all interested parties had been served with notice, and directing the sheriff to summon a jury to assess the damages to be paid to the owner or owners respectively, and to all tenants, incumbrancers of, and others interested in, said lands, real estate, and premises, to wit, the said William Pitt Trimble and Connie Ford Trimble, his wife, for the taking or injuriously affecting the same by said petitioner. The said Trimble and wife, respondents in the condemnation proceeding, thereupon sued out a writ of certiorari from this court to review the action of the superior court as to the order and rulings above mentioned. And the said relators allege that "the court erred in making and entering the order of June 19, 1902, declaring the public use and necessity of the appropriation and ordering a jury to be impaneled for the assessment of the damages of Trimble and wife."

If follows from what we have already said that the objection to the findings of the court as to the public use and necessity of the appropriation is without merit, and it must be conceded that, if the particular property sought to be appropriated is subject to be taken by virtue of the power of eminent domain, and that the owners and other persons interested therein, within the meaning of our statute, were served with notice of the hearing of the petition for condemnation, the court committed no error in ordering the summoning of a jury to determine the resulting damages. It is provided in section 4333, Ballinger's Ann. Codes & St., that "a corporation organized for the construction of any railway * * * shall have the right to enter upon any land, real estate or premises * * * between the termini thereof for the purpose of examining, locating and surveying the line of such road." And section 4334 provides that "such corporation may appropriate so much of said land, real estate or premises * * * as may be necessary for the line of such road not exceeding two hundred feet in width; * * * and * * * sufficient quantity of such land, real estate or premises * * * in addition to that before specified in this section, for the necessary side tracks, depots and water stations, and the right to conduct water thereto by aqueduct." But this court has held that the interest of the state in tide lands cannot be taken under the power of eminent domain granted to railway corporations by the above-mentioned statute, for the reason that the law contemplates the taking of private and not public property, unless the right to take the latter is specifically conferred by law. *Railroad Co. v. State*, 7 Wash. 150, 34 Pac. 551, 22 L. R. A. 217, 38 Am. St. Rep. 866. And, such being the law in this state, the learned counsel for the relators contend that the tide lands in question are not subject to condemnation and appropriation by the railroad company, because they are still the property of the state, and the relators have no estate, either legal or equitable, therein;

State v. Superior Court of King County

and they cite several authorities holding, in effect, that in law the vendee in a mere executory contract for the sale of land obtains no real property or interest in real property; that the relations between the parties to the contract are wholly personal; that the vendee's right is a mere thing in action, and that it is only when the vendee performs, or offers to perform, all the acts necessary to entitle him to a deed, that he has an equitable title and may compel a conveyance. Pomeroy on Contracts, p. 386, § 314; Warvelle on Vendors, p. 188, § 3. See, also, *Smith v. Jones* (Utah) 60 Pac. 1104-1106; *Ruggles v. Nantucket*, 11 Cush. 433; *Railway Co. v. Prescott*, 16 Wall. 603, 21 L. Ed. 373; *Railway Co. v. McShane*, 22 Wall. 444, 22 L. Ed. 747; *Railway Co. v. Trail County*, 115 U. S. 600-609, 6 Sup. Ct. 201, 29 L. Ed. 477. In the last three cases cited the real question for determination was whether lands granted to railroad companies by the United States were subject to taxation before all the conditions of the grant had been performed, and it was decided that they were not. But the authorities cited by counsel for the relators do not seem to us to be decisive of the question here under consideration. We have no doubt that, as between the parties to a contract for the sale and purchase of land, the vendee therein named does not become the full equitable owner until he performs or offers to perform all the acts necessary to entitle him to a conveyance of the land and to a specific performance of the contract in a court of equity; but it does not necessarily follow that a vendee in such a contract has no interest or estate whatever in the land covered by the agreement, which may not be controlled or divested by law. In fact, as we shall hereafter see, there are interests in real property, less than estates in fee simple, which may be taken for public uses by authority of the sovereign power. And, it must be borne in mind that the respondent corporation is not seeking to appropriate the interest of the state in the tide lands described in the petition for condemnation, or the interest of any person or persons therein other than the state's vendee and the relators herein. It simply seeks, as we have already said, to appropriate, condemn, and acquire the entire interest of the relators in said tide lands, namely, their equitable ownership thereof, and their entire interest in said agreement with the state of Washington for the sale and conveyance thereof, and also the entire apparent interest of said Remsberg and wife therein, all subject to the obligation imposed by the terms of said agreement upon the vendee therein named, and his assigns, to pay to the state the balance of the purchase price therein specified, with interest as therein provided for. And the first question, therefore, to be determined is whether the interest sought to be appropriated by the respondent is fairly included in the grant to corporations organized for the construction of railways of the power of eminent domain. It is contended on behalf of the relators that it is

State v. Superior Court of King County

not, for the alleged reason that the power to condemn and appropriate such interest is not conferred upon the respondent corporation either expressly or by necessary implication, and therefore cannot be exercised by it for the purpose of depriving the relators of property which is a mere chose in action, and not "land, real estate, or premises" in contemplation of our statute. And if it be true, as claimed by their counsel, that the relators have no present interest in the lands described in the contract between their assignors and the state, it certainly follows that the condemnation proceeding must fail.

But we are clearly of the opinion that counsel are in error in assuming that the relators have, as between themselves and the railroad company, no interest in the lands in controversy, which is subject to be taken under the power of eminent domain. They are in possession, with the consent of the state, of all the tide lands described in the petition, and have the right to receive the rents, issues, and profits thereof, without interference on the part of the state except for a breach of the covenants set forth in the state's contract, and which we have no right to presume will be broken. Indeed, it is stated in the brief of the relators that "he [Mr. Trimble] has the right, under the contract pleaded, to make payment for this land during the period of 10 years, in accordance with the terms of the agreement. He has the absolutely vested right to the possession of this land under the law, to enjoy its use, rents, issues, and profits during this period unmolested by the law of eminent domain." It is true that the relators have a vested right to the possession and use of this land, as stated by counsel, but we think it is not true that such vested right may not be molested "by the law of eminent domain." The interest of the relators is, to say the least, an interest in land, and as such may be taken for a public use by condemnation, upon payment of just compensation therefor. It is an interest that may be sold for taxes (*State v. Frost*, 25 Wash. 134, 64 Pac. 902), and which may be assigned, transferred, and disposed of by the relators; and the state cannot deprive them of this right. *Washington Iron Works Co. v. King County*, 20 Wash. 150, 54 Pac. 1004. "The term 'land,' in statutes conferring power to condemn, is taken in its legal sense, and includes both the soil and buildings and other structures on it, and any and all interests therein. An easement may be taken under authority to take land." 1 *Lewis on Eminent Domain* (2d Ed.) § 285.

In *Heyneman v. Blake*, 19 Cal. 579, the court held (Field, C. J., delivering the opinion) that the right to condemn private lands under the water company act of 1858, in accordance with the railroad act of 1853, included the right to condemn any estate or interest in the land necessary for the purposes of the company, and that the company might, therefore, seek in its petition for condemnation only the right

State v. Superior Court of King County

of excavating a tunnel through the land, and of running pipes through the tunnel to convey its water, without seeking to obtain a title to the land. In *In re Metropolitan El. Ry. Co.* (Sup.) 2 N. Y. Supp. 278, which was a condemnation proceeding, the property sought to be acquired by the railway company was described generally as "so much of the privilege, easement, or other interest in said street as is taken, appropriated, or interfered with by the construction and maintenance of the elevated railroad of the petitioner belonging to or claimed by * * *, and appurtenant to the lots and premises known as * * *, and bounded and described as follows." And the Supreme Court of New York there ruled that the term "real estate," as used in the statutes granting the right of condemnation to the petitioner, "covers all the incorporeal hereditaments, easements, rights, and privileges which it is sought to acquire in these various proceedings." In *Story v. New York E. R. Co.*, 90 N. Y. 122, 7 Am. & Eng. R. Cas. 596, 43 Am. Rep. 146, it was decided, in effect, that the right of access to an improved lot abutting on a street and the right to have light and air pass to a building thereon were property, and subject to condemnation. See, also, *Lahr v. Metropolitan, etc., Co.*, 104 N. Y. 268, 10 N. E. 528; *State ex rel. Smith v. Superior Court* (Wash.) 70 Pac. 484; *State ex rel. Smith v. Superior Court*, 26 Wash. 278, 66 Pac. 385. This court held in *S. & M. R. Co. v. Scheike*, 3 Wash. 625, 29 Pac. 217, 30 Pac. 503, that the lessee of land condemned by a railroad company is entitled to the damages resulting to his leasehold estate. And in *Enoch v. Railway Co.*, 6 Wash. 393, 33 Pac. 966, we held that, where a railroad company appropriates public lands of the United States upon which a pre-emption entry has been properly made prior to the filing of a profile of the road in the office of the Secretary of the Interior, the railroad company is liable for damages, although the pre-emption claimant is not at the time entitled to a patent from the government. The decisions of this court above cited are based upon the conception that the interest of the respective parties therein mentioned is included in the terms "land" and "real estate," for on no other theory could such interest be condemned at all.

In *Fish v. Fowlie*, 58 Cal. 373, the Supreme Court of California, having under consideration the interest of the vendee under an executory contract of sale of land, said: "The words 'real property' are co-extensive with lands, tenements, and hereditaments. 'Land' also embraces all titles, legal or equitable, perfect or imperfect, including such rights as lie in contract—those which are executory as well as those which are executed. Any interest, therefore, in land, legal or equitable, is subject to attachment or execution, levy and sale." And this court has held that under section 5200, Ballinger's Ann. Codes & St., which provides that "all property, real and

State v. Superior Court of King County

personal, of the judgment debtor, not exempt by law, shall be liable to execution," equitable as well as legal estates may be sold on execution. *Calhoun v. Leary Co.*, 6 Wash. 17, 32 Pac. 1070.

It was held by the Supreme Court of Wisconsin in *Martin v. Scofield*, 41 Wis. 167, that a vendee in an ordinary land contract, with right of possession, is to be regarded as the equitable owner, and as such owner may maintain an action of trover or replevin for timber taken from the land without his consent. In that case it appeared that the owner of the lot from which the logs in controversy were taken executed to the plaintiff in the year 1871 a contract to convey to him, upon his paying to her \$200, with interest thereon, in one year, in addition to \$57.04 paid at the time the contract was executed. At the time of the trial the \$200 had not been paid, but the interest had been paid up to February 1, 1875. The contract provided, among other things, for re-entry in case the vendee should make default in his payments, for a right of distress upon the premises for arrears of interest, and for the recovery of damages for waste. In regard to the relation between the parties to the contract, and the effect of the contract upon the ownership of the land, the court said: "It has often been held that the relation between the parties to a contract for the conveyance of land is analogous to that of equitable mortgagor and mortgagee in fee of the land affected by the contract. And such is the relation the plaintiff and Mrs. Whitney [the vendor named in the contract] sustain to each other in respect to the land in question. * * *

We have no difficulty, therefore, in holding that, when the logs were cut by Coppersmith, the equitable estate in the land upon which they were cut, and the possession and right to the possession of the land, were in the plaintiff. It follows, on the authority of *Northrup v. Trask*, 39 Wis. 515, that the plaintiff was the owner of the land, and, of course, of any timber cut upon it, subject only to the right of Mrs. Whitney as mortgagee, and that he alone could maintain trover or replevin for timber and logs taken therefrom without his consent." The doctrine announced in the case last cited as to the relation between the parties to a valid contract for the sale of land is so firmly settled against the contention of the relators "by a train of uncontroverted authority" that it is now beyond the realm of legitimate controversy. This doctrine of "equitable conversion" has been applied in a great variety of cases, and under divers circumstances. It was recognized and applied, without hesitation, by the Supreme Court of Pennsylvania in an action of ejectment (which was, of course, an action at law) in the case of *Kerr v. Day*, 14 Pa. 112, 53 Am. Dec. 526. In that case the trial court instructed the jury as follows: "(2) That an agreement to give a party an option of purchasing certain land is a mere personal covenant or agreement, and not such an agreement as vests any

State v. Superior Court of King County

interest, legal or equitable, in the land the subject of the contract; and that the defendant, claiming under such agreement alone, without any act of election previous to the sale to the plaintiff, has no such title to the land as furnishes the foundation of a defense to an action of ejectment." The defendant held the land there in question under an optional contract of sale, and the plaintiff claimed it as owner by virtue of a conveyance made to him by defendant's vendor, the holder of the legal title. Upon that state of facts the appellate court held that the instruction above set forth was erroneous. And the ground upon which the court rested its decision is clearly and tersely stated in the opinion delivered by Bell, J., in the following language: "The ground upon which a chancellor executes an executory contract for the sale of lands is that equity looks upon things agreed to be done as actually performed; consequently, when an agreement is made for the sale of an estate, the vendor is considered as a trustee for the purchaser of the estate sold, and the purchaser as a trustee of the purchase money for the vendor. The vendee is, in contemplation of equity, actually seised of the estate, and is, therefore, subject to any loss that may happen to it between the agreement and the conveyance, and will enjoy any benefit which may accrue in the same interval. As a consequence, he may sell or charge the estate before conveyance; and the death of either vendor or vendee, even before the time of completing the contract, is held to be entirely immaterial. As a result of this principle, which seems to be of general application, it is settled that an estate under contract of sale is regarded as converted into personalty from the time of the contract, notwithstanding an election to complete the purchase rests entirely with the purchaser; and, if the seller die before the election be exercised, the purchase money, when paid, will go to his executors as assets."

In the case of *Lysaght v. Edwards*, L. R. 2 Chan. Div. 499, Jessel, M. R., speaking of the effect of a contract for the sale of lands, said: "A valid contract actually changes the ownership in equity. * * * It must, therefore, be considered to be established that the vendor is a constructive trustee of the purchaser of the estate from the moment the contract is entered into. * * * The fact of the purchaser's being able to pay or not being able to pay is immaterial. If there is a valid contract, the conversion is effected. * * * The ownership has passed the moment the contract is made, if valid." See, also, *King v. Ruckman*, 21 N. J. Eq. 599; *Keep v. Miller* (N. J. Ch.) 6 Atl. 495; 1 Sugden on Vendors (8th Am. Ed. by Perkins), p. 270 et seq.; *Craig v. Leslie*, 3 Wheat. 563, 4 L. Ed. 460; *Haughwout v. Murphy*, 22 N. J. Eq. 531-546.

In the New Jersey case last above cited, the court observed: "In equity, upon an agreement for the sale of lands, the contract is regarded, for most purposes, as is specifically ex-

State v. Superior Court of King County

ecuted. The purchaser becomes the equitable owner of the lands, and the vendor of the purchase money. After the contractor the vendor is the trustee of the legal estate for the vendee. * * * Before the contract is executed by conveyance, the lands are devisable by the vendee and descendible to his heirs as real estate; and the personal representatives of the vendor are entitled to the purchase money." And Warvelle, in his work on Vendors, vol. 1, pages 197-8, lays down the rule as follows: "Where the purchaser has been let into possession, he is, in equity the owner, subject only to the lien of the vendor for the unpaid purchase money. He has a right to the free use and enjoyment of the property, and to the rents, issues, and profits thereof, so long as he is not in default under the contract. He may mortgage it for the payment of his debts. He may sell and assign his rights to another, or may create a privilege or easement upon any part of the premises which will be valid and binding, but liable to be defeated should there be a failure to pay the balance of the purchase money according to the terms and conditions of the contract of purchase."

The doctrine of equitable conversion has also been frequently invoked in determining upon whom should fall the loss, and who should be entitled to the insurance, if any, in case of destruction by fire of buildings situated upon land under an executory contract of sale. See *Reed v. Lukens*, 44 Pa. 200, 84 Am. Dec. 425; *Marks v. Tichenor* (Ky.) 4 S. W. 225; *Brewer v. Herbert*, 30 Md. 301, 96 Am. Dec. 582; *Taylor v. Holmes* (C. C.) 14 Fed. 498. In the well-considered case of *St. Louis, etc., Co. v. Wilder*, 17 Kan. 239, it was held that a vendee under a bond for a deed is regarded as the real owner of the land, even before full payment of the purchase price is made, and that he, and not the vendor, is entitled to receive the damages if part of the land is taken in a proceeding for condemnation. See, also, *Kuhn v. Freeman*, 15 Kan. 423; *Pinkerton v. Burton, etc., Co.*, 109 Mass. 527; 2 *Lewis, Eminent Domain* (2d Ed.) § 319. And in a recent publication it is said that: "The vendee under an executory contract of sale is the equitable owner, entitled to a deed upon performance of his contract. If, therefore, pending that performance, a part of the land is taken by sovereign authority, he still remains liable to the vendor for the entire purchase money, is entitled to the entire damages, is a necessary party to the condemnation proceeding, and may maintain the proceeding in his own name." 7 Enc. Pl. & Pr. 507.

It seems clear to us, in view of the authorities, that the relators must be regarded as the real owners of the lots in question, subject only to the right of re-entry and forfeiture on the part of the state in the event of a failure on their part, or that of their successors or assigns, to pay the balance of the purchase price according to the terms of the state's contract. Indeed, this court said in *Washington Iron Works Co.*

State v. Superior Court of King County

v. King County, *supra*, where the question under consideration was whether tide lands, under a contract of sale like the one now before us, were subject to taxation before the contract was fully executed by the vendee, that: "In equity, appellants are the owners, possessing a real and substantial interest, which they can assign, transfer, and dispose of as they choose; and the state cannot deprive them of their right.

* * * The naked legal title is in the state, but for one purpose only—to secure the unpaid purchase price." It is true that this case was distinguished in the subsequent case of *State v. Frost*, *supra*, where it was very properly held that only the interest of the vendee in a contract of sale of state lands can be charged with taxes, and that the state's right to the purchase price, or its right to forfeit the contract for non-payment thereof, cannot be divested by a tax sale of such lands. But the doctrine announced in the former case as to the equitable ownership of the vendee of tide lands under an executory contract of sale was neither repudiated nor questioned.

It is provided in section 5637, Ballinger's Ann. Codes & St., that any corporation authorized by law to appropriate land, real estate, premises, or other property for corporate purposes may present to the superior court a petition describing the property sought to be appropriated and "setting forth the name of each and every owner, encumbrancer, or other person or party interested in the same, or any part thereof, so far as the same can be ascertained from the public records, the object for which the land is sought to be appropriated, and praying that a jury be impaneled to ascertain and determine the compensation to be made in money," etc. And section 5638 provides that a notice stating briefly the objects of the petition shall be served on each and every person named therein as owner, incumbrancer, tenant, or others interested therein, at least 10 days previous to the time designated in the notice for the presentation of the petition. But the same section further provides that want of service of such notice shall render the subsequent proceedings void as to the person not served, but all persons or parties having been served with notice as in this section provided shall be bound by the subsequent proceedings. Section 5640 provides, in effect, among other things, that if the court or judge thereof shall have satisfactory proof that all parties interested in the land, real estate, or premises described in the petition have been duly served with the prescribed notice, the court or judge thereof may make an order directing the sheriff to summon a jury to determine the compensation to be paid to the respective parties entitled thereto. As we have seen, the state of Washington was not served with notice of the hearing of the petition, and it is therefore insisted by the relators here (as they insisted in the superior court) that the court, under the provisions of said section 5638, requiring each and every person

State v. Superior Court of King County

named in the petition to be served with such notice, had no right to make the order now under consideration. But we are of the opinion that the provision requiring notice to be served on all interested parties is not jurisdictional, except as to persons or parties not served. The statute expressly declares that all persons duly served with notice shall be bound by the "subsequent proceedings," but that want of service shall render such proceedings void "as to the person not served." *Owen v. Railway Co.*, 12 Wash. 313, 41 Pac. 44. And it seems to be the general rule that: "The omission of any proper party will not invalidate the proceeding as against such persons as are made parties. The only consequence is that as against the omitted persons the condemnation will be nugatory." 7 Ency. Pl. & Pr. 504. See, also, *Matter of Boston, etc., R. Co.*, 79 N. Y. 69, wherein it was held that, where the lessee alone is made a party, the estate in reversion will not be affected. While it is true that the state holds the naked legal title to these tide lands as trustee for the relators and their assigns, and is, to that extent, interested therein, it is also true that it is no more concerned in the condemnation suit than it would be in a voluntary transfer by the relators of their interest to the respondent herein. The state cannot be involuntarily deprived of its title by condemnation or otherwise, and the fact that it was not made a party to the proceeding cannot affect its rights or those of the relators in any manner or degree whatever. All that the relators are entitled to is just compensation for their interest in the land, and such compensation can readily be determined without regard to the rights of the state or any other person or party.

What we have already said concerning the omission to make the state a party virtually disposes of the objection that the Seattle & Lake Washington Waterway Company is a necessary party to the condemnation proceeding, and should have been served with notice of the hearing of the petition. It must be remembered that the respondent is not seeking to condemn any interest that that company may have in the premises in question, and we are unable to see how the failure to serve it with notice of the preliminary hearing can affect its interest, if it has any, in the land sought to be appropriated by the respondent. The railroad company has elected to carry on its condemnation suit without making the waterway company a party, and it will, therefore, be responsible to the latter company for whatever damages it may suffer in consequence thereof. And the relators will neither gain nor lose anything by reason of the fact that the waterway company was not notified of the hearing in the superior court, and did not appear in that proceeding.

It is also objected that the respondent the Seattle & Montana Railroad Company has no right to condemn this property for the purposes indicated in its petition, because it appears from the evidence that it has no rolling stock of its own, does not

State v. Superior Court of King County

operate its road, and does and will permit the Great Northern Railway Company and other railroad companies to run their passenger and freight trains over its line into Seattle, and to use its depot and terminal grounds there situated. In other words, it seems to be claimed that the proof shows that the respondent company is seeking, through the exercise of the power of eminent domain, to take the property of these relators not for its own use and benefit, but for the use and benefit of other corporations. We think this objection is wholly untenable. Under what agreement or understanding between the two companies the respondent's railroad is used and operated by the Great Northern Railway Company, or upon what terms and conditions the cars of other railroad companies are or may be transported over its road, is not disclosed by the evidence; but, whatever the arrangement is under which this may be done, it cannot be presumed to be illegal. Indeed, it is not only the right, but the duty, of the Seattle & Montana Railroad Company, under the law and the Constitution of this state, to permit such use of its road by other railroad companies. Ballinger's Ann. Codes & St. § 4318; Const. art. 12, § 13. And, if it be true that said company has leased its railroad to the Great Northern Company, or any other company or companies, or agreed to do so, it is not thereby precluded from condemning and appropriating private property for a public use, which may be necessary for its tracks, side tracks, depots, etc. In re Metropolitan E. Ry. Co., supra; Crolley v. Ry. Co., 30 Minn. 541, 16 N. W. 422, 14 Am. & Eng. R. Cas. 47; Mayor v. Railway Co., 109 Mass. 103; In re New York, etc., R. Co., 99 N. Y. 12, 1 N. E. 27; Chicago, etc., R. Co. v. Railroad Co., 113 Ill. 156. In Re Metropolitan Ry. Co., supra, it was objected that the condemnation proceedings could not be maintained by the petitioner because of the lease of its line of road to another company. Concerning the objection the court said: "This objection is not well founded, because it has been repeatedly decided that the leasing of a line of a railway corporation to another corporation does not deprive the former of the power to exercise the right of eminent domain." The Illinois case above cited (113 Ill. 156) is an interesting and instructive one, and is directly in point here, especially on the question of the power of a lessor railroad company to condemn private property for corporate purposes. In that case, as in this, the company seeking to appropriate the property did not own any cars or locomotives, and did not transport passengers or freight, and had leased its line to other companies, and yet the court there held that it was not thereby deprived of the right to take property under the power of eminent domain.

We see no prejudicial error in the proceeding in the superior court, and the order under review is affirmed.

FULLERTON, C. J., and HADLEY, DUNBAR, and MOUNT, JJ., concur.

OREGON & CALIFORNIA RAILROAD, Appt., v. UNITED STATES.

(Argued March 4, 1903. Decided April 6, 1903.)

[23 Sup. Ct. Rep. 620.]

Railroad Land Grants—Land within Indemnity Limits—Occupancy in Advance of Selection—Effect of Delay to Make Survey.

Delay upon the part of the Commissioner of the Land Office in making the survey called for with all "convenient speed" by the act of May 4, 1870, chap. 69 (16 Stat. at L. 94), granting land in aid of railroad construction, cannot defeat the rights of a settler attaching under that act in virtue of his bona fide occupancy of lands within the indemnity limits of such grant in advance of their selection to supply a deficiency in the place limits, with the intention of perfecting his title under the homestead laws as soon as the lands should be surveyed.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree of the Circuit Court for the District of Oregon canceling a patent issued to the Oregon & California Railroad Company. Affirmed.

See same case below, 48 C. C. A. 520, 109 Fed. 514.

The facts are stated in the opinion.

Mr. Maxwell Evarts for appellant.

Mr. Charles W. Russell for appellee.

MR. JUSTICE HARLAN delivered the opinion of the court:

The controlling question in this case is whether the United States, in 1893, erroneously issued to the Oregon & California Railroad Company, which succeeded to the rights of the Oregon Central Railroad Company, a patent for certain lands in Oregon.

These lands are without the place and within the indemnity limits of the grant made by the act of Congress of May 4th, 1870, chap. 69, granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the state of Oregon. 16 Stat. at L. 94. The provisions of this act were substantially the same as those of the act of July 25th, 1866 (14 Stat. at L. 239, chap. 242), referred to in *Oregon & C. R. Co. v. United States*, case No. 186, just decided [189 U. S. —, ante, 615, 23 Sup. Ct. Rep. 615], except that the act of 1870 contains a provision not found in the act of 1866, to wit: "That the Commissioner of the General Land Office shall cause the lands along the line of the said railroad to be surveyed with all convenient speed."

The line of the proposed road was definitely fixed, and a plat thereof filed in the office of the Secretary of the Interior.

On the 16th day of February, 1872, the first 20 miles of the contemplated railroad were completed from Portland to a point near Forest Grove, in Oregon, and on the 23d of June, 1876, the road to the Yamhill river, near McMinnville, was completed, but it has never been constructed to Astoria, Oregon.

The final plat and survey of the township, in which the lands in dispute are situated, was not filed and approved until July 27th, 1893; and on that day the company's list of selec-

Oregon & California Railroad v. United States

tions of lands, which included the lands in question, was duly approved.

Prior to the year 1893, to wit, on the 12th day of January, 1891, Joseph H. Elison, a duly qualified entryman under the laws of the United States, settled upon the lands in dispute with the intention in good faith of "homesteading the same," and since that date he has continuously resided upon, cultivated, and improved them; and within ninety days from the date of the filing of the township plat of survey he made application for "filing a homestead" covering these lands.

The selections by the company having been approved by the Land Department, a patent was issued to the Oregon & California Railroad Company on October 15th, 1895. But it was issued without any knowledge at the time on the part of the Secretary of the General Land Office of the adverse claim of Elison, arising from his occupancy of the land.

For the reasons stated in the opinion just delivered in case No. 186, we hold that, in virtue of Elison's bona fide settlement upon the lands in dispute in 1891, with the intention, whenever the way was open by a survey, to enter the lands under the homestead laws, his rights were superior to those acquired, or that could have been acquired, by the railroad company under any selection by it of indemnity lands, made after the date of such settlement. The company's selection did not displace or defeat the right which the settler acquired by his settlement, made previously in good faith, with the intention to avail himself of the benefits of the homestead laws within due time after the lands were surveyed.

The railroad company rests its claim to have a superior right to these lands on the ground, in part, of long delay by the Commissioner of the Land Office in having them surveyed, although it frequently requested the survey to be made. There is nothing of substance in this contention. The statute, it is true, required the lands to be surveyed with all "convenient speed." But the question as to the precise time the lands should be surveyed was exclusively for the Land Office to determine; and it was to be determined with reference to all the facts and circumstances connected with the surveying of the public lands under the direction of the Land Department. We cannot say from the record that the Land Office, in the matter of the surveying of the particular lands here in dispute, did not act with convenient speed. Besides, the railroad company accepted the grant of Congress subject to the possibility of delay in the surveying as well as to the power of the Land Office to determine when the lands should be surveyed. The action or nonaction of the Land Department in such a matter cannot be controlled by the judiciary, unless, perhaps, in a case in which it appeared, beyond question, that its refusal to order the survey was merely arbitrary and without any real excuse. It may be that in such a case the Commissioner could be compelled by judicial process to discharge the duty imposed upon him by statute. But upon that

Burnett & Goodman v. Central of Georgia Ry. Co

point we need not express a decided opinion, for no such case is presented by the record before us. The allegation in the defendant's plea is simply that the Commissioner neglected to perform his duty in the matter of the surveying. But the facts constituting such alleged neglect are not stated. Besides, we may observe that since the right of the settler attached in virtue of his bona fide occupancy of these lands before the railroad company made its selection, that right could not be displaced by reason of any delay or negligence upon the part of the Commissioner to cause a survey of the lands. The act contains no provision that requires a contrary view. The court must determine the rights of the settler according to the facts as they existed at the time his occupancy in good faith began. The statute does not otherwise declare. In that view, as already suggested, the settler's right was superior to any right acquired by the company, after the date of his occupancy, in virtue of its selection of these lands to supply a deficiency in the place limits.

Upon the authority of the case just decided, the decree of the Circuit Court of Appeals must be affirmed.

And it is so ordered.

MR. JUSTICE BREWER and MR. JUSTICE McKENNA took no part in the decision of this case.

BURNETT & GOODMAN v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia, April 6, 1903.)

[43 S. E. Rep. 854.]

Garnishment—Service of Summons—Entry.

An entry of service of a summons of garnishment stating the same was served "personally on S. C. Hoge, agent in charge of the office of the Central of Georgia Railway Company," does not show a service upon the corporation, but only upon the person named as an individual; the words "agent in charge of." etc., serving merely to describe and identify the individual.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Proceedings in garnishment by Burnett & Goodman against the Central of Georgia Railway Company. Judgment before a justice on default set aside on certiorari, and plaintiff brings error. Affirmed.

F. Chambers & Son, for plaintiff in error.

Hardeman, Davis, Lurnes & Jones, E. P. Johnston, and R. D. Feagins, for defendant in error.

COBB, J. A summons of garnishment was issued and served "personally upon S. C. Hoge, agent in charge of the office of the Central of Georgia Railway Company." Hoge filed an answer denying indebtedness. The court struck this answer, and entered a judgment by default against the rail-

Burnett & Goodman v. Central of Georgia Ry. Co

road company, it not having filed any answer to the summons. The railroad company sued out a petition for certiorari, alleging that the judgment entered against it was authorized and void, and exception is taken to a judgment of the superior court sustaining the certiorari.

Civ. Code, § 4710, is as follows: "Service of a summons of garnishment upon the agent in charge of the office or business of the corporation in the county or district at the time of service shall be sufficient." To give the court jurisdiction of the corporation it is absolutely essential that the summons of garnishment shall be served upon it. It is within the power of the General Assembly to prescribe how such service shall be perfected, and under the provisions of the section quoted service upon the corporation may be had by serving the summons upon the agent in charge of its office or business. The corporation may be served by delivering the process to the individual who is its agent, but the entry of service should indicate with reasonable certainty that it was the corporation, and not the individual, who was intended to be served. The entry of service in the present case does not show a service upon the corporation, but only upon Hoge in his individual capacity. The words "agent in charge of the office" of the corporation serving merely to describe and identify the individual upon whom the service was made. See *State v. Sallade*, 111 Ga. 701, 702, 36 S. E. 922, and cases cited. This rule should, if anything, be more strictly applied in cases of garnishments than in ordinary suits. See, in this connection, *Clark v. Chapman*, 45 Ga. 488. The service was upon Hoge individually, and he properly answered the summons. The action of the court in striking the answer of Hoge and entering judgment by default against the railway company was erroneous, and the court properly sustained a certiorari sued out by it for the purpose of having the judgment set aside. If the officer's return had recited that he had served the summons of garnishment upon the Central of Georgia Railway Company by handing the same personally to S. C. Hoge, who was the agent of the corporation, and in charge of its office or business, this would have been sufficient. The return in *Third National Bank v. McCullough*, 108 Ga. 249, 33 S. E. 848, was in this form. The question dealt with in the present case was not involved either in *Central Railroad v. Smith*, 69 Ga. 268, or *Flournoy v. Rutledge*, 73 Ga. 735, nor in *Mitchell v. Southwestern Railroad*, 75 Ga. 398. In all three cases the process was treated as referring to the individual named in his capacity as agent of the corporation in question, and the question was whether, so treating it, it was sufficient. Besides, in the last case, additional service was had upon the president of the corporation, and it was held generally that the service was sufficient.

Judgment affirmed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

OWENSBORO, FALLS OF ROUGH & G. R. R. Co. v. COMMONWEALTH.

(Court of Appeals of Kentucky, April 17, 1903.)

[73 S. W. Rep. 744.]

Taxation—Railroad Corporations—Valuation of Property—Mode.

Gen. St. c. 92, art. 3, § 1, requires railroad companies, on or before the 1st of September of each year, to report to the auditor of public accounts the length of their road with their average value per mile, and all other properties belonging to the company. Section 3 requires the auditor to lay the reports before the railroad commissioners, whose duty it is to examine them, and, if either too high or low, correct and equalize the valuation. Section 4 provides that the same rate for state purposes which is or may be levied on other real estate shall be levied on the value so found by the commissioners. A railroad made the required report, not, however, for purpose of taxation—the railroad believing itself exempt—but for statistical purposes. The railroad was not in fact exempt, and the commissioners fixed the valuation of its property from the reports thus furnished: *held* proper, it not being presumed that the corporation would make a different report for statistical purposes than for purposes of taxation.

Appeal from Circuit Court, Franklin County.

“Not to be officially reported.”

Suit by the commonwealth of Kentucky against the Owensboro, Falls of Rough & Green River Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Walker & Slack, D. W. Lindsey, J. M. Dickinson, and Pirtle & Trabue, for appellant.

C. J. Pratt and M. R. Todd, for appellee.

BURNAM, C. J. This suit was instituted by the commonwealth of Kentucky in September, 1892, against the Owensboro, Falls of Rough & Green River Railroad Company to recover taxes alleged to be due by the company for the years 1889, 1890, and 1891. The trial court adjudged the railroad company exempt from taxation, under the act of May 5, 1884, for five years from the date of the beginning of the construction of the road, which was on December, 1888. The judgment was reversed by this court in an opinion filed October 26, 1893 (23 S. W. 868, 56 S. W. 993), the court holding that the act of May, 1884, had been repealed by the act of May, 1886, known as the “Hewitt Revenue Bill,” as to all roads the construction of which was begun subsequent to the date when that act took effect, and the cause was remanded to the lower court for a trial upon its merits. Substantially the only ground relied on to escape liability by the company is that there had been no valid assessment by the railroad commission of Kentucky of the property of the company prior to the institution of this suit. The trial judge held the company liable for the taxes sought to be recovered for the years 1890 and 1891, finding from the evidence as a matter of fact, first, “that during the period for which taxation for 1889 was due and payable the defendant had not completed its railroad,

and consequently did not own and operate a railroad within the meaning of the statute"; second, "that during the years 1890 and 1891, Triplett, who was manager of the defendant company from October, 1889, to November, 1891, did make to the railroad commissioner a report, which he intended for statistical purposes, and not for assessment purposes; and that this report was before the railroad commissioners, and made the basis of an action by them, which became a record in the auditor's office"; and from these facts found as a matter of law that the defendant was liable for taxes for the years 1890 and 1891 upon the assessment so made, and rendered judgment therefor, and the company has again appealed.

Plaintiff introduced as a witness the then auditor of the state, who testified: That the records of the assessments made by the railroad commissioners for the years 1890 and 1891, which constituted a part of the records of the auditor's office, contained the following written memorandum, which was signed by each of the then acting railroad commissioners of the state: "Owensboro & Falls of Rough R. R. State of Kentucky. 26 miles at \$10,000.00 per mile, \$260,000.00. Davis County 18 miles at \$10,000.00 per mile, \$180,000.00. Ohio County 8 miles at \$10,000.00, \$80,000.00." And that the following certificate was appended to this valuation: "Commonwealth of Kentucky. Office of the Railroad Commission, Frankfort, Ky., Nov. 14, 1890. The undersigned Board of Commissioners, acting under an act entitled an act to prescribe the mode of ascertaining the value of railroad and for taxing same, approved April 3, 1878; and an act entitled an act to amend an act entitled an act to prescribe the mode of ascertaining the value of property of railroad companies and for taxing same, approved April 19, 1882, hereby certify that the foregoing pages from page 178 to the beginning of this certificate embrace the valuation of property of companies owning railroads subject to taxation in the State of Kentucky, and the figures set opposite the names of counties, cities, and incorporated towns show the valuation of property within same subject to taxation. Said valuation includes the sidings and rolling stock." That a similar certificate appears in the record of 1891 assessments, and similarly certified by the railroad commissioners. And Robert S. Triplett, who was the general manager of the appellant corporation during this period, testifies that he made the report required by the statute to the railroad commissioners of Kentucky for each of these years upon printed blanks furnished to him for that purpose by the auditor of public accounts for statistical purposes, as he supposed that company was exempt from taxation during this period under the act of 1884. These reports were laid before the railroad commissioners, and that board made their finding of the length of the defendant's road and its valuation per mile therefrom. As was properly said in the opinion rendered by the

Devoe v. New York, etc., R. Co

trial court: "It cannot be assumed that these officers would report a fact as true for statistical purposes which would not be true for purposes of taxation, nor can it be assumed that Triplett, in making his report, would have fixed the valuation of the road lower for taxation than its actual value. If the railroad was worth \$10,000 for statistical purposes, it was worth \$10,000 for purposes of taxation."

Section 1 of article 3 of chapter 92 of the General Statutes provides that: "The chief officer of each railroad company owning a railroad line in whole or in part in this state shall on or before the first day of September of each year report to the auditor of public accounts the length of such road, with its average value per mile and all other property belonging to the company." Section 3: "The auditor shall lay these reports before the railroad commissioners, whose duty it is to examine such reports, and, if either too high or too low, to correct and equalize such valuation." Section 4: "The same rate of taxation for state purpose which is or may be levied on other real estate shall be levied on the value so found by the railroad commissioner upon the rolling stock and real estate of each railroad company." There is no pretense that appellant has ever paid any taxes to the state for either of these years, and we have reached the conclusion that the assessments shown upon the books of the railroad commission are a substantial compliance with the requirements of the statute, and the judgment appealed from is affirmed.

DEVOE v. NEW YORK CENT. & H. R. R. Co.

(*Court of Appeals of New York, Feb. 24, 1903.*)

[66 N. E. Rep. 568.]

Injury to Employee—Existence of Rules.

Car inspectors employed at a station at which there were many tracks and switches upon which a large number of trains passed every day were required to inspect each car of each train while it was at the station, at which time there was much switching and moving of cars. Several inspectors had been injured in the performance of such duties, and many complaints had been made as to the dangerous character of the work. There was but one printed rule on the subject, which had never been enforced: *held*, in an action for the death of a car inspector killed by the backing up of a train against the train under which he was working, that it was for the jury whether a parol rule, claimed to have been made by the foreman of the car department, without instructions from any one, was in use, and was sufficient, and properly promulgated under the facts.

Same—Rules of Other Companies.

In an action against a railroad for the death of a car inspector, evidence of any rule relating to the subject in force on another railroad is competent.

Same—Rules—Evidence.

In an action for injuries to a car inspector it is competent to show by parol, from the actual knowledge and recollection of the witness, the

Devoe v. New York, etc., R. Co

rule employed to protect car inspectors while the witness was in the employment of another railroad, and it is unnecessary to produce the manuscript of the rules as written, or the book printed therefrom.

Parker, C. J., and Haight, J., dissenting.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Jeanette E. Devoe, administratrix of William H. Devoe, deceased, against the New York Central & Hudson River Railroad Company. From an order of the Appellate Division (75 N. Y. Supp. 136) reversing a judgment for plaintiff and granting a new trial, plaintiff appeals. Reversed.

This action was brought to recover damages on account of the death of the plaintiff's intestate, caused, as alleged, by the negligence of the defendant. The decedent was a car inspector, and the plaintiff claimed that he lost his life because the defendant failed to make, promulgate, and enforce reasonable and proper rules for the protection of its car inspectors while they were engaged in the discharge of their duties at its Syracuse station. The defense relied upon was that a safe practice was established by the defendant at said station by the oral instructions and directions of the foreman of its car department, which obviated the necessity for more formal rules, and that the decedent was not engaged in discharging his duties as car inspector when he was injured.

William S. Jenney, for appellant.

L. B. Williams, for respondent.

VANN, J. At the Syracuse station of the defendant the track of the Rome, Watertown & Ogdensburg Branch of its system of railroads enters from the north, and makes a connection in the form of a Y with track No. 6, which runs east and west. On the 19th of July, 1899, at about noon, train No. 10, consisting of 9 or 10 cars, entered the station from the north, and, after standing upon track No. 6, for a few minutes, was pulled easterly so as to clear the switch at the point of the Y, and enable another train from the north, known as "No. 4," to enter upon the same track, and discharge its passengers. Train No. 10 was so long that when it was moved east far enough to clear the point of the Y it extended across Franklin street, running north and south, and interrupted travel. After train No. 4 entered, its engine was uncoupled, and proceeded westerly to the engine house. That train consisted of four cars, the most westerly being a baggage car, which was followed by a smoker and two passenger coaches. The regular engine of train No. 10 had also been detached, and a switch engine, coupled to the easterly end, backed it westerly until within 10 or 15 feet of train No. 4, when it stopped for a short time, and then backed on west to couple with that train. The decedent at this time was between the two passenger coaches of train No. 4, and when the two trains came together his head was caught, and he was

Devoe v. New York, etc., R. Co

injured so that he died in a short time. The jury found for the plaintiff, but upon appeal to the Appellate Division all the justices united in reversing the judgment, and in their order certified that they reversed "upon questions of law only, the facts having been examined, and no error found therein." As the evidence supports the verdict, there is nothing open to review by us, other than the exceptions relating to the evidence and the charge; and, unless one or more of these exceptions is sufficient to justify the reversal by the Appellate Division, it is our duty to reverse their determination, and affirm the judgment of the trial court. *Ayers v. Delaware, L. & W. R. R. Co.*, 158 N. Y. 254, 258, 53 N. E. 22.

Several witnesses who had been employed as inspectors upon other railroads were called by the plaintiff to show what rules had been provided by the companies operating those roads for the protection of car inspectors. In each instance a book containing the rules of the particular company for which the witness had worked was produced by the plaintiff and shown to him. In several instances it did not appear by the date upon the title page whether it purported to be the edition in force while he had so worked or not, but he testified that the rule appearing in the book upon the subject was in force, if not during the entire period of his employment, at least during the last part thereof. To the question whether that rule was in force upon the railroad in question while the witness was employed by it, the defendant objected upon the ground that it was not the best evidence, and now insists that the plaintiff should have produced "the actual edition of the book of rules in force during the term of the witness' employment." We think the exception to the rulings which allowed such questions to be answered raises no error. It was competent to show any rule relating to the subject recently in force upon another railroad. The witness in each instance testified that the rule was in force while he worked on such road and when he left it. It was competent to show by parol from the actual knowledge and recollection of the witness the rule actually enforced while he was in the employment of another railroad, and to use any edition of the company's rules to refresh his recollection. It was unnecessary to produce the manuscript of the rules as written, or the book printed therefrom. Reasoning is illogical when it leads to an absurdity.

The court charged the jury, in part, as follows: "It is claimed on the part of the defendant that after 1895, under Mr. Beatty, he adopted and promulgated, by giving notice to the employees, a verbal rule to the effect that inspectors should not, in the ordinary inspection, go between cars or under cars. If, however, it became their duty to go between or under cars, that then they should get another man, and station him at or near the car for the purpose of protection. That, I think, is in substance the claim of the defendant in

Devoe v. New York, etc., R. Co

that regard. Mr. Beatty says that an inspector had no business under a car without protection—without protecting himself by putting a man on guard; that he told them to protect themselves by having a man on guard to protect them. In the first place, it will be on this evidence for you to say whether or not any such rule was in fact made and promulgated and in force during the time that Mr. Devoe was there at work; and, if so, whether or not it was a reasonable and proper rule—such a rule as the defendant, in the exercise of ordinary care for the purpose of reasonable protection of its employees, should have made. That really involves the main question here on the question of negligence of this defendant. Was such a rule made? If so, was it a reasonable safe rule for the purpose of furnishing to the employees reasonable protection? It is said that the fact that it was not written is a circumstance to be considered. That evidence is in the case. The simple fact—the fact alone—that the rule was not printed or written, does not make it invalid. It is simply a circumstance for you to consider with all the other evidence in the case as to whether it was a proper and reasonable rule for the fair and reasonable protection of employees engaged in this class of business. Upon the whole case that is a question for you to consider.” At the close of the charge the defendant excepted to that part which left “the question to the jury as to whether or not this rule which Mr. Beatty testified to was a proper and sufficient rule with reference to the inspection of cars; claiming that, obviously, if that rule had been regarded on this occasion, this accident would not have happened, and that all that was required of the defendant was to have that kind of a rule.” After taking other exceptions, not now material, the counsel for the defendant said: “And we except again to the proposition that it is for any one to say whether or not that rule was a reasonably safe and proper rule.” When the business of a master is such that the safety of one servant depends upon the way in which other servants do their work, it is his duty to make, promulgate, and enforce reasonable and sufficient rules for the protection of the servant exposed to danger. The situation at the Syracuse station of the defendant was somewhat complicated at the time of the accident in question. There were many tracks, switches, and branches. Between 50 and 60 trains came and went every day, and the car inspectors were required to inspect the wheels, running gear, couplings, safety chains, and other appliances belonging to each car of each train. There was much movement of trains at the station from one track to another; cars were taken out of one train and put into others; shifting of various kinds was done; trains were made up; and while all this was going on other trains were constantly coming in and going out. The work of car inspection is dangerous, and the necessity for rules to protect the inspectors so obvious as to be scarcely disputed.

Devoe v. New York, etc., R. Co

A rule known as "No. 38" had been made and promulgated by the company in the following form: "A blue flag by day and a blue light by night, placed on the end of the car, engine or train, denote that workmen are at work under or about the car, engine or train. The car, engine or train thus protected must not be coupled to, or moved, or other cars placed in front of it, until the blue signal is removed by the person who placed it." This is the rule, so amended as to adapt it to passenger trains, which was considered by us the first time that the Warn Case was before us. *Warn v. N. Y. C. & H. R. R. Co.*, 157 N. Y. 109, 51 N. E. 744. Upon the first appeal we held that the rule, as it then stood, did not apply to passenger trains stopping at a station, but to cars or trains on sidings or in a yard. Subsequently the same case came before us upon a different record, and a verdict for the plaintiff was sustained. 169 N. Y. 572, 61 N. E. 1135. The rule, as quoted above, was the only rule upon the subject made or promulgated by the company, but it is conceded that it was never enforced. It is also conceded that, if it had been enforced on the occasion in question, the plaintiff's intestate would not have been injured. Several inspectors had been injured at the Syracuse station while in the discharge of their duties prior to the accident in question, others had narrowly escaped injury, and many complaints had been made by employees as to the danger attending the work of inspection.

While the defendant was without any printed rule upon the subject, except the one quoted, which was a dead letter, because it was not enforced, its foreman of the car department testified that he, without instructions from the company, or from any superior officer, had established a practice by verbal directions to certain employees, which, in his opinion, afforded ample protection. According to his testimony, which was not corroborated, he required the inspectors not to go under the cars to inspect, and whenever they had any repairing to do which compelled them to go under to notify the depot master, whereupon he was to inform the engineer of the shifting engine and the engineer in charge of the engine of the train not to move their engines without orders. He further required that the entire crew of the train be notified that the inspectors were at work, and that one man should be stationed by the engine to take signals and another at the end of the car being repaired to give warning in case of danger. According to the practice, as testified to by him, and there was no other evidence for the defendant upon the subject of rules, even if repairs were to be made between or under the cars, which would take but a single minute, such as screwing on a nut or tightening a chain, still this tedious and indirect process was to be resorted to. At times there would be difficulty in promptly finding the depot master, or, in his absence, his representative. At times, also, it would be difficult to find men not otherwise engaged to act as watchers at the

engine and at the car under reparation. The delay and difficulty in enforcing the rule was a temptation to employees to disregard it and run the risk. It lacked the simplicity and adequacy of the blue signal rule, which, as it was shown, is in force on six leading railroads. The existence of that unenforced rule, printed in the books furnished to engineers and others, tended to produce confusion. A rule to protect employees should be so framed as to guard them to a reasonable extent against the consequences not only of the carelessness of co-employees, but of their own carelessness also. It is known of all that men are prone to run risks in order to save time and trouble, especially when the risk lasts but a moment, and the precaution necessary to guard against it requires a considerable period of time. The duty of a master in making rules is measured by the law of ordinary diligence. That law varies with the situation, for what would be ordinary diligence under one set of facts would be negligence in another. If, however, under the circumstances of a particular case, the master has met the obligation of ordinary diligence in making and enforcing a rule, he is free from liability, even if some other rule would have been safer and better. While the law requires him to make and promulgate reasonably safe and proper rules, if he does so, he is not liable, even if he might have made safer and more effective rules. If a rule is actually made, the question still remains, whether it is proper and sufficient, under the circumstances; for due diligence is not satisfied by an insufficient and inadequate rule. There is an essential distinction between rules made by a master for his own protection and the regulation of his business in his own interest and those made for the protection of his servants, for in the one case the sufficiency affects no one but himself, while in the other the lives and limbs of his servants are involved. Hence it has been held that the reasonableness of rules to regulate the purchase and surrender of tickets, the checking of baggage, ingress and egress from trains, and the like, is a question of law. *Vedder v. Fellows*, 20 N. Y. 126; *Avery v. N. Y. C. & H. R. R. Co.*, 121 N. Y. 31, 44, 24 N. E. 20. A common carrier is under no obligation to make any rules upon such subjects, as no interest except its own would be affected by the omission. In this case, however, it was the duty of the defendant to make rules, as the jury properly found, for the safety of its employees was involved. There was no discretion, as in the cases relied upon by the defendant, to make rules or not, as it saw fit. The reasonableness of rules made for the protection of the master's interest is quite different from the sufficiency of rules made to protect human life. The former involves simple inconvenience to the public if the rules are unreasonable, while the latter involves the lives of the employees. It may be that where the situation is simple, and entirely free from complications, the sufficiency of rules made even to

protect employees would be a question of law. When, however, as in this case, the situation was complicated, owing to the large number of tracks and trains, and the rule was not only verbal, leaving its enforcement to the unaided recollection of a simple announcement, but the delay in finding the depot master, the difficulty of getting men to act as watchmen, the danger of taking them from other employment, and the temptation to run a momentary risk rather than to consume time in order to be safe, were so great that the question of the sufficiency of the verbal instructions was for the jury. *Abel v. D. & H. Canal Co.*, 103 N. Y. 581, 9 N. E. 325, 57 Am. Rep. 773; *Id.*, 128 N. Y. 662, 667, 28 N. E. 663; *Ford v. L. S. & M. S. Ry. Co.*, 124 N. Y. 493, 26 N. E. 1101, 48 Am. & Eng. R. Cas. 201, 12 L. R. A. 454; *Berrigan v. N. Y., L. E. & W. R. R. Co.*, 131 N. Y. 582, 585, 30 N. E. 57; *Doing v. N. Y., O. & W. Ry. Co.*, 151 N. Y., 579, 45 N. E. 1028, 9 Am. & Eng. R. Cas., N. S., 69; *Dowd v. N. Y., O. & W. Ry. Co.*, 170 N. Y. 459, 63 N. E. 541.

It is said that it is inexpedient to leave such questions to the jury, as different juries might find diverse verdicts upon the same evidence, and thus there would be no uniformity. The objection is not without reason, but it is not controlling. It applies with equal force to the subject of the necessity for rules, which is clearly for the jury when the evidence is sufficient to raise the question. What is reasonable and proper under a complicated state of facts permitting diverse inferences is a question of fact.

After examining all the exceptions which are open to review by us, we find none to justify the reversal by the Appellate Division. Their judgment should therefore be reversed, and that of the trial court affirmed, with costs in all courts.

HAIGHT, J. (dissenting). But one question of law is presented by this appeal that requires consideration here. The act of negligence charged against the defendant is that of a failure to make, promulgate, and enforce reasonable and proper rules for the protection of its car inspectors while they were engaged in the discharge of their duties. The company had established a rule, which was printed in its book of rules, known as the "blue light" and "blue flag" rule, the flag being used by day and the light by night, by posting one upon the engine and the other upon the rear of the train for the purpose of warning persons that inspectors were engaged upon the train. It was conceded, however, that this rule was not enforced in the station at Syracuse, but instead thereof the defendant's foreman, Beatty, in charge of the inspectors at that station, testified that he had established a rule to the effect that notice should be given to the engineer or person in charge of the engine attached to the train, and to any other person present having charge of the train, if it was necessary for the inspectors to go underneath the cars, and at the same time to post a man to watch, and give them notice of the

Devoe v. New York, etc., R. Co

approach of danger. This rule, he says, was communicated orally to all of the inspectors, including the deceased, with whom the foreman was well acquainted, and a friend, and whom the foreman had warned on a number of occasions to protect himself by conforming to the rule when he went under trains. The question as to whether this rule was in fact made by the foreman and communicated to the inspectors was properly submitted to the jury. The jurors were then instructed that, in case they found such a rule was in fact made and promulgated, then they were to determine "whether or not it was a reasonable and proper rule, such a rule as the defendant, in the exercise of ordinary care for the purpose of reasonable protection of its employees, should have made." To this charge an exception was taken by the defendant. It will thus be seen that the jury was permitted to find that the rule was not reasonable or proper, and therefore the defendant was liable, although the rule had in fact been made and promulgated. I think this was erroneous. The question as to whether a rule is reasonable and proper is a question of law for the court, and not for the jury. If it was a question for the jury, one panel might find the rule to be reasonable and proper, and the next panel might upon the next day find the rule to be unreasonable and improper. This will not do. The defendant had the right to have the court determine whether or not the rule was reasonable and proper, and not the jury.

This question was first considered in this court in the case of *Vedder v. Fellows*, 20 N. Y. 126. Strong, J., in delivering the opinion of the court, after stating that the reasonableness of a rule was a question of law for the court, rather than one of fact for the jury, gave his reasons therefor as follows: "Ordinarily, jurors are not aware, nor can they readily be made aware, of all the reasons calling for the rule. They are apt to listen readily to any allegation of injuries on railways. What one jury might deem an inconvenient rule another might approve as judicious and proper. There would be no uniformity. Ordinarily, the managers of railways are much better qualified than jurors to ascertain and weigh the exigencies which call for any rule, and, if it should be productive of some inconvenience, to compare that with the evil to be prevented or the good to be produced by its adoption. If the question should be deemed one of law, there would be eventual uniformity, as any diversity of sentiment in the courts below would be finally harmonized in the court of dernier resort." In the case of *Avery v. N. Y. C. & H. R. R. Co.*, 121 N. Y. 31, 44, 24 N. E. 20, Judge Gray, in speaking for the court, says: "The question of the reasonableness of such regulation was one of law, and not one for the jury to pass upon;" citing the case of *Vedder v. Fellows*. See, also, 3 Thompson on Negligence (2d Ed.) § 3107, and cases there cited. Of course, in cases where the facts with reference to

the nature and contents of the rule are not clearly established, or are to be determined from controverted facts, the question must be submitted to the jury as to what the rule promulgated was, under proper instructions from the court as to what is necessary to constitute a reasonable and proper rule. *Sullivan v. N. Y. & R. Cement Co.*, 119 N. Y. 348, 355, 23 N. E. 820; *Abel v. D. & H. Canal Co.*, 103 N. Y. 581, 9 N. E. 325, 57 Am. Rep. 773; *Id.*, 128 N. Y. 662, 28 N. E. 663; *Ford v. L. S. & M. S. Ry. Co.*, 124 N. Y. 493, 26 N. E. 1101, 12 L. R. A. 454. In this case, as we have seen, the court submitted to the jury the question as to whether the rule testified to by the witness Beatty was, in fact, made. There was no controversy with reference to the terms or contents of the rule. There consequently was no other question of fact to submit to the jury in reference thereto.

It is now contended that the situation at this depot was complicated, in view of the fact that there were numerous tracks and trains; that the rule was verbal; and that the inspectors would be subjected to delay in finding a person to act as a watchman while they were under the cars, and that the temptation to take a momentary risk, rather than to comply with the rule, was so great as to render the sufficiency of the rule a question for the jury. I cannot indorse this reasoning. A verbal rule is as good as a printed rule if it is thoroughly and well understood. It appears that the decedent had been often instructed with reference to this rule, and had been frequently charged to protect himself in accordance with its requirements. It appears to be conceded that the blue flag and the blue light rule was a sufficient and proper one, had it been enforced in this depot; and yet there would have been the same complications with reference to the number of tracks and trains to be looked after under an enforcement of that rule. In case the inspectors found it necessary to go underneath a train, the same inconvenience would follow as that of procuring a man to stand on watch. They would have to procure flags or lamps, perhaps from the farther end of the depot, where the lamps were kept, and place them upon the train before doing their work. This might induce a similar temptation to take a momentary risk, rather than to subject themselves to the trouble of hunting up and procuring a lamp. It appears to me that the rule, as testified to by Beatty, was a reasonable and proper rule, and that, had it been adhered to by the decedent, he would not have been injured. A blue light or a blue flag might escape observation by trainmen intently occupied in the discharge of their own duties, but, if the persons in charge of the train had been notified that inspectors were working underneath the cars, and at the same time a person had been placed on guard to watch and warn as to approaching danger, it certainly would have proved as effective in shielding the inspectors from danger as the blue flag or the blue light rule.

The reversal of the judgment entered upon the verdict of

Gardner v. Southern Ry. Co

the jury in this case was made upon questions of law only, the Appellate Division certifying that it had examined the facts, "and found no error therein." At the end of the order appear the words, "All concur." A question has arisen as to whether, by this form of certificate, the Appellate Division intended to unanimously affirm the facts as found by the verdict, so as to prohibit this court from a review of the question as to whether there was any evidence to sustain the verdict; but that question does not arise in this case, and it is not, therefore, necessary to now determine it; for, unquestionably, the certificate is sufficient to authorize this court to examine and determine the other questions of law involved in the case.

The order of the Appellate Division should be affirmed, and judgment absolute ordered in favor of the defendant, with costs, upon the stipulation.

BARTLETT, MARTIN, and WERNER, JJ., concur with VANN, J. PARKER, C. J., concurs with HAIGHT, J. GRAY, J., not sitting.

Judgment reversed, etc.

GARDNER v. SOUTHERN RY. CO. et al.

(Supreme Court of South Carolina, March 17, 1903.)

[43 S. E. Rep. 816.]

Willful Tort of Servant—Joint and Several Liability.

Where, in an action for personal injuries, the complaint alleges that plaintiff was injured by the willful tort and negligence of the master and of a servant, it is error to charge that there must be a verdict for defendants if the jury found that the servant was not guilty of negligence.

Appeal from Common Pleas Circuit Court of Sumter County; Dantzler, Judge.

Action by Samuel Gardner against the Southern Railway Company and Morgan B. Pierson. Judgment for defendants, and plaintiff appeals. Reversed.

Lee & Moise, Moise & Clifton, and H. Harby, Jr., for appellant.

Joseph W. Barnwell, B. L. Abney, and E. C. Haynesworth, for respondents.

JONES, J. This was an action against the Southern Railway Company and its engineer, Pierson, for damages for personal injuries alleged to have been sustained by plaintiff while in the employ of the Sumter Compress Company, and engaged in loading a freight car of the defendant company with compressed bales of cotton, as the result of a violent collision of defendant's locomotive engine, operated by Pierson, against said freight car, causing the bales of cotton to be thrown against plaintiff while in said car, and breaking one of his legs. The jury found a verdict for the defendants, and

Gardner v. Southern Ry. Co

from the judgment entered thereon the plaintiff appeals upon one exception, assigning error as follows: "The plaintiff excepts to the charge of his honor to the jury in said case because his honor concluded his charge as follows: 'It is alleged here, gentlemen, that the defendant company, the Southern Railway Co., and its codefendant, M. B. Pierson, its agent and servant, were negligent. If its codefendant, M. B. Pierson, its agent and servant, was its agent and servant, and as its agent and servant was not guilty of negligence, there must be a verdict for the defendants.' This charge, it is respectfully submitted, was erroneous: First. Because the charge ignored the first cause of action of the plaintiff, and eliminated any right to recover thereunder. Second. Because the charge denied the plaintiff the right to recover against the defendant company, unless its servant, M. B. Pierson, was also guilty of negligence; whereas, the servant might have been entirely guiltless of all negligence in carrying out the instructions of the principal, but the principal might have been guilty of negligence or of willful tort by reason of the acts complained of, although such acts were done through a servant who was not himself guilty of negligence or of willful tort.'" The charge complained of was made in response to defendant's request to charge as follows: "That in the present complaint the negligence alleged in both causes of action is alleged to have been done 'by and through the defendant Morgan B. Pierson'; and, unless the jury find from the evidence that the negligence alleged was done by and through him, the plaintiff can recover nothing from the defendants."

The complaint alleged two causes of action, the first charging a willful tort, and the second charging negligence. The third, fourth, and fifth paragraphs in the first cause of action were as follows:

"(3) That the collision that caused the injury as aforesaid resulted from the willful, wrongful, wanton, and malicious disregard of the rights and safety of the plaintiff while he was in defendant company's car, in the management and movement of the engine on the same track on which said car was standing, and in want of ordinary care on the part of the defendants for the life and safety of the plaintiff, to his damage five thousand (\$5,000) dollars.

"(4) That at the time and place when and where the plaintiff was injured as aforesaid the defendant Morgan B. Pierson was, and for a long time theretofore had been, a servant of the defendant, the Southern Railway Company, in charge and control of its engines and trains, and then and there was, and for a long time theretofore had been, one of the engineers of said company, and that said wantonness, willfulness, and recklessness of the defendant company was done by and through the said defendant Morgan B. Pierson, then and there

Gardner v. Southern Ry. Co

in its employment, and the said wantonness, willfulness, and recklessness was the joint act of both defendants.

“(5) The plaintiff further alleges that he is informed and believes that at several times from time to time shortly before the injury he complains of was inflicted on him the defendant had, in total disregard of the rights and safety of the servants of the said compress company, in shifting and moving about on said railway track with its locomotive engine, willfully, wantonly, and maliciously collided with other cars in like situation to the car in which the plaintiff was, and in like manner ran against other cars as aforesaid, and that the defendant had been warned by the said compress company to desist from so doing; but that, notwithstanding said warning, the defendant did cause the engine to collide with the car in which the plaintiff was engaged in working in the manner as aforesaid.”

In the second cause of action the same acts were alleged as in the first cause of action, but, instead of alleging that said acts were wantonly and willfully done, it was alleged that they were carelessly and negligently done. The complaint was evidently drawn in view of the decision of this court showing a broad distinction between an action based upon a wanton or willful breach of duty and one based upon negligence, which involves merely an inadvertent breach of duty. The first cause of action alleged a willful trespass, and respondents properly concede that ever since *Chanet v. Parker*, 1 Mill, Const. 333, it has been familiar law in this state that joint tortfeasors may be sued in one action and a recovery had against one or more of them. In the case of *Schumpert v. Southern R. R. Co. and Hutchison* (recently decided) 43 S. E. 813, we had occasion to consider the liability of master and servant for the negligence and misconduct of the servant within the scope of the agency, and in that case it was shown that the liability of master and servant for the willful tort, or for the negligence of the servant while acting for the master within the scope of his employment, was both joint and several. The circuit court therefore erred in instructing the jury that there must be a verdict for the defendants, if Pierson, the agent or servant, was not guilty of negligence. Under this charge the jury would have been bound to find in favor of both defendants, even though they believed that either or both defendants did the acts complained of wantonly or willfully, as alleged in the first cause of action.

The judgment of the circuit court is reversed, and the case remanded for a new trial.

INDEX TO NOTES.

CONCURRING NEGLIGENCE- POSTAL CLERKS—*Continued.*

See Master and Servant.

EMPLOYEES OF OTHER COMPANIES.

See Master and Servant.

MAIL AGENTS.

See Postal Clerks.

MAIL BAGS.

See Postal Clerks.

MASTER AND SERVANT.

Railroad's liability for injury to employee of another company as affected by concurring negligence of fellow servant, 34.

POSTAL CLERKS.

Liabilities of railroad companies caused by mail bags thrown

7 R R R—61

from train as affected by existence of unlawful rate of speed, 76..

Liabilities of railroad companies for injuries caused by mail bags being thrown from train depending upon notice of custom, 76.

Liabilities of railroad companies for injuries caused by throwing mail bags from moving trains, 76.

Liability of Railroad Companies for Negligence of Railway Postal Clerks.

General rule, 76.

Liabilities of railroad companies where injuries resulted from platform being obstructed by mail bags, 76.

RAILROAD COMPANIES.

See Postal Clerks.

GENERAL INDEX.

ABANDONMENT.

See Right of Way.

ABATEMENT.

See Stock Pens.

ABUTTERS.

See Street Railways.

ACCIDENTS ON TRACK.

See Crossings.

Street Railways.

Trespassers.

Assumption that person on track will avoid car.

Wright *v.* Southern Ry. Co. (N. Car.), 677.

Care due trespasser on track.

Harris *v.* Atlantic C. L. R. Co. (N. Car.), 132.

Contributory Negligence.

Care required in looking out for street cars.

Daum *v.* North Jersey St. Ry. Co. (N. J.), 814.

Does not preclude recovery where defendant's servants could have seen plaintiff's danger in time to avoid accident.

Klockenbrink *v.* St. Louis & M. R. R. Co. (Mo.), 63.

Evidence sufficient to show plaintiff guilty of contributory negligence in crossing track.

Peters *v.* Southern R. Co. (Ala.), 90.

Fact that deceased was on bridge when killed did not show contributory negligence per se.

Harris *v.* Atlantic C. L. R. Co. (N. Car.), 132.

Instruction that deceased would have seen and heard train, if at all careful, was properly refused.

Harris *v.* Atlantic C. L. R. Co. (N. Car.), 132.

Not necessary for jury to pass on issue as to last clear chance.

Harris *v.* Atlantic C. L. R. Co. (N. Car.), 132.

ACCIDENTS ON TRACK—

Continued.

Presumption that injured person exercised due care.

Cox *v.* Wilmington City Ry. Co. (Del.), 818.

Proximate cause fixing liability where both negligence and contributory negligence.

Cox *v.* Wilmington City Ry. Co. (Del.), 818.

Riding railroad tricycle in dense fog.

Dilas *v.* Chesapeake & O. Ry. Co. (Ky.), 712.

Shown by evidence that plaintiff's contributory negligence in jumping on or off train while in motion, or in sitting on cross-tie, was the cause of his injuries.

Givens *v.* Louisville & N. R. Co. (Ky.), 11.

Sudden peril from another cause.

Chattanooga Electric Ry. Co. *v.* Cooper (Tenn.), 709.

Sudden peril from another cause, instruction.

Chattanooga Electric Ry. Co. *v.* Cooper (Tenn.), 709.

Defendant entitled to judgment on special findings, in action for death of person killed while walking on track.

St. Louis & S. F. R. Co. *v.* Karns (Kan.), 753.

Defendant street railway not entitled to instruction declaring admissibility of evidence of the fact that plaintiff did not count on negligence in running car at a high rate of speed and failure to ring gong.

Klockenbrink *v.* St. Louis & M. R. R. Co. (Mo.), 63.

Duty to take care of injured trespasser.

Union Pac. Ry. Co. *v.* Cappier (Kan.), 771.

Evidence.

Ordinance, admissibility where speed in violation of is charged.

Jones *v.* Charleston & W. C. Ry. Co. (S. Car.), 702.

ACCIDENTS ON TRACK —
Continued.

Use of track by pedestrians, pleading.

Jones v. Charleston & W. C. Ry. Co. (S. Car.), 702.

Failure to have headlight not negligence when dense fog would have rendered it useless.
Dilas v. Chesapeake & O. Ry. Co. (Ky.), 712.

Insufficiency of evidence to show wantonness where person in suburbs was injured by train running fifty miles an hour.
Peters v. Southern R. Co. (Ala.), 90.

Liability for death of boy struck by car after being kicked from another car by its motor-man.

Pinder v. Brooklyn Heights R. Co. (N. Y.), 743.

Liability for injury to one who had been a trespasser.

Monahan v. Chicago, M. & St. P. Ry. Co. (Minn.), 761.

Negligence and contributory negligence.

Cox v. Wilmington City Ry. Co. (Del.), 818.

Negligence for company to run train within limits of city without ringing bell or blowing whistle, as required by Code of Ala., § 3440.

Peters v. Southern R. Co. (Ala.), 90.

Presumption that boy sitting on cross-tie will avoid danger.

Givens v. Louisville & N. R. Co. (Ky.), 11.

Presumption that person seen near track will avoid danger.

Waldron v. Boston & M. R. R. (N. H.), 54.

Wolf v. City & Suburban Ry. Co. (Ore.), 777.

Presumption that person seen on track will avoid train.

Carrier v. Missouri Pac. Ry. Co. (Mo.), 585.

Proximate cause where child ordered from moving car alighted uninjured upon pile of sand, which gave way, causing him to slide under car.
Richmond Traction Co. v. Wilkinson (Va.), 723.

Question for jury whether street railway company was negligent in failing to give signals after having assumed the duty

ACCIDENTS ON TRACK —
Continued.

of giving them, in action for injury to laborer in street.

Daum v. North Jersey St. Ry. Co. (N. J.), 814.

Running train at speed of fifty miles an hour through suburbs not evidence of wantonness.
Peters v. Southern R. Co. (Ala.), 90.

Speed in violation of ordinance as negligence.

Jones v. Charleston & W. C. Ry. Co. (S. Car.), 702.

Sufficiency of evidence of defendant's negligence, where deceased was killed on bridge.
Harris v. Atlantic C. L. R. Co. (N. Car.), 132.

Sufficiency of evidence of negligence of parents in allowing child to go upon track.

Corbett v. Oregon Short Line R. Co. (Utah), 736.

Sufficiency of evidence to justify the finding that motorman should have seen plaintiff's wagon in time to have avoided accident.

Klockenbrink v. St. Louis & M. R. R. Co. (Mo.), 63.

Sufficiency of evidence to sustain verdict for plaintiff where boy six years old was killed on track near schoolhouse by electric railway car running, without giving signals, at excessive speed.

Hoon v. Beaver Valley Traction Co. (Pa.), 556.

ACTIONS.

See Children.

ADMINISTRATORS.

See Death by Wrongful Act.

ADVERSE POSSESSION.

See Right of Way.

Interest of public providing for right of way being acquired by adverse possession.

McLucas v. St. Joseph, & G. I. R. Co. (Neb.), 342.

AGENCY.

*See Carriers of Goods.
Master and Servant.*

AMENDMENTS.

*See Corporations.
Street Railways.
Taxation.*

ANIMALS.

See Frightening Teams.
Stock, Injuries to.

Liability of railroad for killing dogs, under Florida statute.
Florida Cent. & P. R. Co. v. Davis (Fla.), 447.

APPEAL.

See Improvements.
Railroads in Streets.
Street Railways.

Review.

Damages for wrongful death.
Corbett v. Oregon Short Line R. Co. (Utah), 736.

Fraud in procuring release of claim for damages.
Indiana, D. & W. R. Co. v. Fowler (Ill.), 715.

It could not be presumed on appeal that switchstand causing death of brakeman was not in dangerous proximity to track,
Wright v. Chicago, etc., R. Co. (Ind.), 314.

When finding of existence of contributory negligence will be disturbed.
Green v. Los Angeles Terminal Ry. Co. (Cal.), 117.

APPREHENSION OF DANGER.

See Children.

ARREST.

Liability of railroad company for false arrest and malicious prosecution instituted by railway policeman.
Tucker v. Erie Ry. Co. (N. J.), 774.

ASSAULTS.

See Trespassers.

ASSIGNMENTS.

See Carriers of Freight.

ASSUMPTION OF RISK.

See Crossings.
Master and Servant.
Personal Injuries.
Stations and Depots.

ATTORNEY'S FEES.

See Constitutional Law.
Fires.

AVOCATION.

See Constitutional Law.

BILLS OF LADING.

See Connecting Carriers.

Effect of mere receipt of bill of lading on prior contract.

Farmers' Loan & Trust Co. v. Northern Pac. R. Co. (C. C. A.), 852.

Negotiation of as ratification of its terms.

Farmers' Loan & Trust Co. v. Northern Pac. R. Co. (C. C. A.), 852.

BONDS.

Street railway bonds equal in priority.

City of Lincoln v. Lincoln St. Ry. Co. (Neb.), 892.

Street railway bonds negotiable.
City of Lincoln v. Lincoln St. Ry. Co. (Neb.), 892.

BRIDGES.

See Accidents on Track.

CALLING.

See Constitutional Law.

CARRIERS OF FREIGHT.

See Connecting Carriers.

Constitutional Law.

Interstate Commerce.

Railroad Commissioners.

CARRIERS OF GOODS.

See Bills of Lading.

Connecting Carriers.

Constitutional Law.

Interstate Commerce.

Railroad Commissioners.

Carrier could waive tort, and sue for value without averment and proof of assignment by consignor of his interest, where misdelivery to stranger.
Johnson, Nesbitt & Co. v. Gulf & Chicago R. Co. (Miss.), 640.

Consideration for agreement not to enforce stipulation exempting carrier from liability for fire.

Texas & P. R. Co. v. Cau (C. C. A.), 239.

Construction of long and short haul clause of Ky. St., § 820.
Commonwealth v. Chesapeake & O. R. Co. (Ky.), 184.

Defective indictment against carrier for discrimination, under Code of Kentucky.

Commonwealth v. Chesapeake & O. R. Co. (Ky.), 183.

Defenses where failure to furnish iced cars.

Mathis v. Southern Ry. Co.

CARRIERS OF GOODS—Continued.

- (S. Car.), 825.
 Evidence of failure to ship goods sufficient to go to jury. *Porter v. Raleigh, etc., R. Co.* (N. Car.), 249.
 Insufficiency of indictment of carrier for discrimination. *Commonwealth v. Chesapeake & O. R. Co.* (Ky.), 182.
 Liability for failure to furnish iced cars. *Mathis v. Southern Ry. Co.* (S. Car.), 825.
 Liability for failure to ship as affected by failure of refrigerator company to furnish cars. *Mathis v. Southern Ry. Co.* (S. Car.), 825.
 Question whether loss was proximately caused by shipper's negligence in loading for the jury. *Elgin, etc., R. Co. v. Bates Mach. Co.* (Ill.), 256.
 Ratification of unauthorized contract by agent to ship goods. *Porter v. Raleigh, etc., R. Co.* (N. Car.), 249.
 Validity of joint traffic arrangement under Ky. St. § 820. *Commonwealth v. Chesapeake & O. R. Co.* (Ky.), 184.
 Validity of tracing act of Georgia could not be tested by motion for nonsuit. *Savannah & F. W. R. Co. v. Elder* (Ga.), 223.
 Where cotton belonging to T. & Co. was delivered by carrier to stranger by mistake, assignment by T. & Co. of their interest transferred right to sue carrier. *Johnson, Nesbitt & Co. v. Gulf & Chicago R. Co.* (Miss.), 640.

CARRIERS OF LIVE STOCK.

See Carriers of Goods.
Connecting Carriers.
Constitutional Law.
Interstate Commerce.

Evidence.

- Burden of proving that defect in car was not patent. *Williams v. Central of Georgia Ry. Co.* (Ga.), 839.
 Liability for death by disease. *Klair v. Wilmington Steamboat Co.* (Del.), 821.

CARRIERS OF PASSENGERS.

See Evidence.

Stations and Depots.
Tickets and Fares.

- Care due person meeting passengers. *Smoak v. Savannah, etc., R. Co.* (S. Car.), 240.
 Carrier's negligence question for jury where passenger's injury was caused by hole in elevated railway platform. *Lake St. El. R. Co. v. Burgess* (Ill.), 136.
 Common knowledge that jerks and jars ordinarily attend running and handling of freight trains. *Southern R. Co. v. Crowder* (Ala.), 150.

Contributory Negligence.

- Damages not allowed to female passenger injured by fall while alighting from moving car at night, because she was warned not to alight and her act was caused by nervousness on her part. *McMicheal v. Illinois Cent. R. Co.* (La.), 140.

Ejection.

- Unjustifiable expulsion of passenger holding defective transfer. *Indianapolis St. Ry. Co. v. Wilson* (Ind.), 841.

Evidence.

- Admissibility of passenger's testimony that brakeman stationed at car steps directed her to board moving train. *Chicago, etc., R. Co. v. Flaherty* (Ill.), 159.
 Proper cross-examination of brakeman, in action for injury to passengers caused by a sudden jerk of freight train. *Southern R. Co. v. Crowder* (Ala.), 150.
 Lady passenger takes risk who attempts to alight in night time, with bundles in hand, from moving car. *McMichael v. Illinois Cent. R. Co.* (La.), 140.
 Liability for injury to female passenger caused by fall, while alighting at night from moving car. *McMichael v. Illinois Cent. R. Co.* (La.), 140.

CARRIERS OF PASSENGERS—Continued.

Liability where passenger is injured by mail bag thrown from train.

Carver *v.* Minneapolis, etc., R. Co. (Iowa), 70.

Passenger could not complain of the use of force by provoked employee enforcing regulation against sleeping in depot.

Central of Georgia R. Co. *v.* Motes (Ga.), 161.

Plaintiff injured by sudden jerk of train properly non-suited.

Denny *v.* North Carolina R. Co. (N. Car.), 146.

Reasonableness of carrier's regulations question for jury.

Central of Georgia R. Co. *v.* Motes (Ga.), 161.

Sufficiency of complaint in action for injury to passenger caused by sudden jerk of car.

Southern R. Co. *v.* Crowder (Ala.), 150.

Sufficiency of declaration in action for injury to passenger, claimed to have been caused by failure of elevated railroad to maintain suitable gates and safe-guards around platform.

Lake St. El. R. Co. *v.* Burgess (Ill.), 136.

Who are passengers.

Lake St. El. R. Co. *v.* Burgess (Ill.), 136.

CARS.

See Carriers of Goods.

CATTLE GUARDS.

See Stock, Injuries to.

CHARTERS.

See Street Railways.

Taxation.

CHILDREN.

See Accidents on Track.

Application of Pennsylvania statute, giving wife equal right with father to custody and services of minors.

Kelly *v.* Pittsburg & B. Traction Co. (Pa.), 811.

Care required of parents.

Corbett *v.* Oregon Short Line R. Co. (Utah), 736.

Child's capacity to apprehend danger, question for jury.

Kelly *v.* Pittsburg & B. Traction Co. (Pa.), 811.

CHILDREN—Continued.**Contributory Negligence.**

Care required of child.

Anderson *v.* Central R. Co. of New Jersey (N. J.), 51.

Child seven years old injured by street car incapable of contributory negligence.

Vogel *v.* North Jersey St. R. Co. (N. J.), 654.

Child under five years of age cannot be chargeable with contributory negligence.

Eskildsen *v.* City of Seattle (Wash.), 549.

Direction of verdict in action for injury to boy.

Anderson *v.* Central R. Co. of New Jersey (N. J.), 51.

Father allowing eleven year old son to stroll alone on street.

Enright *v.* Pittsburg Junction R. Co. (Pa.), 717.

Harmless error in instructing.

Givens *v.* Louisville & N. R. Co. (Ky.), 11.

Implied admissions of plaintiff's brother.

Givens *v.* Louisville & N. R. Co. (Ky.), 11.

Sufficiency of evidence to show that boy injured by train was capable of contributory negligence.

Givens *v.* Louisville & N. R. Co. (Ky.), 11.

Judgment in wife's name where father dies pending action by him for injuries sustained by minor son.

Kelly *v.* Pittsburg & B. Traction Co. (Pa.), 811.

Liability for malicious act of brakeman in ordering boy from moving freight car.

Williams *v.* Southern Ry. in Kentucky (Ky.), 732.

Loss of services and society elements of damages, in action for death of child.

Corbett *v.* Oregon Short Line R. Co. (Utah), 736.

Measure of damages for death of child, instructions.

Corbett *v.* Oregon Short Line R. Co. (Utah), 736.

Negligence of city, in suffering dangerous place to remain in railroad track in street, rendering company liable for injury to child guilty of contributory negligence, because

CHILDREN—Continued.

- company's negligence was proximate cause.
Eskildsen v. City of Seattle (Wash.), 549.
- Negligence of parent not attributable to child, in action for benefit of child.
Eskildsen v. City of Seattle (Wash.), 549.
- Proximate cause where child was injured through negligence of city in suffering dangerous place to remain in street.
Eskildsen v. City of Seattle (Wash.), 549.
- Question for jury as to the negligence of motorman where child was injured on track.
Koenig v. Union Depot R. Co. (Mo.), 655.
- Sufficiency of evidence of negligence of parents in allowing child to go upon track.
Corbett v. Oregon Short Line R. Co. (Utah), 736.
- Sufficiency of evidence to sustain verdict for plaintiff in action for killing boy six years old at crossing.
Hoon v. Beaver Valley Traction Co. (Pa.), 556.
- Verdict for plaintiff supported by the evidence, in action for injuries to seven year old boy ordered from moving street car.
Richmond Traction Co. v. Wilkinson (Va.), 723.

CLEAR CHANCE.

See Accidents on Track.

COLLISIONS.

- Application of statute requiring trains to stop when approaching intersections.
St. Louis Nat. Stock Yards v. Godfrey (Ill.), 28.
- Contributory Negligence.**
 Instruction as to contributory negligence of engineer causing collision in switch yard not misleading.
St. Louis Nat. Stock Yards v. Godfrey (Ill.), 28.
- Evidence as to usage and custom admissible as bearing on question of negligence in causing collision in switch yard.
St. Louis Nat. Stock Yards v.

COLLISIONS—Continued.

- Godfrey* (Ill.), 28.
- Instruction as to liability for negligence of engineer in causing collision in switch yard.
St. Louis Nat. Stock Yards v. Godfrey (Ill.), 28.
- Not negligence per se to run trains in switch yards in violation of rules of which engineer had no notice.
St. Louis Nat. Stock Yards v. Godfrey (Ill.), 28.
- Waiver of rules in regard to running trains in switch yard.
St. Louis Nat. Stock Yards v. Godfrey (Ill.), 28.

COMBUSTIBLES.

See Fires.

COMMISSIONERS.

See Railroad Commissioners.

COMMON CARRIERS.

See Carriers of Freight.
Carriers of Goods.
Interstate Commerce.
Railroad Commissioners.

- Duty to give competing boat lines equal privileges with respect to use of wharf.
Macon, D. & S. R. Co. v. Graham & Ward (Ga.), 860.

COMMON LAW.

See Crossings.

COMPARATIVE NEGLIGENCE.

See Negligence.

CONCOURRING NEGLIGENCE.

See Fellow Servants.
Master and Servant.

CONNECTING CARRIERS.

See Carriers of Goods.
Interstate Commerce.

- Authority of general freight agent to bind receivers by contracting to transport over connecting lines.
Farmers' Loan & Trust Co. v. Northern Pac. R. Co. (C. C. A.), 852.
- Duty of intermediate carriers to forward.
Buston v. Pennsylvania R. Co. (U. S.), 234.
- Duty to trace freight.
Savannah, F. & W. R. Co. v. Elder (Ga.), 223.

CONNECTING CARRIERS—
Continued.

Intermediate carrier discharging his duty by sending cotton to connecting carrier and notifying owner of its refusal to transport, was not required to put it in condition and again tender it.

Buston v. Pennsylvania R. Co. (U. S.), 234.

Liability for delay in clearing ship of connecting carrier.

Farmers' Loan & Trust Co. v. Northern Pac. R. Co. (C. C. A.), 852.

Liability of receiving carrier for injury on connecting lines.

Elgin, etc., R. Co. v. Bates Mach. Co. (Ill.), 256.

Liability of receiving carrier for negligence of connecting carrier, construction of bill of lading.

Louisville, etc., R. Co. v. Chestnut & Bro. (Ky.), 252.

Power of receivers to contract for transportation over connecting lines.

Farmers' Loan & Trust Co. v. Northern Pac. R. Co. (C. C. A.), 852.

CONSIDERATION.

See Right of Way.

CONSOLIDATION.

See Local Assessments.

CONSTITUTIONAL LAW.

*See Employers' Liability Acts.
Interstate Commerce.
Leases and Running Powers.*

Constitutionality of act making railroad company liable for attorney's fees.

Cleveland, C., C. & St. L. Ry. Co. v. Hamilton (Ill.), 40.

Contract by railroad company allowing one to erect warehouse on its right of way, he to hold it harmless from damage by fire therein, not unconstitutional.

Wabash R. Co. v. Ordelheide (Mo.), 96.

Equal protection of law not denied by provisions of Alabama Code 1886, § 453, cl. 13, and Code 1896, § 3911, cl. 14, providing for taxation of railroad stock, because of exemption of

CONSTITUTIONAL LAW—
Continued.

stock in domestic railroads and in others that list substantially all their property for taxation.

Kidd v. State (U. S.), 518.

Operation of street railways not an ordinary avocation, within constitutional provision securing to every individual right to choose his occupation.

Goddard v. Chicago & N. W. Ry. Co. (Ill.), 781.

Tracing act of Georgia not unconstitutional.

Savannah, F. & W. R. Co. v. Elder (Ga.), 223.

Validity of order requiring safety appliances at grade crossings.

Detroit, etc., R. Co. v. Osborne (U. S.), 456.

CONTRACTS.

*See Railroads in Streets.
Right of Way.*

CONTRIBUTORY NEGLIGENCE.

See Appeal.

Children.

Crossings.

Frightening Teams.

Jurisdiction.

Master and Servant.

Trespassers.

Burden of proof.

Corbett v. Oregon Short Line R. Co. (Utah), 736.

Doctrine of the "last clear chance."

Chicago, etc., R. Co. v. Lilley (Neb.), 798.

Erroneous conduct in avoiding danger.

Chesapeake & N. Ry. Co. v. Ogles (Ky.), 740.

Chicago, etc., R. Co. v. Lilley (Neb.), 798.

Not contributory negligence per se to engage in dangerous occupation.

Hays v. Wilkinsburg & E. P. St. Ry. Co. (Pa.), 563.

Party who has last clear opportunity of avoiding accident, must, notwithstanding negligence of his opponent, avail himself of that opportunity.

Barnhill v. Texas & P. Ry. Co. (La.), 7.

Where employee engaged in dangerous occupation, to

CONTRIBUTORY NEGLIGENCE—CROSSINGS—Continued.**GENOE—Continued.**

charge him with contributory negligence, it must be shown that he voluntarily, unnecessarily, and with notice, exposed himself to danger.

Potts v. Shreveport Belt Ry. Co. (La.), 566.

CORPORATIONS.

*See Foreign Corporations.
Stock and Stockholders.*

Right of city to amend statute fixing rate of taxation of gross receipts of railroad company.
Northern Cent. Ry. Co. v. State of Maryland (U. S.), 536.

Right to transfer land not used in business.

State v. New Orleans Warehouse Co. (La.), 334.

COUNTY BOARDS.

See Street Railways.

CROPS.

See Water and Watercourses.

CROSSINGS.

*See Contributory Negligence.
Eminent Domain.
Frightening Teams.
Trespassers.*

Care required of railroad company in constructing.

Chicago, R. I. & P. R. Co. v. Sporer (Neb.), 646.

Care required of trainmen where obstructed view.

Ortolano v. Morgan's L. & T. R. & S. S. Co. (La.), 103.

Contributory Negligence.

Assumption that statutory precautions will be observed by trainmen.

Birmingham Southern R. Co. v. Powell (Ala.), 806.

Care required of highway traveler.

Barnhill v. Texas & P. Ry. Co. (La.), 7.

Direction of verdict in action for injury to boy.

Anderson v. Central R. Co. of New Jersey (N. J.), 51.

Evidence sufficient to show plaintiff guilty of contributory negligence when crossing track.

Peters v. Southern R. Co. (Ala.), 90.

Insufficiency of evidence to

show that deceased was guilty of contributory negligence, as matter of law, in failing to see headlight where view was obstructed.

Northern Pac. Ry. Co. v. Spike (C. C. A.), 749.

Plaintiff's failure to stop before driving on track, where view was obstructed, contributory negligence as matter of law.

Shatto v. Erie R. Co. (C. C. A.), 127.

Presumption of due care on part of deceased.

Northern Pac. Ry. Co. v. Spike (C. C. A.), 749.

Waldron v. Boston & M. R. R. (N. H.), 54.

Question for jury, whether minor run over by freight car was guilty of.

Monahan v. Chicago, M. & St. P. Ry. Co. (Minn.), 761.

Discovered peril and contributory negligence, instruction not warranted by the evidence.
Guyer v. Missouri Pac. Ry. Co. (Mo.), 673.

Evidence showing absence of lights and signals sufficient to justify submission of question to jury where flagman was injured by train.

Erickson v. Kansas City, etc., R. Co. (Mo.), 300.

Existence of wantonness or intentional injury question for jury where collision resulted from making flying switch at crossing, in violation of ordinance.

Birmingham Southern R. Co. v. Powell (Ala.), 806.

Failure to look when approaching street crossing negligence per se.

Moser v. Union Traction Co. (Pa.), 632.

Intentional injury and assumption of risk.

Birmingham Southern R. Co. v. Powell (Ala.), 806.

Jury of vicinage competent judges of necessity of allowing one railroad to cross another.
Houston & S. Ry. Co. v. Kansas City, S. & G. Ry. Co. (La.), 120.

Liability on account of dangerous approaches, whether road crossing track public or private.

CROSSINGS—Continued.

- Yazoo & M. V. R. Co. *v.* Watson (Miss.), 880.
- Presumption that person seen near track will avoid danger. Waldron *v.* Boston & M. R. R. (N. H.), 54.
- Right of one company to cross track of another.
- Houston & S. Ry. Co. *v.* Kansas City, S. & G. Ry. Co. (La.), 120.
- Right of one company to cross track of another under general statute.
- Houston & S. Ry. Co. *v.* Kansas City, S. & G. Ry. Co. (La.), 120.
- Right to require interlocking devices at intersection.
- Houston & S. Ry. Co. *v.* Kansas City, S. & G. Ry. Co. (La.), 120.
- Signals.**
- Assumption that statutory precautions will be observed by trainmen.
- Birmingham Southern R. Co. *v.* Powell (Ala.), 806.
- Civil Code of South Carolina, § 2132, requiring crossing signals to be given, applicable to train of cars standing across highway.
- Brown *v.* Southern Ry. (S. Car.), 764.
- Comparative weight of positive and negative testimony.
- Selensky *v.* Chicago Great Western Ry. Co. (Iowa), 756.
- Conflict of evidence created by positive and negative testimony.
- Selensky *v.* Chicago Great Western Ry. Co. (Iowa), 756.
- Duty to give statutory signals where view is obstructed.
- Northern Pac. Ry. Co. *v.* Spike (C. C. A.), 749.
- Failure to give signals cause of action at common law.
- Cooper *v.* Charleston & W. C. Ry. Co. (S. Car.), 112.
- Not negligence at common law for company to fail to give signals on approaching highway which it crosses on a trestle.
- Cooper *v.* Charleston & W. C. Ry. Co. (S. Car.), 112.
- Not negligence on part of railway company not to give

CROSSINGS—Continued.

- signal when approaching crossing.
- Louisville & N. R. Co. *v.* Howerton (Ky.), 554.
- Not negligence on part of railway company to fail to give signals from hand car on approaching crossing.
- Louisville & N. R. Co. *v.* Howerton (Ky.), 554.
- Silence of trainmen when accused of failure to signal as admissions.
- Selensky *v.* Chicago Great Western Ry. Co. (Iowa), 756.
- Statutory signals not measure of company's duty.
- Ortolano *v.* Morgan's L. & T. R. & S. S. Co. (La.), 103.
- Sufficiency of evidence to show negligence in running train over city street crossing without giving signals.
- Shatto *v.* Erie R. Co. (C. C. A.), 127.
- That happening of accident could not have been averted by stopping of train no excuse for absence of proper signals and warnings.
- Ortolano *v.* Morgan's L. & T. R. & S. S. Co. (La.), 103.
- Speed.**
- Company guilty of negligence in running train at speed prohibited by ordinance.
- Southern Ry. Co. *v.* Aldridge (Va.), 59.
- Speed in violation of ordinance as negligence.
- Shatto *v.* Erie R. Co. (C. C. A.), 127.
- Stop, Look and Listen.**
- Absence of watchman and failure to stop, look and listen.
- Southern Ry. Co. *v.* Aldridge (Va.), 59.
- Conductor of street car injured in collision between his car and a train.
- Birmingham Southern R. Co. *v.* Powell (Ala.), 806.
- Contributory negligence in failing to stop, look and listen as affected by fact of watchman's absence.
- Southern Ry. Co. *v.* Aldridge (Va.), 59.
- Contributory negligence, question for jury.
- Selensky *v.* Chicago Great

CROSSINGS—Continued.

- Western Ry. Co. (Iowa), 756.
- Deaf person crossing track.
Hackney *v.* Illinois Cent. R. Co. (Miss.), 42.
- Evidence showed that deceased was guilty of contributory negligence as matter of law.
Waldron *v.* Boston & M. R. R. (N. H.), 54.
- Failure to stop and look again.
Green *v.* Los Angeles Terminal Ry. Co. (Cal.), 117.
- Street railways.
Wolf *v.* City & Suburban Ry. Co. (Ore.), 777.
- The greater the difficulty of seeing and hearing trains, the greater caution the law imposes upon travelers.
Barnhill *v.* Texas & P. Ry. Co. (La.), 7.
- Validity of order requiring safety appliances at grade crossings.
Detroit, etc., R. Co. *v.* Osborne (U. S.), 456.
- Wantonness and contributory negligence.
Birmingham Southern R. Co. *v.* Powell (Ala.), 806.

CUSTOMS.

See Collisions.

DAMAGE BY FIRE.

See Fires.

DAMAGES.

See Appeal.
Children.
Death by Wrongful Act.
Eminent Domain.
Master and Servant.
Nuisances.
Railroads in Streets.
Release.
Relief Department.
Right of Way.
Stock, Injuries to.
Water and Watercourses.
Wrongful Death.

Elements.

- Grief and mental suffering of heirs.
Brown *v.* Southern Ry. (S. Car.), 764.
- Interest on judgment in action for tort.
Ortolano *v.* Morgan's L. & T. R. & S. S. Co. (La.), 103.
- Right of husband acting as nurse to injured wife, to re-

DAMAGES—Continued.

- cover on ground of loss of salary.
Southern R. Co. *v.* Crowder (Ala.), 150.
- Right of husband to recover for loss of wife's services.
Southern R. Co. *v.* Crowder (Ala.), 150.
- Evidence.
Evidence of declarations of deceased that his children were trying to get his property from him incompetent in mitigation of damages.
Brown *v.* Southern Ry. (S. Car.), 764.
- Excessive Verdict.
\$12,000 for fracture of leg of a man forty-five years of age engaged in office work.
Rueping *v.* Chicago & N. W. R. Co. (Wis.), 15.
- Verdict for \$1,518 for death of boy six years old not excessive.
Hoon *v.* Beaver Valley Traction Co. (Pa.), 556.

DANGEROUS CUSTOMS.

See Personal Injuries.

DANGEROUS PREMISES.

See Licensees.

DEAFNESS.

See Trespassers.

DEATH BY WRONGFUL ACT.

See Crossings.
Wrongful Death.

- Application of Pennsylvania statute, giving wife equal right with father to custody and services of minors.
Kelly *v.* Pittsburg & B. Traction Co. (Pa.), 811.

Contributory Negligence.

- Instructions.
Turnbull *v.* New Orleans & C. R. Co. (C. C. A.), 698.
- Presumption of due care on part of deceased.
Northern Pac. Ry. Co. *v.* Spike (C. C. A.), 749.

Damages.

- Evidence of declarations of deceased that his children were trying to get his property from him incompetent in mitigation of damages.
Brown *v.* Southern Ry. (S. Car.), 764.

DEATH BY WRONGFUL ELECTRIC RAILWAYS.**AOT—Continued.**

Grief and mental suffering of heirs.

Brown v. Southern Ry. (S. Car.), 764.

Loss of husband's society.

Florida Cent. & P. R. Co. v. Foxworth (Fla.), 604.

Loss of services and society as elements of damage, in action for death of child.

Corbett v. Oregon Short Line R. Co. (Utah), 736.

Measure of damages in action by widow.

Cox v. Wilmington City Ry. Co. (Del.), 818.

Foreign administrator's right of action.

Boulden v. Pennsylvania R. Co. (Pa.), 641.

Right of action under act April 26, 1855, of Pennsylvania.

Marsh v. Western New York & P. Ry. Co. (Pa.), 124.

Widow cannot assign her claim under act April 26, 1855, of Pennsylvania, giving her right of action for death of husband.

Marsh v. Western New York & P. Ry. Co. (Pa.), 124.

DECLARATIONS.

See Res Gestæ.

DEFENDANTS.

See Stock Pens.

DELIVERY.

See Carriers of Freight.

DEPOTS.

See Eminent Domain.

DISCRIMINATION.

See Carriers of Goods.

Common Carriers.

Interstate Commerce.

DISEASE.

See Carriers of Live Stock.

DIVERSE CITIZENSHIP.

See Federal Jurisdiction.

Interstate Commerce.

DIVISION LINE.

See Eminent Domain

DOGS.

See Animals.

DOMESTIC CORPORATIONS.

See Federal Jurisdiction.

EJECTION.

See Carriers of Passengers.

See Street Railways.

Care required of master in maintaining wires in safe condition.

Potts v. Shreveport Belt Ry. Co. (La.), 566.

Inspection of wires.

Potts v. Shreveport Belt Ry. Co. (La.), 566.

ELEMENTS OF DAMAGES.

See Death by Wrongful Act.

ELEVATED RAILWAYS.

See Carriers of Passengers.

EMINENT DOMAIN.

See Right of Way.

Condition which makes the use of water power a public use must exist at time of taking under right of eminent domain.

Avery v. Vermont Electric Co. (Vt.), 876.

Damages.

Loss of business connected with land not taken.

Bailey v. Boston & P. R. Corp. (Mass.), 500.

Rental value of property not taken to be considered as special injury, as distinguished from that suffered by public generally.

Bailey v. Boston & P. R. Corp. (Mass.), 500.

Temporary injuries caused by construction of railroad.

Bailey v. Boston & P. R. Corp. (Mass.), 500.

Mine owner had a public way to station, within meaning of statute of Iowa.

Morrison v. Thistle Coal Co. (Iowa), 462.

Parties in proceeding to condemn land acquired from state.

State v. Superior Court of King County (Wash.), 929.

Right of lessor railroad to condemn land.

State v. Superior Court of King County (Wash.), 929.

Right of railroad to condemn land of another railroad company not in actual and necessary use for railway purposes.

Atchison, T. & S. F. Ry. Co. v. Kansas City, M. & O. Ry. Co. (Kan.), 509.

EMINENT DOMAIN — Continued.

Right of way for railroad to mine may be a public way though it cannot be used by public for travel except by railway cars.

Morrison v. Thistle Coal Co. (Iowa), 462.

Right to condemn land, under Code of Iowa, § 2028.

Morrison v. Thistle Coal Co. (Iowa), 462.

Right to condemn tide land.

State v. Superior Court of King County (Wash.), 929.

Water power for public uses.

Avery v. Vermont Electric Co. (Vt.), 876.

Where railroad, having right to exercise eminent domain, took land as purchaser from one holding adverse possession, title became good when combined adverse possession of railroad and its grantor exceeded twenty-one years.

Covert v. Pittsburg & W. Ry. Co. (Pa.), 516.

EMPLOYEES.

See Collisions.

Electric Railways.

Employers' Liability Acts.

Master and Servant.

EMPLOYERS' LIABILITY ACTS.

Chartered street railroad company a railroad company within meaning of §§ 2297 and 2323 of Civ. Code of Ga. of 1895, and therefore liable to one servant for injuries inflicted by negligence of fellow servants.

Savannah, etc., R. Co. v. Williams (Ga.), 279.

Effect of fact that injury occurred in Mexico on validity of contract exempting railroad from liability under employers' liability act of Texas.

Mexican Nat. R. Co. v. Jackson (C. C. A.), 259.

Laws Tex. 1897, Sp. Sess., p. 14, defining liability for injuries to servants not in violation of Const. of Tex., art. 3, § 35, as containing plurality of subjects.

Mexican Nat. R. Co. v. Jackson (C. C. A.), 259.

EQUAL PROTECTION OF LAWS.

See Taxation.

ESTOPPEL.

See Right of Way.

EVIDENCE.

See Carriers of Passengers.

Damages.

Fires.

Res Gestæ.

Admissions.

Silence of trainmen when accused of failure to signal as admission.

Selensky v. Chicago Great Western Ry. Co. (Iowa), 756.

Opinion Evidence.

Opinion evidence as to speed of train.

Atlanta, K. & N. Ry. Co. v. Strickland (Ga.), 35.

Pencil drawing of cars, showing steps where injury to passenger occurred.

Lake St. El. R. Co. v. Burgess (Ill.), 136.

Physical facts outweighed by testimony of witnesses.

McMichael v. Illinois Cent. R. Co. (La.), 140.

Testimony to show that witness afterwards told different persons that he witnessed occurrence not admissible.

Atlanta, K. & N. Ry. Co. v. Strickland (Ga.), 35.

EXCAVATION.

See Street Railways.

EXCESSIVE INDEBTEDNESS.

See Street Railways.

EXCESSIVE VERDICT.

See Damages.

EXEMPLARY DAMAGES.

See Master and Servant.

EXEMPTION FROM LIABILITY.

See Carriers of Goods.

Fires.

EXEMPTIONS.

See Taxation.

EXPENSES.

See Insolvency.

EXPERT TESTIMONY.

See Fires.

FATHER.

See Children.

FEAR.

See Contributory Negligence.

FEDERAL CONSTITUTION.

See Interstate Commerce.

FEDERAL JURISDICTION.

Diverse citizenship as affected by fact that foreign corporation filed articles of incorporation within state.

Davis v. Chesapeake & O. Ry. Co. (Ky.), 347.

Effect of domestication under statute of North Carolina.

Southern Ry. Co. v. Allison (U. S.), 431.

Foreign corporation does not become citizen of North Carolina by complying with N. Car. Pub. Acts 1899, ch. 62.

Southern Ry. Co. v. Allison (U. S.), 431.

FEEES.

See Constitutional Law. Fires.

FELLOW SERVANTS.

Car inspectors and repairers not fellow servants of conductor injured by reason of their negligence.

McDonald v. Michigan Cent. R. Co. (Mich.), 288.

Chartered street railroad company a railroad company within meaning of §§ 2297 and 2323 of Civ. Code of Ga. of 1895, and, therefore, liable to one servant for injuries inflicted by negligence of fellow servant. *Savannah, etc., R. v. Williams (Ga.), 279.*

Employees of other company using track.

Erickson v. Kansas City, etc., R. Co. (Mo.), 300.

Negligence of fellow servant concurring with that of another.

St. Louis Nat. Stock Yards v. Godfrey (Ill.), 28.

Negligence of vice principal and fellow servant concurring.

St. Louis, etc., R. Co. v. Robertson (Ark.), 78.

FENCES.

See Stock, Injuries to.

Contributory Negligence.

Letting cattle loose as a defense to action under Rev. St. of Wis. § 1810, requiring right of way to be fenced.

Perrault v. Minneapolis, etc., R. Co. (Wis.), 467.

Court ruling that fence was insufficient was outside issue.

Perrault v. Minneapolis, etc., R. Co. (Wis.), 467.

Destruction of fence by trespassers a defense in action for injury to cattle alleged to have been caused by insufficient fence, under Rev. St. of Wis. of 1898, § 1810.

Perrault v. Minneapolis, etc., R. Co. (Wis.), 467.

Error to hold, as matter of law, that fence of four wires was insufficient.

Perrault v. Minneapolis, etc., R. Co. (Wis.), 467.

FINDINGS.

See Appeal.

FIRES.

See Carriers of Goods.

Allegations not sufficient to support finding of negligence in using defective spark arrester. *Missouri, K. & T. Ry. Co. v. Garrison (Kan.), 746.*

Application of Act June 25, 1836, of R. I., providing for liability of railroads for injuries caused by fires from their locomotives. *Spink v. New York, N. H. & H. R. Co. (R. I.), 53.*

Circumstantial evidence creating question for jury as to railroad company's negligence, where fire was claimed to be from locomotive.

Carter v. Pennsylvania R. Co. (C. C. A.), 558.

Combustibles on right of way. *Cratt v. Albemarle Timber Co. (N. Car.), 85.*

Company liable for damage caused by fire, under Rev. St. 1899, § 1111 of Mo., regardless of negligence.

Wabash R. Co. v. Ordelheide (Mo.), 96.

Condition of engine causing fire, question for jury.

Illinois Cent. R. Co. v. Scheible (Ky.), 100.

Constitutionality of statute mak-

FIRES—Continued.

ing railroad companies liable for attorney's fees where failure to keep right of way clear of combustibles.

Cleveland, C., C. & St. L. Ry. Co. *v.* Hamilton (Ill.), 40.

Contract by railroad company allowing one to erect warehouse on its right of way, he to hold it harmless from damage by fire therein, not unconstitutional.

Wabash R. Co. *v.* Ordelheide (Mo.), 96.

Evidence.

Evidence of fact that engine passed shortly before fire making prima facie case.

Carter *v.* Pennsylvania R. Co. (C. C. A.), 558.

Expert testimony.

Texas & Pacific R. Co. *v.* Watson (U. S.), 634.

Of other fires.

Illinois Cent. R. Co. *v.* Scheible (Ky.), 100.

Other fires.

MacDonald *v.* New York, N. H. & H. R. Co. (R. I.), 792.

Texas & Pacific R. Co. *v.* Watson (U. S.), 634.

Price paid for land.

MacDonald *v.* New York, N. H. & H. R. Co. (R. I.), 792.

Origin, evidence.

Pittsburgh, C., C. & St. L. R. Co. *v.* Wilson (Ind.), 671.

Exemption from liability, who entitled to.

Texas & Pacific R. Co. *v.* Watson (U. S.), 634.

Fires set by locomotives.

Norfolk & W. Ry. Co. *v.* Perrow (Va.), 611.

Liability of private company building logging road for fire resulting from absence of spark arresters.

Cratt *v.* Albemarle Timber Co. (N. Car.), 84.

Liability of railroad company for fire communicated from combustibles on railroad platform.

Hamburg-Bremen Fire Ins. Co. *v.* Atlantic Coast Line R. Co. (N. Car.), 177.

Probate court, under Rev. Stat. 1899, § 192, of Mo., has jurisdiction of demand for money due under contract by outsider to hold plaintiff harmless

FIRES—Continued.

where damage by fire.

Wabash R. Co. *v.* Ordelheide (Mo.), 96.

Subrogation of insurer.

Hamburg-Bremen Fire Ins. Co. *v.* Atlantic Coast Line R. Co. (N. Car.), 177.

Sufficiency of bill of particulars.

MacDonald *v.* New York, N. H. & H. R. Co. (R. I.), 792.

Sufficiency of evidence to establish negligence of railroad company.

Jefferson *v.* Chicago, etc., Ry. Co. (Wis.), 621.

Norfolk & W. R. Co. *v.* Perrow (Va.), 611.

Sufficiency of evidence to submit question of negligence in failing to have spark arresters on engine.

Cratt *v.* Albemarle Timber Co. (N. Car.), 84.

Sufficiency of evidence to warrant assumption that spark arrester was not properly adjusted.

Cincinnati, N. O. & T. Pac. Ry. Co. *v.* Caskey (Ky.), 583.

Sufficiency of petition in action for injury to property by fire alleged to have been set by railroad locomotive.

Pittsburgh, C., C. & St. L. R. Co. *v.* Wilson (Ind.), 671.

Validity of contract between railroad company and person erecting warehouse on its right of way to hold company harmless from damages from fires as affected by public policy.

Wabash R. Co. *v.* Ordelheide (Mo.), 96.

FOG.

See Accidents on Track.

FOREIGN ADMINISTRATORS.

See Death by Wrongful Act.

FOREIGN STATUTES.

See Death by Wrongful Act.

FOREIGN CORPORATIONS.

See Federal Jurisdiction.

*Interstate Commerce.
Taxation.*

Return of service.

Pennsylvania R. Co. *v.* Rogers (W. Va.), 413.

Right to do business.

State *v.* New Orleans Warehouse Co. (La.), 334.

FRANCHISES.

See Corporations.
Street Railways.

FRAUD.

See Release.

FREIGHT.

See Carriers of Goods.
Carriers of Live Stock.
Common Carriers.
Connecting Carriers.
Contributory Negligence.

FREIGHT AGENTS.

See Connecting Carriers.

FREIGHT TRAINS.

See Carriers of Passengers.

FRIGHTENING TEAMS.

See Crossings.
City not liable where injury resulted from fright of horse from usual and necessary operation of hand car.
Louisville & N. R. Co. v. Howerton (Ky.), 554.

Contributory Negligence.

Jumping from buggy when horse is frightened by train.
Chesapeake & N. Ry. Co. v. Ogles (Ky.), 740.

Duty of motorman discovering that horse is frightened at approaching car.
Danville R. & El. Co. v. Hodnett (Va.), 170.

Duty to give warning, on approaching trestle crossing highway for the protection of travelers.

Chesapeake & N. Ry. Co. v. Ogles (Ky.), 740.

Liability for injury to rider thrown by horse frightened by approach of street car.
Danville R. & El. Co. v. Hodnett (Va.), 170.

Not negligence on part of railway company not to give signal when approaching crossing.

Louisville & N. R. Co. v. Howerton (Ky.), 554.

Proximate cause where rider was thrown by horse frightened by car not stopped by motorman.

Danville R. & El. Co. v. Hodnett (Va.), 170.

Railroad company not liable for injuries to one driving horse

FRIGHTENING TEAMS—Continued.

resulting from fright of horse from approach of hand car without unusual noise.

Louisville & N. R. Co. v. Howerton (Ky.), 554.

GARNISHMENT.

See Jurisdiction.

Service of summons upon railroad agent.

Burnett & Goodman v. Central of Ga. R. Co. (Ga.), 945.

Status of garnishee.

Pennsylvania R. Co. v. Rogers (W. Va.), 413.

GRADE CROSSINGS.

See Constitutional Law.
Street Railways.

GRANTS.

See Public Lands.
Railroads in Streets.

GRIEF.

See Damages.

GROSS NEGLIGENCE.

See Master and Servant.
Trespassers.

HACKMEN.

See Stations and Depots.

HAND CARS.

See Crossings.
Frightening Teams.
Trespassers.

HARMLESS ERROR.

See Negligence.

HEADLIGHTS.

See Accidents on Track.

HIGHWAYS.

See Crossings.
Railroads.
Railroads in Streets.

HOMESTEAD.

See Public Lands.

HOTELS.

See Leases and Running Powers.

HUSBAND AND WIFE.

See Damages.
Death by Wrongful Act.

ICED CARS.

See Carriers of Goods.

IMPROVEMENTS.

See Railroads in Streets.
Street Railways.

IMPUTABLE NEGLIGENCE.

See Children.

INDEBTEDNESS.

See Street Railways.

INDEMNITY LANDS.

See Public Lands.

INDEPENDENT CONTRACTORS.

Liability of employer for injury to abutting property from unnecessary embankment.

Chattahoochee & G. R. Co. v. Behrman (Ala.), 920.

Question for jury whether parties to contract to haul logs on private road were independent contractors, in action for injuries caused by fire resulting from absence of spark arresters.

Cratt v. Albemarle Timber Co. (N. Car.), 84.

INDIOTMENTS.

See Carriers of Goods.

INJUNCTIONS.

See Railroads in Streets.
Stations and Depots.
Stock Pens.

Railroads in Streets.

Construction of agreement by abutter allowing location of line of railroad adjoining his premises.

Stephens v. New York, etc., R. Co. (N. Y.), 449.

INJURIES TO PROPERTY.

See Eminent Domain.
Railroads in Streets.

INSOLVENCY.

See Receivers.

Priority between claim of seller of rails reserving lien as against receiver's certificate issued for maintenance of property.

Royal Trust Co. v. Washburn, etc., R. Co. (C. C. A.), 560.

Seller of rails reserving lien could not enforce same.

Royal Trust Co. v. Washburn, etc., R. Co. (C. C. A.), 560.

INSPECTION.

See Electric Railways.
Master and Servant.

INSURANCE.

See Fires.

INTENTIONAL INJURY.

See Crossings.

INTEREST.

See Damages.
Local Assessments.

INTERLOCKING DEVICES.

See Crossings.

INTERMEDIATE CARRIERS.

See Connecting Carriers.

INTERSECTIONS.

See Collisions.

INTERSTATE COMMERCE.

See Railroad Commissioners.

Policy slips not within provision of Act of Congress of March 21, 1895, ch. 191, making it an offense to cause to be carried from one state to another any paper connected with traffic in lottery tickets.

Francis v. United States (U. S.), 215

Power of Congress to prohibit commerce in lottery tickets.
Champion v. Ames (U. S.), 188.

Preference between localities in fixing rates where conditions are dissimilar.

Interstate Commerce Commission v. Nashville, C. & St. L. R. Co. (C. C. A.), 874.

Remedies to compel compliance with act to regulate commerce applicable to prior pending proceedings.

Missouri Pac. R. Co. v. United States (U. S.), 865.

Right of federal law officers to maintain suit to enjoin carrier from discriminating between localities.

Missouri Pac. R. Co. v. United States (U. S.), 865.

State regulation of railroad rates for shipment over route partially outside of state.

Hanley v. Kansas City Southern R. Co. (U. S.), 246.

Statute of Kentucky permitting foreign corporation to become domestic corporation not cou-

INTERSTATE COMMERCE—
Continued.

trary to interstate commerce clause of federal constitution.
Davis v. Chesapeake & O. Ry. Co. (Ky.), 347.

Sufficiency of evidence to show unreasonableness, of rates.
Interstate Commerce Commission v. Nashville, C. & St. L. R. Co. (C. C. A.), 874.

JERKS AND JARS.

See Carriers of Passengers.

JOINT TORT FEASORS.

See Master and Servant.

JUDGMENTS.

See Children.

JURISDICTION.

See Fires.

*Railroad Commissioners.
 Railroads in Streets.*

Foreign corporations and non-residents on same footing in respect to garnishment.

Pennsylvania R. Co. v. Rogers (W. Va.), 413.

Nonresidents temporarily within state.

Pennsylvania R. Co. v. Rogers (W. Va.), 413.

LAND GRANTS.

See Public Lands.

LAST CLEAR CHANCE.

See Contributory Negligence.

LEASES AND RUNNING POWERS.

See Corporations.

Eminent Domain.

Monopolies.

Warehouses.

Lease of warehouse made subject to state's power to decree annulment.

State v. New Orleans Warehouse Co. (La.), 334.

Lessee not assuming liabilities of lessor.

State v. New Orleans Warehouse Co. (La.), 334.

No ground to annul lease merely because it has been made pendente lite.

State v. New Orleans Warehouse Co. (La.), 334.

LEASES AND RUNNING POWERS—Continued.

Power of railroad to lease portion of property for hotel.

State v. New Orleans Warehouse Co. (La.), 334.

Upper story of building did not fall within clause of constitution, requiring corporation to dispose of land within ten years, if not in use for objects of incorporation.

State v. New Orleans Warehouse Co. (La.), 334.

LICENSEES.

See Stations and Depots.

Trespassers.

It appearing that conductor ordering newsboy from moving street car did not intend to injure him, his conduct was negligent, but not wrongful.

Indianapolis St. Ry. Co. v. Hockett (Ind.), 787.

Liability for injury to newsboy ordered from moving street car.

Indianapolis St. Ry. Co. v. Hockett (Ind.), 787.

Newsboys on street cars.

Indianapolis St. Ry. Co. v. Hockett (Ind.), 787.

Person carrying meals to mail clerks.

Illinois Cent. R. Co. v. Hopkins (Ill.), 3.

Person doing business at railroad station entitled to same accommodation as a passenger.

Smoak v. Savannah, etc., R. Co. (S. Car.), 240.

Proximate cause where boy ordered from moving car was injured while alighting.

Indianapolis St. Ry. Co. v. Hockett (Ind.), 787.

Question for jury whether it was safe for boy to alight from street car moving at rate of five miles an hour.

Indianapolis St. Ry. Co. v. Hockett (Ind.), 787.

Railroad merely suffering boys to play games on part of its premises not liable for injury to one of them from caving of embankment.

Ann Arbor R. Co. v. Kinz (Ohio), 404.

LICENSEES—Continued.

Special finding as to when conductor ordered newsboy from street car and general verdict for plaintiff not inconsistent, since it was not found that he heard or could have heard the command.

Indianapolis St. Ry. Co. v. Hockett (Ind.), 787.

Sufficiency of evidence of negligence where person carrying meals to mail clerk was injured by falling over skid on platform.

Illinois Cent. R. Co. v. Hopkins (Ill.), 3.

LIENS.

See Insolvency.

Local Assessments.

LIGHTS.

See Crossings.

LOCAL ASSESSMENTS.

Company could not object that assessment was without notice to it.

Fair Haven & W. R. Co. v. City of New Haven (Conn.), 526.

Consolidation of street railways, effect on assessment lien.

City of Lincoln v. Lincoln St. Ry. Co. (Neb.), 892.

Enforcement against railroad property not used in carrying on railroad business.

Minneapolis, etc., R. Co. v. Lindquist (Iowa), 521.

Front-foot rule.

Minneapolis, etc., R. Co. v. Lindquist (Iowa), 521.

Interest on delinquent assessments, construction of Nebraska statute.

City of Lincoln v. Lincoln St. Ry. Co. (Neb.), 892.

Lien for paying taxes.

City of Lincoln v. Lincoln St. Ry. Co. (Neb.), 892.

Local assessment lien against street railway superior to mortgage lien.

City of Lincoln v. Lincoln St. Ry. Co. (Neb.), 892.

Ownership in fee of railroad property.

Minneapolis, etc., R. Co. v. Lindquist (Iowa), 521.

Provision of statute of Connecticut as to amount of assessments on railway com-

LOCAL ASSESSMENTS—Continued.

panies not repealed by Sp. Acts 1899, p. 181.

Fair Haven & W. R. Co. v. City of New Haven (Conn.), 526.

Railroad property, under Iowa Code, § 819.

Minneapolis, etc., R. Co. v. Lindquist (Iowa), 521.

Street railways, construction of Connecticut statute.

Fair Haven & W. R. Co. v. City of New Haven (Conn.), 526.

Under Code of Iowa, § 840, property of railroad, loss of which would dismember road as line of travel, could not be sold under special assessment as ordinary property.

Minneapolis, etc., R. Co. v. Lindquist (Iowa), 521.

LOCAL CARRIERS.

See Stations and Depots.

LOGGING ROADS.

See Fires.

LOOKOUTS.

See Trespassers.

LOTTERY LAWS.

See Interstate Commerce.

LOTTERY TICKETS.

See Interstate Commerce.

LOW BRIDGES.

See Master and Servant.

MAIL BAGS.

See Stations and Depots.

MAIL CLERKS.

See Stations and Depots.

MALICE.

See Trespassers.

MALICIOUS PROSECUTION.

See Arrest.

MAPS.

See Railroads in Streets.

MARKET VALUE.

See Stock, Injuries to.

MASTER AND SERVANT.*See Arrest.**Contributory Negligence.**Crossings.**Electric Railways.**Employers' Liability Acts.**Fellow Servants.**Relief Departments.***Assumption of Risk.**

Low bridge not guarded by telltales.

Hollingsworth *v.* Chicago, etc., R. Co. (Ind.), 264.

Obstructions near track.

Murray *v.* Boston & M. R. R. (N. H.), 623.

Proximity of switchstand.

Wright *v.* Chicago, etc., R. Co. (Ind.), 314.

Tree near track.

Drake *v.* Auburn City R. Co. (N. Y.), 269.

Care required of master in inspecting electric wires.

Potts *v.* Shreveport Belt Ry. Co. (La.), 566.

Complaint in action for injuries caused by negligence of employees of railroad company good though it did not give names of alleged negligent agents or servants.

Bolin *v.* Southern Ry. Co. (S. Car.), 320.**Contributory Negligence.**

Brakeman discovering defective condition of coupling only at moment of attempting to use it not guilty of contributory negligence as matter of law.

Murphy *v.* Baltimore, etc., R. Co. (Ky.), 295.

Brakeman injured by reason of defective brake was not required to give it more minute inspection.

McDonald *v.* Michigan Cent. R. Co. (Mich.), 288.

Care required of flagman for his self-protection, instruction.

Erickson *v.* Kansas City, etc., R. Co. (Mo.), 300.

Care required of trackman for his own safety.

Kitzberger *v.* Chicago, etc., R. Co. (Neb.), 275.

Obstructions near track.

Murray *v.* Boston & M. R. R. (N. H.), 623.**MASTER AND SERVANT—
Continued.****Damages.**

Evidence warranted instruction on punitive damages, in action for death of fireman caused by collision between sections of broken train.

Louisville, etc., R. Co. *v.* Gilliam (Ky.), 272.

Insufficiency of evidence to show that master was liable in punitive damages for wrongful act of servant.

Rueping *v.* Chicago & N. W. Ry. Co. (Wis.), 15.

Prejudicial error in instructing as to whether punitive damages could be recovered for act of servant.

Rueping *v.* Chicago & N. W. Ry. Co. (Wis.), 15.

Principal not liable for punitive damages unless he directed wrongful act to be done or subsequently affirmed it, whether the negligence of servant was ordinary or gross.

Rueping *v.* Chicago & N. W. Ry. Co. (Wis.), 15.

Effect on liability of company that brakeman killed by low bridge had no knowledge of existence of telltales.

Hollingsworth *v.* Chicago, etc., R. Co. (Ind.), 264.**Evidence.**

Rules of other companies.

Devoe *v.* New York Cent., etc., R. Co. (N. Y.), 949.

Inspection of electric wires.

Potts *v.* Shreveport Belt Ry. Co. (La.), 566.

It could not be presumed on appeal that switchstand causing death of brakeman was not in dangerous proximity to track.

Wright *v.* Chicago, etc., R. Co. (Ind.), 314.

Joint and several liability for willful tort of servant.

Gardner *v.* Southern Ry. Co. (S. Car.), 958.

Liability for malicious act of brakeman in ordering boy from moving freight car.

Williams *v.* Southern Ry. in Kentucky (Ky.), 732.

Negligence of vice principal and fellow servant concurring.

St. Louis, etc., R. Co. *v.* Robertson (Ark.), 78.

MASTER AND SERVANT—
Continued.

Prejudicial error in instructing as to whether punitive damages could be recovered for act of servant.

Rueping *v.* Chicago & N. W. Ry. Co. (Wis.), 15.

Rules, parol evidence.

Devoe *v.* New York, etc., R. Co. (N. Y.), 949.

Rules, question for jury whether in use.

Devoe *v.* New York Cent., etc., R. Co. (N. Y.), 949.

Rules, question for jury whether sufficiently promulgated.

Devoe *v.* New York, etc., R. Co. (N. Y.), 949.

Sufficiency of allegation of willfulness or recklessness in backing train.

Bolin *v.* Southern Ry. Co. (S. Car.), 320.

Sufficiency of evidence of negligence to go to jury where death of fireman was occasioned by collision between sections of broken train.

Louisville, etc., R. Co. *v.* Gilliam (Ky.), 272.

MEALS.

See Licensees.

MENTAL SUFFERING.

See Damages.

MERGER.

See Stock and Stockholders.

MINERAL LANDS.

See Public Lands.

MINES.

See Eminent Domain.
Right of Way.

MITIGATION OF DAMAGES.

See Damages.
Relief Department.

MONOPOLIES.

Monopoly charge against Morgan's Louisiana & Texas Railroad raised legislative, and not judicial, question.

State *v.* New Orleans Warehouse Co. (La.), 334.

MORTGAGES.

Local assessment lien against street railway superior to mortgage lien.

MORTGAGES—Continued.

City of Lincoln *v.* Lincoln St. Ry. Co. (Neb.), 892.

Presumption that mortgage given by street railway was not for excessive amount.

City of Lincoln *v.* Lincoln St. Ry. Co. (Neb.), 892.

MOTHER.

See Children.

MOTORMEN.

See Street Railways.

MOVING CARS.

See Carriers of Passengers.

MUNICIPAL CORPORATIONS.

See Railroads in Streets.

NEGATIVE EVIDENCE.

See Crossings.
Fires.

NEGLIGENCE.

See Accidents on Track.

Children.

Collisions.

Contributory Negligence.

Crossings.

Damages.

Death by Wrongful Act.

Fellow Servants.

Fires.

Frightening Teams.

Independent Contractors.

Licensees.

Master and Servant.

Ordinances.

Street Railways.

Trespassers.

Complaint, in action for injuries caused by negligence of employees of railroad company, good, though it did not give the names of alleged negligent agents or servants.

Bolin *v.* Southern Ry. Co. (S. Car.), 320.

Doctrine of comparative negligence not recognized in Nebraska.

Riley *v.* Missouri Pac. Ry. Co. (Neb.), 594.

Harmless error in instructing as to degree of negligence.

Kitzberger *v.* Chicago, etc., R. Co. (Neb.), 275.

It was not necessary to prove all allegations of complaint.

Erickson *v.* Kansas City, etc., R. Co. (Mo.), 300.

NEGLIGENCE—Continued.

Sufficiency of allegation of willfulness or recklessness in backing train.

Bolin v. Southern Ry. Co. (S. Car.), 320.

Where negligence of defendant has been established, the fact that plaintiff has also been guilty of negligence no defense unless it contributed to injury. *Norfolk & W. Ry. Co. v. Perrow (Va.), 611.*

NEGOTIABLE INSTRUMENTS.

See Bonds.

NEWSBOYS.

See Licensees.

NONRESIDENTS.

See Jurisdiction.

NUISANCES.

See Stock Pens.

Street Railways.

Recovery of damages for discomfort of family in use of homes resulting from operation of railroad coal hoist.

Daniel v. Ft. Worth & R. G. Ry. Co. (Tex.), 331.

OBSTRUCTED VIEW.

See Crossings.

OBSTRUCTIONS.

See Master and Servant.

OBSTRUCTIONS NEAR TRACK.

See Master and Servant.

OCCUPATION OF STREETS.

See Railroads in Streets.

OCCUPATIONS.

See Street Railways.

OPINION EVIDENCE.

See Evidence.

ORDINANCES.

See Crossings.

Speed in violation of ordinance as negligence.

Jones v. Charleston & W. C. Ry. Co. (S. Car.), 702.

ORDINARY NEGLIGENCE.

See Master and Servant.

ORIGIN OF FIRES.

See Fires.

PARENTS.

See Children.

PARTIES.

See Eminent Domain.

PASSENGERS.

See Carriers of Passengers.

PATENT DEFECTS.

See Carriers of Live Stock.

PAVING.

See Street Railways.

PERSONAL INJURIES.

See Children.

Collisions.

Contributory Negligence.

Damages.

Frightening Teams.

Licensees.

Release.

Street Railways.

Trespassers.

Contributory Negligence.

Person standing in dangerous position assumed only such risks as he should reasonably apprehend.

Carver v. Minneapolis, etc., R. Co. (Iowa), 70.

Shown by evidence that plaintiff's contributory negligence in jumping on or off train while in motion, or in sitting on cross-tie, was the cause of his injuries.

Givens v. Louisville & N. R. Co. (Ky.), 11.

Evidence.

Question to plaintiff's witness, testifying that he had been injured by defendant's cars, "did you present any claim to the company?" properly excluded.

Daum v. North Jersey St. Ry. Co. (N. J.), 814.

PLATFORMS.

See Carriers of Passengers. Stations and Depots.

PLEADING.

See Fires.

PLEDGE.

See Stock and Stockholders.

POLICEMEN.

See Arrest.

POLICY SLIPS.

See Interstate Commerce.

POSITIVE EVIDENCE.

*See Crossings.
Fires.*

POSTAL CLERKS.

*See Licensees.
Stations and Depots.*

POWERS.

See Warehouses.

PREFERENTIAL CLAIMS.

*See Bonds.
Insolvency.*

PREMISES.

See Licensees.

PRESUMPTIONS.

*See Accidents on Track.
Crossings.
Death by Wrongful Act.
Trespassers.*

PRIORITY.

*See Bonds.
Insolvency.*

PRIVATE RAILROADS.

See Fires.

PROCESS.

*See Garnishment.
Service of Process.*

PROSECUTION.

See Right of Way.

PROXIMATE CAUSE.

*See Accidents on Track.
Children.
Frightening Teams.
Licensees.
Street Railways.*

PUBLIC IMPROVEMENTS.

See Street Railways.

PUBLIC INTEREST.

See Adverse Possession.

PUBLIC LANDS.

Effect of delay in making survey upon rights of settler occupying lands within indemnity limits of grant, under act of congress of May 4, 1870, chap.

PUBLIC LANDS—Continued.

69, in advance of their selection by company to supply deficiency in place limits.
Oregon & California Railroad v. United States (U. S.), 943.
Effect of order of withdrawal based on map of general route where occupancy in good faith for homestead.
Nelson v. Northern Pac. Ry. Co. (U. S.), 367.
Land within exterior limits within meaning of act of congress of May 14, 1880, ch. 89, § 3.
Nelson v. Northern Pac. Ry. Co. (U. S.), 367.
Mineral lands, what are.
Northern Pac. Ry. Co. v. Soderberg (U. S.), 911.
Occupancy in good faith by settlers not defeated by selection of lands within indemnity limits of grant made by act of congress of July 25, 1866, ch. 242, to California & Oregon Railroad Company.
Oregon & California R. Co. v. United States (U. S.), 882.
Sufficiency of claim of occupancy in good faith within meaning of act of congress of July 2, 1864, ch. 217, § 3, restricting grant in aid of certain railroads to odd numbered sections within certain limits.
Nelson v. Northern Pac. Ry. Co. (U. S.), 367.
Withdrawal of indemnity lands in advance of selection.
Oregon & California R. Co. v. United States (U. S.), 882.

PUBLIC POLICY.

See Death by Wrongful Act.

PUBLIC WAYS.

See Eminent Domain.

PUNITIVE DAMAGES.

See Master and Servant.

RAILROAD COMMISSIONERS.

*See Railroads in Streets.
Street Railways.*

Jurisdiction to review acts of commissioners establishing rates, under Rev. St. 1895 of Texas, arts. 4565, 4566.
Railroad Commission of Texas v. Weld (Tex.), 572.

RAILROAD COMMISSIONERS—Continued.

Jurisdiction to review acts of railroad commissioners, under Rev. St. of Texas, arts. 4565, 4566.

Railroad Commission of Texas *v.* Weld (Tex.), 572.

Powers.

Atchison, T. & S. F. Ry. Co. *v.* Kansas City, M. & O. Ry. Co. (Kan.), 509.

Reasonableness of rates, construction of Rev. St. of Texas of 1895, arts. 4565, 4566.

Railroad Commission of Texas *v.* Weld (Tex.), 572.

RAILROADS.

See Adverse Possession.
Corporations.

Crossings.

Eminent Domain.

Fires.

Foreign Corporations.

Frightening Teams.

Garnishment.

Insolvency.

Leases and Running Powers.

Local Assessments.

Railroads in Streets.

Res Gestæ.

Right of Way.

Stations and Depots.

Stock and Stockholders.

Street Railways.

Taxation.

Venue.

Warehouses.

Wharves.

Public highways.

McLucas *v.* St. Joseph & G. I. R. Co. (Neb.), 342.

RAILROADS IN STREETS.

See Street Railways.

Abutter only entitled to nominal damages where railroad company abandoned street.

Hays *v.* Wilkinsburg & E. P. St. Ry. Co. (Pa.), 563.

Abutter's right to damages where location of additional tracks in violation of agreement.

Stephens *v.* New York, etc., R. Co. (N. Y.), 449.

Abutter's right to enjoin construction of additional tracks, construction of agreement.

Stephens *v.* New York, etc., R. Co. (N. Y.), 449.

RAILROADS IN STREETS—Continued.

Act of 1901 of Connecticut authorizing railroad company, on being denied by city authorities right to lay certain kind of pavement, to appeal from order of railroad commissioners.

City of Hartford *v.* Hartford St. Ry. Co. (Conn.), 546.

Agreement of abutter allowing location of line construed not to allow additional tracks.

Stephens *v.* New York, etc., R. Co. (N. Y.), 449.

Agreement of abutter allowing railroad line to be located in street did not include consent to location of sidings and switches.

Stephens *v.* New York, etc., R. Co. (N. Y.), 449.

Negligence for company to run train within limits of city without ringing bell or blowing whistle, as required by Code of Alabama, § 3440.

Peters *v.* Southern Ry. Co. (Ala.), 90.

Power of municipality to compel street railway to pave part of street.

City of Hartford *v.* Hartford St. Ry. Co. (Conn.), 546.

Statute of Pennsylvania preventing occupation of streets by railroads without municipal consent not repealed by constitutional provision.

City of Pittsburgh *v.* Pittsburgh, etc., R. Co. (Pa.), 224.

Sufficiency of map to show location of track.

Stephens *v.* New York, etc., R. Co. (N. Y.), 449.

RATES.

See Interstate Commerce.

Railroad Commissioners.

RATIFICATION.

See Carriers of Goods.

RECEIVERS.

See Insolvency.

Authority of general freight agent to bind receivers by contracting to transport over connecting lines.

Farmers' Loan & Trust Co. *v.* Northern Pac. R. Co. (C. A.), 852.

RECEIVERS—Continued.

Power of receivers to contract for transportation over connecting lines.

Farmers' Loan & Trust Co. v. Northern Pac. R. Co. (C. C. A.), 852.

RECEIVER'S EXPENSES.

See Insolvency.

RECEIVING CARRIERS.

See Connecting Carriers.

RECKLESSNESS.

See Negligence.

REFRIGERATOR COMPANIES.

See Carriers of Goods.

REGULATIONS.

See Carriers of Passengers.

RELEASE.

Effect of fact that injury occurred in Mexico on validity of contract exempting railroad from liability made under employers' liability act of Texas. Mexican Nat. R. Co. v. Jackson (C. C. A.), 259.

Return of consideration for release procured by fraud not condition precedent to right of action.

Indiana, D. & W. R. Co. v. Fowler (Ill.), 715.

Right of illiterate person to rely on representations of railroad's agent.

Indiana, D. & W. R. Co. v. Fowler (Ill.), 715.

RELEASE OF ABUTTER'S INTERESTS.

See Railroads in Streets.

RELIEF DEPARTMENT.

Mitigation of damages.

Boulden v. Pennsylvania R. Co. (Pa.), 641.

REPEALS.

See Local Assessments.

RES ADJUDICATA.

See Warehouses.

RESERVED POWERS.

See Taxation.

RES GESTÆ.

Declarations of injured brakeman.

Murray v. Boston & M. R. R. (N. H.), 623.

RIGHT OF WAY.

See Adverse Possession.

Eminent Domain.

Public Lands.

Abandonment, what constitutes. Chicago, etc., R. Co. v. Clapp (Ill.), 489.

Effect of abandonment under provision of constitution of Illinois.

Chicago, etc., R. Co. v. Clapp (Ill.), 489.

Expression of intention on part of railroad company not to abandon right of way not conclusive evidence of such intent. Chicago, etc., R. Co. v. Clapp (Ill.), 489.

Intention to abandon, instruction.

Chicago, etc., R. Co. v. Clapp (Ill.), 489.

Location of depot as consideration for grant of right of way. Cadiz R. Co. v. Roach (Ky.), 502.

On issue as to whether right of way had been abandoned it was competent to show that the road was built merely for hauling supplies and coal to and from mine since exhausted.

Chicago, etc., R. Co. v. Clapp (Ill.), 489.

Operation of deed conveying.

Wilson v. Muskegon. G. R. & I. R. Co. (Mich.), 325.

Partial building of railroad in reliance on promise to donate right of way sufficient detriment to promisee to constitute consideration for granting right of way.

Cadiz R. Co. v. Roach (Ky.), 502.

Question for jury whether railroad company has abandoned branch to coal mine.

Chicago, etc., R. Co. v. Clapp (Ill.), 489.

Right to acquire tested by public necessity and interest.

Houston & S. Ry. Co. v. Kansas City, S. & G. Ry. Co. (La.), 120.

Where right of way has been abandoned owner of land was only entitled to recover nominal damages.

Hays v. Wilkinsburg & E. P. St. Ry. Co. (Pa.), 563.

RIPARIAN RIGHTS.

See Water and Watercourses.

RULES.

See Carriers of Passengers.

Collisions.

Master and Servant.

Waiver of rules intended to regulate the running of trains in switch yard.

St. Louis Nat. Stock Yards *v.* Godfrey (Ill.), 28.

SAFETY APPLIANCES.

See Crossings.

Street Railways.

SERVANTS.

See Master and Servant.

SERVICE OF PROCESS.

See Foreign Corporations.

Garnishment.

Venue.

Meaning of "passenger or freight agent," under Civ. Code Prac. § 51, subsecs. 3, 4. Louisville, etc., R. Co. *v.* Chestnut & Bro. (Ky.), 252.

SERVICIES.

See Children.

SIDINGS AND SWITCHES.

See Railroads in Streets.

SIGNALS.

See Crossings.

Street Railways.

SLEEPING IN DEPOTS.

See Carriers of Passengers.

SOCIETY.

See Children.

SPARK ARRESTERS.

See Fires.

SPECIAL ASSESSMENTS.

See Local Assessments.

SPEED.

See Accidents on Track.

Children.

Crossings.

Evidence.

Ordinances.

Street Railways.

SPUR TRACKS.

See Eminent Domain.

STATIONS AND DEPOTS.

See Carriers of Passengers.

Eminent Domain.

Defendant's right to bring suit for expropriating land for its depot was reserved.

McCormick *v.* Louisiana & N. W. R. Co. (La.), 861.

Depot constructed upon plaintiff's land by defendant, for joint use of both, becoming inadequate, plaintiff may cause removal as per agreement.

McCormick *v.* Louisiana & N. W. R. Co. (La.), 861.

Evidence as to use of steps at depot platform admissible to show that they had been adopted by defendants.

Smoak *v.* Savannah, etc., R. Co. (S. Car.), 240.

Knowledge of company of dangerous custom of throwing mail bags from train.

Carver *v.* Minneapolis & St. L. R. Co. (Iowa), 70.

Liability for injury to person falling over stump in platform while trying to catch car.

Lucas *v.* St. Louis & S. Ry. Co. (Mo.), 834.

Liability of company for death of deceased caused by mail bag thrown from train.

Carver *v.* Minneapolis, etc., R. Co. (Iowa), 70.

Mail carrier injured by mail bag thrown from train did not assume risk of such accident merely for the reason that he had knowledge of the dangerous custom.

Carver *v.* Minneapolis, etc., R. Co. (Iowa), 70.

Notice to railroad of condition of platform steps.

Smoak *v.* Savannah, etc., R. Co. (S. Car.), 240.

One assuming risk incident to throwing mail bags on train does not thereby assume risk of mail bags being thrown from train.

Carver *v.* Minneapolis, etc., R. Co. (Iowa), 70.

Passengers could not complain of the use of force by provoked employee enforcing regulation against sleeping in depot.

Central of Georgia Ry. Co. *v.* Motes (Ga.), 161.

STATIONS AND DEPOTS—
Continued.

Persons doing business at railroad station entitled to same accommodation as a passenger.

Smoak v. Savannah, etc., R. Co. (S. Car.), 240.

Person on platform injured by mail bag thrown from train, did not assume risk merely because he had knowledge of dangerous custom.

Carver v. Minneapolis, etc., R. Co. (Iowa), 70.

Regulation against passengers sleeping in depot not, in legal sense, unreasonable.

Central of Georgia Ry. Co. v. Motes (Ga.), 161.

Right of company to exclude hackmen from station.

Donovan v. Pennsylvania Co. (C. C. A.), 229.

Right to prevent obstruction of entrance to station by injunction.

Donovan v. Pennsylvania Co. (C. C. A.), 229.

Same liability for injury either to bystander or passenger, resulting from mail bag thrown from train.

Carver v. Minneapolis, etc., R. Co. (Iowa), 70.

STATUS.

See Garnishment.

STATUTES.

See Collisions.

Local Assessments.

STOCK AND STOCKHOLDERS.

Right of company to vote stock pledged as collateral.

Pennsylvania R. Co. v. Pennsylvania Co. for Ins. on Lives and Granting Annuities (Pa.), 607.

Shareholder not bound to attend meeting at which merger was arranged, under statute of New Hampshire, providing for merger and exchange of old stock for new.

Douglass v. Concord & M. R. R. (N. H.), 442.

Stockholder's rights had not been lost by laches where merger under Laws of 1899 of New Hampshire, p. 35, ch. 5, § 1, providing for merger and exchange of old stock for new.

Douglass v. Concord & M. R.

STOCK AND STOCKHOLDERS—
Continued.

R. (N. H.), 442.

Sufficiency of evidence of refusal to accept new stock, under statute of New Hampshire providing for merger and exchange of old stock for new.

Douglass v. Concord & M. R. R. (N. H.), 442.

STOCK, INJURIES TO.

See Fences.

Frightening Teams.

Care required in constructing cattle guards.

Choctaw & M. R. Co. v. Vosburg (Ark.), 1.

Court ruling that fence was insufficient was outside issues.

Perrault v. Minneapolis, etc., R. Co. (Wis.), 467.

Evidence of market value.

Central of Ga. Ry. Co. v. Main (Ala.), 95.

Penalty for constructing insufficient cattle guards intended as full compensation, under Sand. & H. Dig., §§ 6238, 6239.

Choctaw & M. R. Co. v. Vosburg (Ark.), 1.

STOCK PENS.

Burden of proving them a nuisance.

Pittsburg, etc., R. Co. v. Town of Crothersville (Ind.), 474.

Burden of proving them a nuisance, ruling of court.

Pittsburg, etc., R. Co. v. Town of Crothersville (Ind.), 474.

Existence of hog pens no defense where it was sought to abate stock pens as a nuisance.

Pittsburg, etc., R. Co. v. Town of Crothersville (Ind.), 474.

Plaintiff could not come into equity and have abatement of stock pens as a nuisance enjoined, they being shown to be a public nuisance, though defendant had no authority to abate them.

Pittsburg, etc., R. Co. v. Town of Crothersville (Ind.), 474.

Plaintiff, seeking to enjoin abatement of stock pens as public nuisance, alleging that defendant had no authority to abate them, must, on rule of clean hands, allege that they were not a public nuisance.

Pittsburg, etc., R. Co. v. Town of Crothersville (Ind.), 474.

STOP, LOOK AND LISTEN. STREET RAILWAYS—*Cont'd.*

See Crossings.

STREET RAILWAYS.

See Accidents on Track.

Children.

Nuisances.

Railways.

Right of Way.

Abutter having remedy at law cannot enjoin construction of street railway on ground of threatened danger to ingress and egress and incidental inconvenience.

Baker *v.* Selma Street & Suburban Ry. Co. (Ala.), 506.

Abutter not suffering any injury from construction of street railway cannot complain.

Baker *v.* Selma Street & Suburban Ry. Co. (Ala.), 506.

Abutter sustaining no damage other than that sustained by general public cannot restrain construction of electric railway as nuisance.

Baker *v.* Selma Street & Suburban Ry. Co. (Ala.), 506.

Act of 1891 of Connecticut authorizes street railway companies, on being denied by city authorities right to lay particular kind of pavement, to appeal from such order to railroad commissioners.

City of Hartford *v.* Hartford St. Ry. Co. (Conn.), 546.

Application of statute authorizing them to borrow money.

City of Lincoln *v.* Lincoln St. Ry. Co. (Neb.), 892.

Authority of county board, under statute of Illinois, to grant to individuals right to construct railway on or along highway.

Goddard *v.* Chicago & N. W. Ry. Co. (Ill.), 781.

Care required after discovery of person on track.

Danville Ry. & El. Co. *v.* Hodnett (Va.), 170.

Care required of motorman at crossings to avoid injuring pedestrians.

Koenig *v.* Union Depot Ry. Co. (Mo.), 655.

Company could not object that assessment was made without notice to it.

Fair Haven & W. R. Co. *v.* City of New Haven (Conn.), 526.

Company has right of way within limits of its tracks.

Cox *v.* Wilmington City Ry. Co. (Del.), 818.

Consolidation of street railways, effect on assessment lien.

City of Lincoln *v.* Lincoln St. Ry. Co. (Neb.), 892.

Contributory Negligence.

Care required in looking out for street cars.

Daum *v.* North Jersey St. Ry. Co. (N. J.), 814.

Care required of persons using highway.

Cox *v.* Wilmington City Ry. Co. (Del.), 818.

Does not preclude recovery where defendant's servants should have seen plaintiff's danger in time to avoid accident.

Klockenbrink *v.* St. Louis & M. R. R. Co. (Mo.), 63.

Failure to look and listen before crossing.

Wolf *v.* City & Suburban Ry. Co. (Ore.), 777.

Negligence and contributory negligence.

Cox *v.* Wilmington City Ry. Co. (Del.), 818.

Presumption that injured person exercised due care.

Cox *v.* Wilmington City Ry. Co. (Del.), 818.

Proximate cause fixing liability where both negligence and contributory negligence.

Cox *v.* Wilmington City Ry. Co. (Del.), 818.

Struck by car while crossing track, question for jury.

Coleman *v.* Lowell, etc., St. Ry. Co. (Mass.), 680.

Defendant company guilty of negligence in making ridge of earth between its track and sidewalk under direction of commissioner of highway.

Lee *v.* Boston El. Ry. Co. (Mass.), 346.

Degree of care due persons using street.

Southern Electric Ry. Co. *v.* Hageman (C. C. A.), 681.

Duty as to signals and speed.

Cox *v.* Wilmington City Ry. Co. (Del.), 818.

Duty of motorman discovering that horse is frightened by approach of car.

Danville Ry. & El. Co. *v.* Hodnett (Va.), 170.

STREET RAILWAYS—Cont'd. STREET RAILWAYS—Cont'd.**Evidence.**

- Burden of proving that collision was caused by negligence.
Cox v. Wilmington City Ry. Co. (Del.), 818.
- Question to plaintiff's witness, testifying that he had been injured by defendant's cars, "Did you present any claim to the company?" properly excluded.
Daum v. North Jersey St. Ry. Co. (N. J.), 814.
- Insufficiency of evidence to show that laborer in street injured by street car was a trespasser.
Daum v. North Jersey St. Ry. Co. (N. J.), 814.
- It appearing that conductor ordering newsboy from moving street car did not intend to injure him, his conduct was negligent, but not wrongful.
Indianapolis St. Ry. Co. v. Hockett (Ind.), 787.
- Legislative power to limit authority of county board to grant license to occupy highways.
Goddard v. Chicago & N. W. Ry. Co. (Ill.), 781.
- Liability for death of boy struck by car after being kicked from another car by its motorman.
Pinder v. Brooklyn Heights R. Co. (N. Y.), 743.
- Liability for injury to person falling over stump in platform while trying to catch car.
Lucas v. St. Louis & S. Ry. Co. (Mo.), 834.
- Liability for injury to rider thrown by horse frightened by approach of street car.
Danville Ry. & Elec. Co. v. Hodnett (Va.), 170.
- Lien for paving taxes.
City of Lincoln v. Lincoln St. Ry. Co. (Neb.), 892.
- Local assessment lien against street railway superior to mortgage lien.
City of Lincoln v. Lincoln St. Ry. Co. (Neb.), 892.
- Mutual obligations of street railways and other users of streets.
Southern Electric Ry. Co. v. Hageman (C. C. A.), 681.
- Operation of street railways not an ordinary avocation, within constitutional provision secur-

- ing to every individual right to choose his occupation.
Goddard v. Chicago & N. W. Ry. Co. (Ill.), 781.
- Pleading negligence, in action against company for personal injuries resulting from collision between street car and another vehicle.
Southern Electric Ry. Co. v. Hageman (C. C. A.), 681.
- Power given by act of 1893 of Connecticut to municipal authorities to order street railway company to repair part of highway not abrogated by act of 1891.
City of Hartford v. Hartford St. Ry. Co. (Conn.), 546.
- Power of city to grant charter.
City of Lincoln v. Lincoln St. R. Co. (Neb.), 892.
- Power to borrow money.
City of Lincoln v. Lincoln St. R. Co. (Neb.), 892.
- Power to purchase line already constructed.
City of Lincoln v. Lincoln St. R. Co. (Neb.), 892.
- Presumption that mortgage given by street railway was not for excessive amount.
City of Lincoln v. Lincoln St. Ry. Co. (Neb.), 892.
- Presumption that person seen near track will avoid danger.
Wolf v. City & Suburban Ry. Co. (Ore.), 777.
- Proximate cause where boy ordered from moving car was injured while alighting.
Indianapolis St. Ry. Co. v. Hockett (Ind.), 787.
- Proximate cause where rider was thrown by horse frightened by car not stopped by motorman.
Danville Ry. & Elec. Co. v. Hodnett (Va.), 170.
- Question for jury whether street railway company was negligent in failing to give signals after having assumed the duty of giving them, in action for injury to laborer in street.
Daum v. North Jersey St. Ry. Co. (N. J.), 814.
- Railroads, within meaning of employers' liability act of Georgia.
Savannah, etc., Ry. v. Williams (Ga.), 279.

STREET RAILWAYS—Cont'd.

Sp. Acts 1895, of Conn. p. 565, requiring street railway companies to pay cost of paving nine feet of width of street, within power of state to amend charter.

Fair Haven & W. R. Co. v. City of New Haven (Conn.), 122.

Street railway as railroad within meaning of statutes of Georgia creating presumption against company where it inflicts injuries to persons or property. Cordray v. Savannah, etc., Ry. (Ga.), 286.

Street railway bonds negotiable. City of Lincoln v. Lincoln St. Ry. Co. (Neb.), 892.

Street railways without exclusive right to use of track.

Klockenbrink v. St. Louis & M. R. R. Co. (Mo.), 63.

Sufficiency of evidence to sustain verdict for plaintiff where boy six years old was killed on track near schoolhouse by electric railway car running, without giving signals, at excessive speed.

Hoon v. Beaver Valley Traction Co. (Pa.), 556.

Validity of order requiring safety appliances at grade crossings. Detroit, etc., R. Co. v. Osborn (U. S.), 456.

STREETS AND HIGHWAYS.

See *Railroads in Streets, Street Railways.*

SUBROGATION OF INSURER.

See *Fires.*

SUI JURIS.

See *Children.*

SUMMONS.

See *Foreign Corporations, Service of Process.*

SURFACE WATER.

See *Water and Watercourses.*

SWITCH YARDS.

See *Collisions.*

TAXATION.

See *Corporations, Local Assessments.*

Equal protection of law not denied by provisions of Ala-

TAXATION—Continued.

bama Code 1886, § 453, cl. 13, and Code 1896, § 3911, cl. 14, for taxation of railroad stock, because of exemption of stock in domestic railroads and in others that list substantially all their property for taxation. Kidd v. State (U. S.), 518.

No presumption that railroad would make different report for statistical purposes than for purposes of taxation.

Owensboro, etc., R. Co. v. Commonwealth (Ky.), 947.

Reserved power of state to amend charter provision in regard to taxation.

Northern Cent. Ry. Co. v. State (U. S.), 536.

Right of city to amend statute fixing rate of taxation of gross receipts of railroad company.

Northern Cent. Ry. Co. v. State of Maryland (U. S.), 536.

TELLTALES.

See *Master and Servant.*

TEMPORARY INJURIES.

See *Eminent Domain.*

TICKETS AND FARES.

Duty of conductor to accept passenger's explanation in regard to transfer given him by agent through mistake.

Indianapolis St. Ry. Co. v. Wilson (Ind.), 841.

Unjustifiable expulsion of passenger holding defective transfer.

Indianapolis St. Ry. Co. v. Wilson (Ind.), 841.

TIDE LANDS.

See *Eminent Domain.*

TORTS.

See *Damages, Master and Servant, Independent Contractors.*

TRACING ACT.

See *Carriers of Goods.*

TRANSFERS.

See *Tickets and Fares.*

TRAVELERS.

See *Crossings.*

TRESPASSERS.

See Accidents on Track.
Licensees.

Assumption that person on track will avoid car.

Wright *v.* Southern Ry. Co. (N. Car.), 677.

Care due from railroad.

Carrier *v.* Missouri Pac. Ry. Co. (Mo.), 585.

Care required of persons in charge of hand cars to avoid injuring trespassers.

Wright *v.* Southern Ry. Co. (N. Car.), 677.

Contributory Negligence.

Death of trespasser on track.

Carrier *v.* Missouri Pac. Ry. Co. (Mo.), 585.

Riding railroad tricycle in dense fog.

Dilas *v.* Chesapeake & O. Ry. Co. (Ky.), 712.

Defendant entitled to judgment on special findings, in action for death of person killed while walking on track.

St. Louis & S. F. R. Co. *v.* Karns (Kan.), 753.

Duty owing by railroad company to trespasser on track.

Corbett *v.* Oregon Short Line R. Co. (Utah), 736.

Richmond Passenger & Power Co. *v.* Rack's Adm'r (Va.), 615.

Duty to look out for trespasser on track.

Carrier *v.* Missouri Pac. Ry. Co. (Mo.), 585.

Duty to take care of injured trespasser.

Union Pac. Ry. Co. *v.* Cap-pier (Kan.), 771.

Insufficiency of evidence to show that laborer in street injured by street car was a trespasser.

Daum *v.* North Jersey St. Ry. Co. (N. J.), 814.

Liability for death of boy struck by car after being kicked from another car by its motor-man.

Pinder *v.* Brooklyn Heights R. Co. (N. Y.), 743.

Liability for injury to one who had been a trespasser.

Monahan *v.* Chicago, M. & St. P. Ry. Co. (Minn.), 761.

TRESPASSERS—Continued.

Liability for malicious act of brakeman in ordering boy from moving freight car.

Williams *v.* Southern Ry. in Kentucky (Ky.), 732.

Liability of company for beating by conductor.

Hamilton *v.* Chicago, M. & St. P. Ry. Co. (Iowa), 823.

Negligence in ejecting child from street car, instruction warranted by evidence.

Richmond Traction Co. *v.* Wilkinson (Va.), 723.

No presumption that prosecution of work by corporation in street is unauthorized and its employees trespassers.

Daum *v.* North Jersey St. Ry. Co. (N. J.), 814.

Proximate cause where child ordered from moving car alighted uninjured upon pile of sand, which gave way, causing him to slide under car.

Richmond Traction Co. *v.* Wilkinson (Va.), 723.

Question for jury whether minor was injured by collision with car or by fall therefrom while stealing ride.

Monahan *v.* Chicago, M. & St. P. Ry. Co. (Minn.), 761.

Sufficiency of allegation to show gross and wanton negligence.

Seaboard Air Line Ry. *v.* Shigg (Ga.), 37.

Verdict for plaintiff supported by evidence, in action for injuries to seven year old boy ordered from moving street car.

Richmond Traction Co. *v.* Wilkinson (Va.), 723.

TRESTLES.

See Crossings.
Frightening Teams.

TRICYCLES.

See Trespassers.

USAGES AND CUSTOMS.

See Collisions.

USE OF TRACK.

See Street Railways.

VENUE.

Under act, approved Nov. 12, 1889, of Georgia, providing for lease of Western and Atlantic Railroad.

Le Croix v. Western & A. R. Co. (Ga.), 448.

VESTED RIGHTS.

See Corporations.

VICE PRINCIPALS.

See Fellow Servants.

WAIVER.

See Collisions.

WANTONNESS.

*See Accidents on Track.
Crossings.
Negligence.
Trespassers.*

WAREHOUSES.

See Leases and Running Powers.

Lease by Morgan's Louisiana & Texas Railroad and Steamship Company to New Orleans Warehouse Company necessarily subject to court's decree. *State v. New Orleans Warehouse Co. (La.), 334.*

Power to sell or let.

State v. New Orleans Warehouse Co. (La.), 334.

WARNINGS.

See Crossings.

WATCHMEN.

See Crossings.

WATER AND WATER-COURSES.

Condition which makes use of water power public use must exist at time of taking under right of eminent domain.

Avery v. Vermont Electric Co. (Vt.), 876.

Damages for injuries to crops caused by water collected during construction of road.

Yazoo, etc., R. Co. v. Darden (Miss.), 488.

Liability of railroad casting surface water on adjacent property.

Chorman v. Queen Anne's R. Co. (Del.), 923.

WATER AND WATER-COURSES—Continued.

Power for public use.

Avery v. Vermont Electric Co. (Vt.), 876.

Right to overflow land of others, under statute, in absence of showing of public use.

Avery v. Vermont Electric Co. (Vt.), 876.

WHARVES.

See Common Carriers.

Railroad company could not discriminate in granting right to use wharf.

West Coast Naval Stores Co. v. Louisville, etc., R. Co. (U. S.), 479.

Right of public to use wharf constructed by railroad company.

West Coast Naval Stores Co. v. Louisville, etc., R. Co. (U. S.), 479.

WHIPPING STRAPS.

See Master and Servant.

WIDOWS.

See Death by Wrongful Act.

WILLFULNESS.

*See Master and Servant.
Negligence.*

WIRES.

See Electric Railways.

Fences.

Master and Servant.

WRONGFUL DEATH.

See Death by Wrongful Act.

Elements of damages in action for death of father.

St. Louis, etc., R. Co. v. Robertson (Ark.), 78.

Enforcement of action accruing in another state as affected by public policy.

St. Louis, etc., Ry. Co. v. Robertson (Ark.), 78.

Not necessary to set out foreign statute in exact language.

St. Louis, etc., R. Co. v. Robertson (Ark.), 78.

Presumption that death was caused by running of defendant's locomotive not rebutted.

Brunswick & W. R. Co. v. Griffin (Ga.), 181.



Stanford Law Library



3 6105 063 116 169